

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.843 OF 2007

Ranjay Laxman Sawant	]	
Age : 40 Yrs., Occu.: Service,	]	
R/at Nanavati Hospital Staff Quarters,	]	
Room No.29, 1 st Floor, S.V. Road,	]	 Appellant /
Vile Parle (W), Mumbai – 400 056.	]	(Org. Accused No.3)
<i>Versus</i>		
The State of Maharashtra	]	 Respondent

ALONG WITH
CRIMINAL APPEAL NO.949 OF 2007

Prakash Vinayak Yeragi	]	
Age : 63 Yrs.	]	
R/at Tarak Niwas, Sitaram Nagar,	]	
Savarkar Marg, Ulhasnagar, Sector-4,	]	 Appellant /
District Thane	]	(Org. Accused No.2)
<i>Versus</i>		
The State of Maharashtra	]	
(At the instance of Santacruz Police Station,	]	
Mumbai)	]	 Respondent

AND
CRIMINAL APPEAL NO.1113 OF 2007

Uday Dhaku Sutar	]	
Age : 40 Yrs.	]	
R/at 98/687, M.H.B. Colony,	]	
Shantidoot Co-op. Housing Society,	]	 Appellant /
Jogeshwari (E), Mumbai – 400 060.	]	(Org. Accused No.1)
<i>Versus</i>		
The State of Maharashtra	]	
(At the instance of Santacruz Police Station,	]	
Mumbai)	]	 Respondent

Mr. H.E. Palwe, i/by Mr. Ajay R. Varma, for the Appellant in
Cr. Appeal No.843 of 2007.

Mr. Murtuza M. Nazmi with Mr. A.A. Siddiquie, i/by
M/s. A.A. Siddiquie & Associates, for the Appellant in Cr.
Appeal No.949 of 2007.

Mr. S.V. Kotwal, i/by Mr. Ashish S. Sawant, for the
Appellant in Cr. Appeal No.1113 of 2007.

Mrs. A.S. Pai, A.P.P., for the Respondent-State.

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

DATE : 27TH NOVEMBER, 2015.

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

1. As these three Appeals are arising out of one and same Judgment and Order dated 10th August, 2007 of Additional Sessions Judge, Greater Bombay, in Sessions Case No.695 of 2004, they are being decided by this common Judgment. By the impugned Judgment, Appellants / Accused Nos.1 to 3 have been convicted for the offence punishable under Section 302 r/w. 34 of IPC and sentenced to suffer R.I. for life and to pay fine of Rs.5,000/- each, in default to suffer imprisonment for five months.

2. Facts of the Appeals can be stated, in brief, as follows :-

There were two rival Labour Unions in Nanavati Hospital, Mumbai, namely, Bhartiya Kamgar Sena and Mumbai Labour Union. Deceased Nityanand Shetty, employed in the Kitchen Department of Nanavati

Hospital, was a member of Mumbai Labour Union and the Accused were belonging to the other Labour Union. As in the past Deceased Nityanand had caused grievous hurt to Accused No.1 Uday, there was animosity between the two groups. On account of the said incident, Deceased was also removed from the services in the Hospital.

3. In this back-drop, the incident took place on 2nd June, 2004. On that day, at about 2:30 pm, Deceased Nityanand came to the Hospital for treatment of his shoulder. He had tea with his friend PW-1 Arun Gurav and then, at about 3:10 pm, he went near his motor-cycle, which was parked in the compound of the Hospital, opposite Casualty Ward. As per prosecution case, at that time, all the three Accused came there. Accused No.2 Prakash gave the kick to his motor-cycle, on account of which Deceased and his motor-cycle fell down on the ground. Taking the advantage of the same, Accused No.1 Uday stabbed Deceased with knife, whereas, Accused No.3 Ranjay assaulted him with iron hammer on his head. Seeing the assault, PW-1 Arun Gurav and PW-2 Rajkumar Sharma, Security Guard attached to the Hospital, rushed to the help of the Deceased. Deceased was taken in the Hospital for treatment. There, his complaint, vide Exhibit-32, came to be recorded by PW-9 PSI Prakash Patil.

4. On his complaint, C.R. No.207/2004 came to be registered at Santacruz Police Station for the offence punishable under Section 307 r/w. 34 of IPC against all the three Accused. PW-9 PSI Patil then seized the blood stained clothes of the Deceased under Panchanama (Exhibit-33). Thereafter he went to the spot of incident and made Scene of Offence Panchanama (Exhibit-35). On the same day, Accused No.1 Uday and Accused No.2 Prakash came to the Police Station and they were arrested under Panchanama (Exhibit-27). At the time of Arrest Panchanama, Accused No.1 Uday produced the knife (Article No.6). The said knife was seized along with the clothes on his person under the said Panchanama. Thereafter Accused No.3 Ranjay came to be arrested under Panchanama (Exhibit-22). At the instance of Accused No.3 Ranjay, the weapon of assault, the iron hammer (Article No.13), and his blood stained clothes were seized under Panchanama (Exhibit-22 and Exhibit-22A). On the next day, in the morning, at about 10:15 am, Nityanand succumbed to the injuries. Hence, after drawing the Inquest Panchanama (Exhibit-37), his dead body was sent for postmortem examination. The Station Diary Entry of converting the offence under Section 302 r/w. 34 of IPC was accordingly made.

5. As a part of further investigation, the statements of witnesses were recorded. All the seized muddemal articles were sent to Chemical

Analyzer. The C.A. Reports were produced on record at Exhibits “47”, “48” and “20”. The Postmortem Report was produced on record at Exhibit-19. The Test Identification Parade of Accused No.2 Prakash and Accused No.3 Ranjay was held by PW-8 SEO Dattaram Kambli in which PW-2 Rajkumar Sharma identified them. Further to completion of investigation, PW-12 PI Rajendra Chavan filed Charge-Sheet in the Court against the Accused.

6. On committal of the case to the Sessions Court, the Trial Court framed charge against the Accused vide Exhibit-4. The Accused pleaded not guilty and claimed trial, raising the defence of false implication on account of previous rivalry.

7. In support of its case, the prosecution examined in all twelve witnesses and on appreciation of their evidence, the Trial Court was pleased to hold the guilt of all the three Accused to be proved beyond reasonable doubt and convicted and sentenced them, as aforesaid.

8. This Judgment of the Trial Court is challenged in these Appeals by learned counsel for Accused No.1 Mr. Kotwal, learned counsel for Accused No.2 Mr. Nazmi and learned counsel for Accused No.3 Mr. Palwe, whereas, supported by learned A.P.P. Mrs. Pai. In our considered opinion, in order to appreciate rival submissions advanced at

bar by them, it would be useful to refer to the evidence on record.

9. The prosecution case stands on the evidence of an eye-witness PW-2 Rajkumar Sharma, the oral Dying Declaration of the Deceased before PW-1 Arun Gurav, the written Dying Declaration / Complaint (Exhibit-32) made before PW-9 PSI Patil and the recovery evidence of the weapons of assault and the blood-stained clothes.

10. Before adverting to the evidence of the eye-witness PW-2 Rajkumar Sharma, in our considered opinion, it would be necessary to refer and discuss the evidence of PW-1 Arun Gurav. He was working as Food Service Supervisor at Nanavati Hospital. According to him, on the date of incident, while he was on duty, at about 2:30 hrs. and was proceeding from Casualty Department to Food Service Department, he met the Deceased on the way. Deceased told him that he had come to the Hospital for medical treatment of his shoulder and requested him to accompany him for taking out case-papers. Both of them then went to Registration Counter, took the case-papers, came to Orthopedic Department and waited for concerned Medical Officer to arrive. As from the Assistant Doctor they came to know that the concerned Dr. Sanjay Garude was not likely to come, therefore, Deceased got himself examined by the Assistant Dr. Shrirang, who told him that he was required to attend

on next day. Thereafter, both of them went to canteen and after taking tea there, they came at telephone booth, where Deceased has parked his motor-cycle nearby. After wishing him good-bye, PW-1 Arun went to his Department. When he reached there, he heard some shouts and commotions and, therefore, he came out of the Department and at the spot there, he saw that motor-cycle of the Deceased was lying and near the motor-cycle, Deceased was lying in a pool of blood. He also saw Accused No.1 Uday armed with knife and Accused No.3 Ranjay holding iron hammer in his hand. Accused No.2 Prakash was also present there and all the three of them were proceeding towards Maintenance Department. Then, along with other persons present there, he lifted the injured and took him to Casualty Ward. The concerned Medical Officer, after examination of the Deceased, advised that he should be admitted in I.C.U. Hence, he was taken to I.C.U. on the stretcher. At that time, PW-1 Arun asked the Deceased as to how it happened all of a sudden. Deceased told him that when he started his motor-cycle for going out, suddenly three Accused came in front of him. Accused No.2 Prakash kicked on his motor-cycle, due to which he and his motor-cycle fell down on the ground. At that time, Accused No.1 Uday stabbed him by means of knife, whereas, Accused No.3 Ranjay assaulted him with iron hammer on his head.

11. The only admissions elicited through his cross-examination are that the Deceased was his friend and both of them were members of Mumbai Labour Union. The Defence has placed much reliance on the admission given by him that while going away from the place of the incident, he could not see the faces of Accused. However, he had denied the suggestion that he had no occasion to see the Accused at the spot of incident when he reached there or he could not identify the real culprits as he saw the Accused from behind while they were leaving the spot. Much argument is also advanced that on account of the exhaust fan in the Kitchen Department, where PW-1 Arun was serving as Supervisor, he was not in a position to hear the commotion. However, considering that the Kitchen Department is situate on the ground and the incident has also taken place on the ground, it does not appear probable that he will not hear the commotion or will not come to know about the incident. He has just left the Deceased at the parking place and was returning to the Kitchen Department when the incident has happened. Hence, his rushing to the spot is natural one.

12. Moreover, his evidence is not relied upon by prosecution in his capacity as an eye-witness to the incident, but to prove the oral Dying Declaration given by the Deceased before him, which was in the nature of immediate disclosure after the incident and in the said Dying Declaration,

the Deceased has clearly attributed the role of kicking the motor-cycle to Accused No.2 Prakash, the role of stabbing him with knife to Accused No.1 Uday and the assault by iron hammer to Accused No.3 Ranjay. On this aspect of oral Dying Declaration, the evidence of this witness has remained totally unshattered on record.

13. PW-2 Rajkumar Sharma is an eye-witness to the incident. He was working as Security Guard at the Hospital and at the time of incident, he was present opposite Casualty Department of the Hospital, near the parking lot. There he saw one person on the motor-cycle in the parking area and Accused No.1 Uday was having some talk with the said person. At the same time, he saw Accused No.1 Uday and Accused No.3 Ranjay coming there from Maintenance Department. Out of them, Accused No.3 Ranjay was having iron hammer in his hand. He saw that Accused No.2 Prakash was shouting and quarreling with the person sitting on the motor-cycle, then Accused No.2 Prakash kicked the motor-cycle of that person, Accused No.1 Uday gave blow of knife on the stomach of the said person on the motor-cycle and Accused No.3 Ranjay assaulted the said person with iron hammer on his head. According to his further evidence, due to the assault, the said person fell down. He immediately rushed to the Chief Security Officer, informed him about the incident, they came there running, then the Deceased was taken for treatment inside the Hospital. After

some time, when Police came there, he has narrated the incident to the Police. His statement was recorded on the same day, in which he has given description of the Accused. In the Test Identification Parade conducted by PW-8 SEO Dattaram Kambli on 25th August, 2004, this witness has identified both Accused No.2 Prakash and Accused No.3 Ranjay. According to his evidence, he was knowing Accused No.1 Uday since before the incident whereas he was knowing Accused No.2 Prakash and Accused No.3 Ranjay by faces, though not by names. In his substantive evidence before the Court also, he has identified them.

14. The presence of this witness at the spot of incident is natural one. His rushing to inform his superior officer is also natural one. His statement, being recorded on the same day containing all the details of the incident, his evidence constitutes a solid foundation for the prosecution case.

15. This oral evidence of these two witnesses gets further support and corroboration from the prompt lodging of First Information Report (Exhibit-32). The complaint contains all the details of the incident and is registered on the same day in the evening.

16. Further, there is complete corroboration to the ocular account of the incident and the oral Dying Declaration, by medical evidence. Initially,

Deceased was examined by PW-6 Dr. Chaudhary, who was working as Registrar in I.C.U. and thereafter by PW-3 Dr. Harkishan Koticha. According to their evidence, at that time, Deceased was conscious and able to speak. On examination, following injuries were found on his body :-

- (i) Oblique stab wound over left hypo condrium admeasuring 4 cm x 4 cm.
- (ii) Wound on left scapulla admeasuring 3 cm x 3 cm.
- (iii) Small contused lacerated wound over left hemi thorax admeasuring 2 cm x 1 cm.
- (iv) Another contused lacerated wound over left eye brow admeasuring 2 cm x 1 cm.

17. The emergency explorative laporotomy was done by Dr. Koticha at about 5:45 pm, which was completed at 7:30 pm. However, the condition of the Deceased was deteriorated and he succumbed to the injuries on 4th June, 2004 at 12:15 am.

18. The postmortem was conducted by PW-4 Dr. Rajaram Marathe, who has also deposed about the sutured injuries found on the person of the Deceased, as noted above, and, according to him, the cause of the death was “on account of multiple injuries”.

19. Both these Medical Officers have been certain that Injury No.1 was possible by sharp edged weapon like Muddemal Article No.6 Knife and other injuries are possible due to the assault by Muddemal Article No.13 Iron Hammer. According to the evidence of PW-4 Dr. Marathe, the injuries were sufficient in the ordinary course of nature to cause the death.

20. The only submission advanced by the learned counsel for Accused is that, as per the evidence of PW-3 Dr. Koticha and PW-6 Dr. Somesh Chaudhary, the patient had given the history of assault in hospital campus by unknown persons. However, the case-papers (Exhibit-16) reveal that history was given by one Ratnakar Shetty and not by the patient himself. This explains the assault attributed to unknown persons.

21. The prosecution has also placed reliance on the evidence of Dying Declaration, which is recorded by PW-9 PSI Patil. According to his evidence, on the receipt of information, he has immediately rushed to the Hospital and there, in the I.C.U., he recorded the statement of injured Nityanand and thereafter obtained the endorsement of concerned Medical Officer on a separate paper. In the statement, injured Nityanand told him that he was assaulted by three persons and gave the names of the Accused. He further told him that while he was sitting on motor-cycle, Accused No.2 Prakash kicked upon his motor-cycle, Accused No.1 Uday

stabbed him with knife and Accused No.3 Ranjay assaulted him with iron hammer on his head.

22. This complaint / F.I.R./ Dying Declaration (Exhibit-32) is, however, challenged by learned counsel for Accused on three-four counts. In the first place it is submitted that, as admitted by Doctor, Nityanand was given the Injection Fortwin, which is a sedative, immediately after his admission in the I.C.U. Secondly, the endorsement of the Medical Officer is not appearing on the Dying Declaration, but it is on a separate paper without mentioning the timing thereon. PW-3 Dr. Koticha is not stating anything about recording of this Dying Declaration by the Police and, lastly, it is submitted that the Dying Declaration is in the handwriting of the Constable to whom PW-9 PSI Patil has given the dictation; however, the said Constable is not examined.

23. Hence, by placing reliance on ***Sudhakar & Anr. Vs. State of Maharashtra, 2000 ALL MR (Cri.) 1389, Subhash Vs. State of Haryana, (2011) 2 SCC 715, Surinder Kumar Vs. State of Haryana, (2011) 10 SCC 173, Atul Gandhia & Anr. Vs. State of Assam, 1990 CRI.L.J. 1049, and Laxman Vs. State of Maharashtra, (2002) 6 SCC 710***, it is submitted that such Dying Declaration cannot be accepted or relied upon. In our considered opinion, in view of the above said infirmities

in the Dying Declaration, even if the same is excluded from consideration, it will not make much difference to the prosecution case as the prosecution case stands on the evidence of the eye-witness and oral Dying Declaration made before PW-1 Arun.

24. The prosecution is also relying on the evidence relating to the recovery of the weapons of assault. As per evidence of PW-9 PSI Patil and PW-12 PI Chavan, on the same day, in the evening, at about 18:15 hrs., Accused No.1 Uday and Accused No.2 Prakash came to Santacruz Police Station. Accused No.1 Uday produced the knife, which came to be seized under Panchanama (Exhibit-27). He also produced his blood-stained clothes under the same Panchanama. Accused No.2 Prakash also produced his clothes, which were also seized under Panchanama. There is corresponding evidence to that effect of Panch PW-7 Anil Shelke, in whose presence these articles were seized. Further, the evidence of Panch PW-5 Lalan Chaudhary and PW-12 PI Chavan goes to prove that during the custodial interrogation of Accused No.3 Ranjay, he has shown his willingness to produce the iron hammer and his blood-stained clothes. His statement was reduced to Memorandum Panchanama (Exhibit-22) and he guided the Police and Panch in the compound of Nanavati Hospital. There, in one corner of the building, he pointed out the place and produced the iron hammer, which was kept there. It came to be seized

under Panchanama. His clothes were also seized under Panchanama.

25. All these seized muddemal articles were sent to Chemical Analyzer and as per the C.A. Report, on the Article No.6 Knife, the blood stains of "O" Group were found, which was the blood group of the Deceased. This recovery evidence, in our considered opinion, also thus corroborates in the case of prosecution.

26. Prosecution has also led the evidence of PW-8 SEO Dattaram Kambli, who has conducted the Test Identification Parade, wherein PW-2 Rajkumar Sharma has identified Accused No.2 Prakash.

27. Thus, in our considered opinion, there is more than sufficient evidence on record to implicate and prove the guilt of the Accused in the present case beyond reasonable doubt. Though a submission is advanced by the learned counsel for Accused No.2 Prakash that the role of Accused No.2 is very limited to the extent of only giving kick to the motor-cycle and that he had also come to the spot after the talk between the Deceased and Accused No.1 Uday and, therefore, his case cannot fall under Section 302 r/w. 34 of IPC, we are not inclined to accept this submission as the evidence on record clearly goes to prove that all the three Accused have acted in unison in furtherance of their common intention. The act of Accused No.2 Prakash of kicking the motor-cycle of

the Deceased resulted into Deceased falling on the ground, thereby facilitating the stabbing by knife at the hands of Accused No.1 Uday and assault with iron hammer at the hands of Accused No.3 Ranjay. Both, Accused No.2 Prakash and Accused No.3 Ranjay, had come together at the spot following Accused No.1 Uday. In such situation, the act of Accused No.2 Prakash cannot be segregated; as the common intention on their part is writ large on the face of the evidence on record.

28. Therefore, in our considered opinion, the Trial Court has rightly held the guilt of the Accused to be proved beyond reasonable doubt for the offence punishable under Section 302 r/w. 34 of IPC. The Appeals, therefore, hold no merit and stand dismissed.

29. The Bail Bonds of Accused No.2 Prakash stand cancelled. On the request of learned counsel for Accused No.2 Prakash, period of eight weeks is given to Accused No.2 Prakash to surrender to his Bail Bonds before the Trial Court.

[DR. SHALINI PHANSALKAR-JOSHI, J.] [ACTING CHIEF JUSTICE]