

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1199 OF 2012

1. Baliram Genu Ahir
2. Anil Baliram Ahir
3. Pandharinath Genu Ahir
4. Sambhaji Chandrakant Ahir
5. Ajit Baliram Ahir
6. Milind Baliram Ahir
7. Sunil Baliram Ahir
8. Sachin Ramdas Ahir
9. Sanjay Dattu More

all r/o. Vill. Shelar, Tal. Karjat, Dist. Raigad
through Kalande Jail – Kolhapur)

... Appellants /
org. accused

Vs.

The State of Maharashtra

... Respondent

Mr.V.V. Purwant i/b R.D. Suryawanshi for the Appellants/Applicants
Mr.H.J. Dedia, APP, for Respondent – State

**CORAM: MRS.V.K. TAHILRAMANI, Actg.C.J. &
MRS.MRIDULA BHATKAR, J.**

DATE: 18th NOVEMBER, 2015

ORAL JUDGMENT (PER Mrs.BHATKAR, J.):

1. In this appeal challenges the judgment and order dated 27.9.2012 passed by the learned Additional Sessions Judge, Raigad-Alibag, thereby convicting all the appellants/accused for different offences is challenged. It is a case of murder. Two families, namely, Ahir family and Pokharkar

family were on hostile terms in village Karjat, District Raigad Alibag. They are the residents of the same village. On around 26-27 September, 2009, Pandharinath Ahir gave a complaint against Mahesh Pokharkar on account of quarrel between them. The complaint was recorded by head constable P.B. Thale from Karjat police station, who is PW15 as he called both the complainant and the accused at the police station on 29th September, 2009. In the morning at around 10.30am on 29.9.2009, the complainant Dilip Maruti Tamhane, who was maternal uncle of Mahesh Pokharkar, alongwith the family members and friends of Mahesh including the deceased Ganesh Mangal Pokharkar went to Karjat police chowky and informed the head police constable Thale. They were asked to wait outside as the other party Pandharinath was to come to the police chowky. When all those eight persons were waiting outside the police chowky, accused No.1 Baliram Ahir and all the other remaining 8 accused persons arrived and Baliram abused them and shouted that he is going to assault them. He took out a knife which was concealed under his shirt and attacked Ganesh Pokharkar with the knife. At that time, his four children, who are the other four accused i.e., accused Nos.2 Anil, accused No.5 Milind, accused No.6 Ajit and accused No.7 Sunil caught hold of Ganesh and then he gave blow on the left side chest of Ganesh. Ganesh fell down and others i.e., PW2 Rohidas Tamhane, PW3 Pankaj Gharat were also assaulted by the accused persons. Accused No.3 Pandharinath Ahir

and accused No.7 Sunil Ahir assaulted Rohidas with chopper. Then, accused No.2 Anil and accused No.8 Sachin inflicted blows with gupti on Pankaj Gharat. Accused No.4 Sambhaji Ahir and accused No.9 Sanjay More assaulted the complainant Dilip Maruti Tamhane with stick. Thereafter, they all ran away. All the injured were shifted to the hospital. Ganesh succumbed to the injuries immediately after the assault and others sustained various injuries and therefore they were treated in the hospital. Rohidas was admitted in the ICU for 10 days

2. The police registered offence at C.R. No.83 of 2009 at Karjat police station, Raigad on 29.9.2009. They carried out investigation, drew spot panchanama, inquest panchanama, arrested the accused persons, drew memo of seizure of the weapons, collected postmortem notes and recorded the statements of the witnesses. After completion of the investigation, they filed chargesheet on 23.12.2009 for the offences punishable under sections 302, 307, 326, 324, 323, 504 147, 148, 149 of the Indian Penal Code and under sections 37(1)(3) and section 135 of the Mumbai Police Act. The case was committed to the Court of Sessions at Raigad Alibag. The learned judge framed charges against all the accused persons. The accused pleaded not guilty. Thereafter the prosecution tendered the evidence and the trial concluded in the conviction of the accused as follows:

Accused Baliram Anil, Pandharinath, Ajit, Milind, Sunil and Sachin are held guilty for the offences under sections 302, 149, 147, 148 of the Indian Penal Code and sentenced to suffer R.I. for life under section 302 and fine and under sections 302 and 149 RI for one year and under section 148 R.I. for two years.

Accused Nos.2 and 8 are also held guilty under sections 307 and 149 and sentenced to suffer R.I. for 10 years and fine each.

Accused Nos.3 and 7 were punished under sections 326 and 149 and sentenced to suffer R.I. For 7 years and fine.

Accused Nos.4 and 9 are held guilty under sections 323, 149, 147 and 148 of the Indian Penal Code and sentenced to suffer R.I. For one year for each count and pay fine of Rs.10,000/-.

Hence, this appeal.

3. We have read the evidence; perused the relevant documents and the judgment passed by the learned Sessions Judge. It is a case of an assault which had taken place in the daylight at around 11am outside the police chowky. The accused persons and the deceased, the injured and the witnesses are from the same village and they knew each other by name. The two families, namely, Ahir and Pokharkar families were on inimical terms. Quarrels used to take place between the members of the families. Two days prior to the incident, accused No.3 Pandharinath Ahir

had lodged a complaint against Mahesh Pokharkar and there was a cross complaint from Mahesh Pokharkar. This background is brought on record by the witnesses. The assault has taken place in the presence of four eye witnesses, namely, PW1 Dilip Tamhane, PW2 Rohidas Tamhane, PW3 Pankaj Gharat (all injured) and PW4 Mahesh Pokharkar. All these witnesses have stated about previous enmity, the reason for they coming to the police station on that day and the sudden attack by the appellants/accused on them. The complainant Dilip Tamhane has stated that when they were standing, accused No.1 Baliram and the other accused arrived there when Baliram took out a weapon from his shirt and gave a blow on the chest of Ganesh who was standing in front of the group. At the relevant time, his four sons i.e., accused Nos.2, 5, 6 and 7 held Ganesh. When others tried to rescue Ganesh and tried to resist the assailants, the accused persons in pairs assaulted PW1 Dilip, PW2 Rohidas and PW3 Pankaj. The complainant has stated that Rohidas was attacked by accused No.3 Pandharinath and accused No.7 Sunil with chopper. PW3 Pankaj, who rushed to rescue Ganesh was assaulted by accused No.2 Anil and accused No.8 Sachin with gupti. Accused No.4 Sambhaji Ahir and accused No.9 Sanjay More assaulted the complainant with stick. All of them were injured. Rohidas, Ganesh and Pankaj hadc sustained bleeding injuries and they all were shifted to Kashele hospital. From there, they were shifted to Dhirubhai Ambani hospital where Ganesh

was declared dead. Thereafter, Dilip gave complaint to Khalapur police station and the FIR is marked exhibit 40. Evidence of Rohidas and Pankaj, who were also injured, was adduced by the prosecution. They both supported the evidence of the complainant. The injury certificates of Ganesh (exhibit 91) Rohidas (exhibit 92) and Pankaj (exhibit 93) were produced before the Court. Thus, they were eye witnesses and their evidence cannot be disbelieved. After going through the cross-examination and the points raised by the learned Counsel for the accused, we are unable to appreciate the defence.

4. The learned Counsel for the appellants/accused has pointed out that there are material contradictions in the evidence of these witnesses. He further submitted that all these witnesses are from one family and the friends of that family are interested witnesses. Hence, they are not to be believed. He further submitted that recovery of weapons is also doubtful. He submitted that PW2 Rohidas, after receiving the alleged blows from the accused Nos.2 and 7, became unconscious. So he has not seen the assault. The witnesses have exaggerated the version and concocted the story of assault. He tried to raise questions in respect of photographs taken at the time of spot panchanama, recovery of clothes and submitted that the entire case is stage managed by PW1 with his associates and the police officers.

5. The learned Prosecutor has opposed the submissions of the learned defence counsel and supported the impugned judgment of the trial Court.

6. We cannot appreciate the case of the defence on the point of assault and regarding the investigation carried out by the police. The learned Sessions Judge has properly appreciated the evidence of all the witnesses on the point of the incident, drawing panchanamas and recovery of clothes and articles. This is a foolproof case entirely based on the oral and the medical evidence. The submissions of the learned Counsel only on the point of charge of section 302 and conviction under the same can be considered. Our attention is drawn to the post-mortem report and evidence of Dr.Smitarani Khillare, PW14, who has conducted the post-mortem on the body of Ganesh Pokharkar on the same day at 1pm. In column No.17, she observed incise wound of 2cm length and 5cm deep in chest on the chest wall anterior to left nipple. She also noticed abrasion of 5cms on the finger and abrasion on left knee on two sides and all injuries were ante-mortem. The opinion was given that the cause of death was haemorrhagic shock due to perforation of left lung. The death has occurred due to blow on the chest which was caused by Baliram to the deceased Ganesh. Thus, the case falls under the category of death occurred due to single blow.

7. Alongwith medical evidence, we find it is necessary to marshal the evidence of the utterance by Baliram just before inflicting the blow on Ganesh. The complainant Dilip Tamhane, eye witness Rohidas, Pankaj and Mahesh Pokharkar have deposed about the utterance that Baliram has said in vernacular language thus:

Dilip - "मादर्चोदानो तुम्हाला बघतो तुमच्यावर वाराच करतो" (I will inflict blow on you)

Rohidas - "मादर्चोदानो तुम्हाला बघतो. तुम्हाला एकएकाला खलास् करतो, मी तुमच्यावर वार करतो"

Pankaj - "मादर्चोदाना धरा, त्याच्यावर वार करा, त्यांना ठार मारा."

Mahesh - "थाम्बा मादरचोद तुम्हास् बघतो. तुमच्यावर वार करतो. आज तुम्हाला सोडनार नाही."

8. Thus, it shows that there is veracity in the evidence as regards the utterance of Baliram before the assault. However, one sentence is consistent that he abused them all by words "tumchyawar waar karto" (I will inflict blow on you). In the evidence of PW1 Dilip and PW4 Mahesh, they did not depose that Baliram has stated anything that he wanted to kill them. The two witnesses i.e., PW2 Rohidas had said that he will finish one by one; then PW3 Pankaj has deposed that Baliram had uttered the words "kill them". According to these witnesses, he did not say anything about killing the deceased or the injured. These two witnesses Nos.2 / 3 were more injured while PW1 had suffered simple injuries and PW4 was not attacked. Hence, possibility of exaggeration by those injured witnesses cannot be overruled. Therefore, whether Baliram really uttered

the words that he wanted to kill them or not is doubtful. However, it is proved by his utterance which is consistent in the deposition of all the four eye witnesses that before inflicting blow, he abused them all and said that he wanted to inflict the blow. Thus, it shows that Baliram in fact wanted to only assault the deceased and the others. He took out some sharp edged weapon from his shirt and stabbed in the left side chest of Ganesh. On receiving blow on the vital part of the body, Ganesh succumbed to that injury. As per the post-mortem report and as per the evidence of Dr.Khillare, who performed the post mortem. There are no more incise wounds on the body of Ganesh. As per the evidence of the complainant and other witnesses, four sons of Baliram, who are accused Nos.2, 5, 6 and 7, held Ganesh by his hands and thereafter Baliram inflicted blow on the chest. Thus, Ganesh was at the relevant time, defenceless, yet no further blows were inflicted on the person of Ganesh by either Baliram or other accused persons. Thus, the death of Ganesh was caused due to single blow on a vital part. This fact alongwith the evidence as discussed above regarding utterance of Baliram, if considered together, then the case of the prosecution that the assault was motivated with intention to kill becomes doubtful.

9. Considering the discussion above, therefore, the case will have to be brought down from section 302 to a lesser degree of offence i.e., from under section 302 of the Indian Penal Code to section 304 part 2 of the

Indian Penal Code. The role played by the other accused in the assault of Ganesh is also required to be discussed specifically. The witnesses have said that four persons Anil, Ajit, Milind and Sunil held Ganesh and then Baliram stabbed him. When Rohidas rushed, Pankaj and Dilip came forward to rescue Ganesh and to resist the attack, at that time, the accused No.3 Pandharinath and accused No.7 Sunil gave blows to Rohidas with chopper and he sustained injuries. Therefore, they are convicted additionally under section 307 of the Indian Penal Code. So also, Pankaj was assaulted with blows of gupti by accused No.2 Anil and accused No.8 Sachin and was injured. They were held guilty and rightly so, under section 326 of the Indian Penal Code. When Dilip rushed ahead, accused No.4 Sambhaji and accused No.9 Sanjay assaulted him with stick and so they were convicted rightly under section 323 of the Indian Penal Code. All the accused are facing charges under section 302 r/w 149 of the Indian Penal Code. The evidence of the witnesses shows that accused No.5 Ajit and accused No.6 Milind did not assault anybody and they were not holding any weapon at that time. The other accused like Anil, Pandharinath, Sunil and Sachin i.e., accused Nos.2, 3, 7 and 8 were holding deadly weapons like chopper and gupti and they assaulted Pankaj and Rohidas. Therefore, they were also held guilty under section 302 and section 149 of the Indian Penal Code. The role attributed to accused No.5 and accused No.6 is also of a lesser degree though they

were the members of unlawful assembly. Thus, considering the role attributed to each one and proved by the prosecution, we are inclined to reduce the term of the sentence of the accused persons as per the gravity of their act intention manifested thereby and role attributed to them.

10. While going through the impugned judgement, we found that accused Nos.2 and 8, accused Nos.3 and 7 are punished twice for their offences under sections 147 and 148. We, therefore, set aside that double conviction of those accused i.e., accused Nos.2 and 8 under section 147 and 148 of the Indian Penal Code, more specifically under clauses (6) and (7) and also of accused Nos.3 and 7 under clauses (10) and (11) of the operative portion of the impugned judgment and order, as they are already convicted under section 147 in clause (2) and under section 148 in clause (3).

11. Thus, the following order is passed:

(i) Appeal is partly allowed.

(ii) The conviction and sentence of appellant No. 1 - Baliram Genu Ahir, appellant No. 2 - Anil Baliram Ahir, appellant No. 3 - Pandharinath Genu Ahir, appellant No. 5 - Ajit Baliram Ahir, appellant No. 6 - Milind Baliram Ahir, appellant No. 7 - Sunil Baliram Ahir and appellant No. 8 Sachin Ramdas Ahir under Section 302 r/w 149 of IPC is hereby set aside.

(iii) Appellant No. 1 - Baliram Genu Ahir, appellant No. 2 - Anil Baliram Ahir, appellant No. 3 - Pandharinath Genu Ahir, appellant No. 5 - Ajit Baliram Ahir, appellant No. 6 - Milind Baliram Ahir, appellant No. 7 - Sunil Baliram Ahir and appellant No. 8 Sachin Ramdas Ahir are held guilty under Section 304-II r/w 149 of IPC. For the said offence, Appellant No. 1 - Baliram Genu Ahir is sentenced to suffer R.I. for seven years and to pay a fine of Rs.25,000/- in default, R.I. for one year. Appellant No. 2 - Anil Baliram Ahir, appellant No. 3 - Pandharinath Genu Ahir, appellant No. 7 - Sunil Baliram Ahir and appellant No. 8 Sachin Ramdas Ahir are sentenced to suffer R.I. for five years and to pay a fine of Rs.25,000/- each in default, R.I. for one year. Further appellant No.5 - Ajit Baliram Ahir and appellant No. 6 - Milind Baliram Ahir are sentenced to suffer R.I. for four years and to pay a fine of Rs.25000/- each, in default, R.I. for one year.

(iv) The conviction and sentence of Appellant No. 1- Baliram Genu Ahir, appellant No. 2 - Anil Baliram Ahir, appellant No. 3 - Pandharinath Genu Ahir, appellant No. 5 - Ajit Baliram Ahir, appellant No. 6 - Milind Baliram Ahir, appellant No. 7 - Sunil Baliram Ahir and appellant No. 8 Sachin Ramdas Ahir under Sections 147 and 148 of IPC is maintained.

(v) Further appellant No. 2 Anil Baliram Ahir and appellant No. 8 Sachin Ramdas Ahir are held guilty for the offence punishable under Section 307 r/w 149 of IPC. They are directed to suffer R.I. for five years and to pay fine of Rs. 20,000/- each, in default, R.I. for one year.

(vi) Appellant No. 3 Pandharinath Genu Ahir and appellant No. 7 Sunil Baliram Ahir are held guilty for the offence punishable under Section 326 r/w 149 of IPC and are sentenced to suffer R.I. for three years and to pay a fine of Rs. 20,000/- each in default, R.I. for one year.

(vii) Appellant No. 4 Sambhaji Chandrakant Ahir and appellant No.9 Sanjay Dattu More are held guilty for the offence punishable under Section 323 r/w 149 of IPC and are sentenced to suffer R.I. for one year and to pay a fine of Rs. 10,000/- each, in default, R.I. for three months.

(viii) Appellant No. 4 Sambhaji Chandrakant Ahir and appellant No.9 - Sanjay Dattu More are held guilty for the offence punishable under Section 147 of IPC and are sentenced to suffer R.I. for one year.

(ix) Further Appellant No. 4 Sambhaji Chandrakant Ahir and appellant No. 9 - Sanjay Dattu More are held guilty for the offence punishable under Section 148 of IPC and are sentenced to suffer R.I. for one year.

(x) All the above sentences of imprisonment shall run concurrently.

(xi) The appellants are entitled to set-off.

(MRIDULA BHATKAR, J.)

(ACTING CHIEF JUSTICE)