

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1504 OF 2011

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|-------------------------------------|---|-------------------|
| 1. Raju Maruti Dhumal, |] | |
| Age 38 Yrs., Occ.: Rickshaw Driver, |] | |
| R/at S. No.120, Kishkindanagar, |] | |
| Kothrud, Pune. |] | |
| |] | |
| 2. Nitin Prakash Shelar, |] | |
| Age 21 Yrs., Occ.: Agriculturist, |] | |
| R/at Godambewadi No.1, |] | Appellants / |
| Post – Ghotawade, Tal. Mulshi, |] | (Org. Accused |
| Dist. Pune. |] | Nos.1 and 2) |

Versus

The State of Maharashtra,		
Thru' Hinjawadi Police Station, Pune.	]	 Respondent

Mr. Sarang Kotwal, i/by Mr. Jayesh Kocheta and
Mr. Avinash Kamkhedkar, for the Appellants.

Mrs. S.D. Shinde, A.P.P., for the Respondent-State.

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

DATE : 26TH FEBRUARY, 2015.

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

1. The Appellants, who stand convicted for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and sentenced to

suffer imprisonment for life and to pay fine of Rs.2,000/- each, in default to undergo R.I. for one year, by Judgment dated 12th October, 2011 in Sessions Case No.633 of 2008, by Additional Sessions Judge, Pune, by this Appeal, challenge their conviction and sentence.

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

On 8th May, 2008, at about 3:50 pm, while PW-14 PSI Prataprao Bhosle was on duty at MIDC Police Chowky, under Hinjwadi Police Station, he received a telephonic call from PW-2 Tukaram Bhoir, the Police Patil of Village Bhoirwadi, informing him that Sarpanch of Chandewadi, PW-3 Shankar Mandekar has given him information that Appellant No.1 and his associates had assaulted deceased Sunil Godambe and Dhananjay Godambe, near the stream situate adjoining to Kumar Property and they were lying in injured condition at the spot. PW-14 PSI Bhosle gave information of this incident to his senior and proceeded to the spot. There he found deceased Sunil and Dhananjay lying in injured condition. He sent the Police Constable to bring the ambulance.

3. By that time, PW-15 SI Khavle, who was on patrolling duty, also received the information about the incident from the Police Station and he

also reached to the spot. PW-2 Tukaram also came to the spot. PW-15 SI Khavle remained on the spot and sent both the injured in ambulance to Sai-Jyoti Hospital along with PW-14 PSI Bhosle. As at Sai-Jyoti Hospital they were declared to be dead. As per the directions, the dead bodies were then taken for postmortem to Aundh Hospital.

4. PW-15 SI Khavle, who had remained on the spot, called two Panchas and prepared the Scene of Offence Panchanama. On the spot, he found motor driving license issued by R.T.O., Pune in the name of Appellant No.1. He seized the same under Panchanama (Exhibit-109).

5. Meanwhile, PW-1 Fulaji Godambe, the brother of deceased Sunil and uncle of deceased Dhananjay, went to Hinjwadi Police Station and lodged the complaint (Exhibit-85) against the Appellants and other co-accused. On his complaint, at about 7:10 pm, C.R. No.103 of 2008 came to be registered. The investigation of the same was taken over by PW-17 PI Bajirao Mohite.

6. The clothes on the dead body of Sunil and Dhananjay were produced by the Police Constables Jadhav and Palande from Aundh Hospital, which were seized by PW-17 PI Mohite under Panchanama (Exhibit-68). Then on receipt of information that the Appellants were at Konark Hotel, Bavdhan, he went there and apprehended them at about

23:15 hours on the same night and seized the blood stained clothes on their person under Panchanama (Exhibit-118).

7. On the next day, PW-17 PI Mohite recorded the statements of eye witnesses, namely, PW-3 Shankar Mandekar and PW-4 Ganesh Shinde. He also recorded the statement of PW-2 Tukaram. During police custody, on 10th May, 2008, at the instance of Appellant No.1 Raju, the weapons of assault, namely, iron rod and two bamboo sticks, came to be recovered under the Memorandum Panchanama (Exhibit-114) and Seizure Panchanama (Exhibit-115). On 10th May, 2008, PW-17 PI Mohite recorded the statement of PW-7 Tukaram Sawant and on 11th May, 2008, he recorded the statement of the Photographer PW-5 Umesh Dhamale. On 13th May, 2008, at the behest of Appellant No.1 Raju, his motor cycle came to be seized under Memorandum Panchanama (Exhibit-162) and Seizure Panchanama (Exhibit-163). On 20th May, 2008, PW-17 PI Mohite sent the seized muddemal articles to Chemical Analyzer vide requisition letter (Exhibit-171). The C.A. Report is produced at Exhibit-175. Further to completion of investigation, PW-17 PI Mohite filed Charge-Sheet in the Court against present Appellants and two other co-accused, whereas, against two juveniles in conflict with law, he filed report in the Juvenile Justice Board. On case being committed to the Sessions Court, the Trial Court framed charge against the Appellants for various offences vide

Exhibit-41. The Appellants and other co-accused pleaded not guilty and claimed trial.

8. To prove its case, the Prosecution examined 17 witnesses, placing reliance mainly on the evidence of two eye witnesses viz. PW-3 Shankar Mandekar and PW-4 Ganesh Shinde. The Appellants raised the defence of false implication on account of the previous enmity and strained relations.

9. On appreciation of the evidence on record, the Trial Court held the guilt of the present Appellants to be proved beyond reasonable doubt for the offence punishable under Section 302 r/w. 34 of the IPC and convicted and sentenced them, as aforesaid.

10. This Judgment of the Trial Court is challenged in this Appeal by learned Counsel for the Appellants Mr. Kotwal, whereas, supported by learned A.P.P. Mrs. Shinde. In our considered opinion, in order to effectively deal with their rival submissions, it would be useful to refer first to the evidence on record.

11. To prove the homicidal death of deceased Sunil and Dhananjay, Prosecution has led the evidence of PW-12 Dr. Ashok Ingale. On examination of deceased Sunil, he found following external injuries :

- (1) *Incised wound right parital area oblique above and behind the ear 3 x 1" bone deep.*
- (2) *Right ear clotted blood.*
- (3) *Fracture right middle finger of the hand.*
- (4) *Abrasion right hand dorsum near wrist 2 x 1 cms.*
- (5) *Contusion right forearm near elbow dorsum lateral aspect, 3 x 2 cms.*
- (6) *Abrasion left arm 1 x 0.5 cm. lateral aspect.*
- (7) *Contusion left arm 2 x 1" lateral aspect.*
- (8) *Incised wound 1 cm. length, left hand ring finger at the base.*
- (9) *Three contusions on left side back, infra scapular area oblique about 6 x 7" in length.*
- (10) *Two oblique contusions right thigh with oedema 12 x 3" and 11 x 2".*
- (11) *Incised wounds oval on right shin, vertical four in numbers, 1 x 0.5", 1 x 1", 2 x 1" bone deep and 1" x 0.5".*
- (12) *Incised wounds left shin, six in number oval vertical 1 x 1 cm. 3" x 1" bone deep; 2 x 2 cms., 2 x 1 cm.; 1 x 1" and 2 x 2 cms.*
- (13) *Contusion left thigh transverse 10 x 4".*
- (14) *There was fracture right middle finger of right hand.*

12. On internal examination, he found following injuries :

- (1) *There was haematoma right parietal area 2 x 3 cms. adjacent to injury.*

(2) *There was haemorrhagic area right parietal area.*

(3) *There hemorrhagic meninges right side with haemotoma subdural right lobe, 2 x 2" and the brain was pale.*

13. According to him, all these injuries were antemortem and sufficient in the ordinary course of nature to cause the death. All these injuries were caused within 6 hrs. to 12 hrs. The cause of the death was "*due to haemorrhagic shock due to multiple injuries with head injury*".

14. Accordingly, he has issued the Postmortem Report (Exhibit-128). In evidence before the Court, he was shown Muddemal Articles No.20, 21 and 27, the wooden logs and the iron pipes recovered at the behest of Appellant No.1, and he has opined that the injuries found by him on the dead body of deceased Sunil can be caused by these muddemal articles.

15. He has also conducted the postmortem on the dead body of Dhananjay and on examination, he found following external injuries :

(1) *Contusion right arm lateral aspect, 5 x 3".*

(2) *Punctured wound 1" deep and 1" width on right fore arm near elbow lateral aspect with bleeding.*

(3) *Punctured wound right wrist dorso lateral aspect, 0.5 x 0.5 cms.*

(4) *Incised wound circular left shin oedema mid 1/3rd, 1 x 1", 2" deep.*

- (5) *Incised circular wound left shin with oedema mid 1/3rd, with avulsed skin, and bone fragment seen, 2 x 1" and 1 ½" deep.*
- (6) *Incised wounds circular in close proximity upper 1/3rd shin of 1 x 0.5", 0.5 x 0.5", 0.5 x 0.3", 1" x 0.5" bony deep. Four in numbers with surrounding oedema.*
- (7) *Punctured wounds right shin, mid 1/3rd, two in number, 0.5 x 0.5 cms., 1 x 0.5 cms.*
- (8) *Fracture left tibia fibula was seen.*

16. He has opined that all these injuries were antemortem. There were no corresponding internal injuries. The cause of the death, according to him, was *"haemorrhagic shock due to multiple injuries"*. The age of the injuries was within 6 hrs. to 12 hrs. and they were sufficient in the ordinary course of nature to cause the death. He has further stated that these injuries were also possible due to Muddemal Articles No.20, 21 and 27 i.e. wooden logs and iron pipes. He has issued the Postmortem Report vide (Exhibit-130). The evidence of this witness, thus, goes to prove the cause of the death of both Sunil and Dhananjay as homicidal one, as a result of haemorrhage shock due to multiple injuries.

17. To prove the complicity of Appellants in the alleged incident, main reliance of the Prosecution is on the evidence of two eye witnesses, namely, PW-3 Shankar Mandekar, the Sarpanch of the village, and PW-4 Ganesh Shinde. Evidence of PW-3 Shankar goes to prove that, on that

day, as there was village fare, he was going in his Scorpio Vehicle at about 3:45 pm on the road from Bapujibuva to Bhoirwadi. Near Kumar Constructions, he found that the Appellants were holding sticks and iron pipes in their hands and beating deceased Sunil and Dhananjay by shouting and abusing them. He tried to stop there, but the Appellants threatened him. Then he went to Bhoirwadi and informed about it to the Police Patil PW-2 Tukaram. On that day, in the evening, he received the phone call from Police. Accordingly, he went to the Police Station on the next day and stated about the incident to Police. This witness is of the same village and, therefore, knowing both the deceased and also the Appellants. In evidence before the Court, he has identified the Appellants and also muddemal articles – the bamboo sticks and the iron pipes.

18. In his cross-examination, further details of the incident are brought on record to the effect that the beating was going on at the side of the stream. The spot was adjacent to the road. It is further brought on record that Appellant No.1 Raju was holding iron pipe and Appellant No.2 Nitin was having bamboo sticks in his hand. They were assaulting both Sunil and Dhananjay by these pipes and bamboos. The beating continued for five minutes in his presence. The other co-accused Raghu was not allowing the persons to stop by that spot. Raghu was giving threatening and, therefore, he could not stop at the spot. It is also brought on record

that at 7:30 pm to 8 pm, he came to know about the death of the injured. He attended the funeral, which was in the late night of that day, and then on the next day, his statement came to be recorded.

19. There is similar evidence of PW-4 Ganesh Shinde, who was also of the same village, and, therefore, knowing both the Appellants and the deceased. According to him, on 8th may, 2008, he had been to Deokarwadi on his motorcycle to distribute wedding cards of his cousin. He started from Bhoirwadi. On the way, he found beating was going on in the *kaccha* road near Kumar Builders' construction site. Appellant Nos.1 and 2 and other 4 to 5 persons were abusing and beating deceased Sunil and Dhananjay by pipes, sticks and weapons. On seeing this, he was frightened and hence proceeded ahead. He narrated the said incident to the Police and on the next day, his statement came to be recorded.

20. There is corresponding evidence of PW-2 Tukaram, the Police Patil. He has stated that on that day, while he was going on two-wheeler to leave his sister and her husband, he met 4 to 5 boys of the village, who told him that near the stream of Kumar Property, one vehicle was lying on the road with two injured persons. Hence, he immediately went to the spot and saw that two persons were lying there in injured condition. Out of them, one person told him to make a phone call to his house. Accordingly,

he made a phone call to the house of that injured and also to the Police Station. The Police then came there. His evidence corroborates the evidence of PW-14 PSI Bhosle that he received information of the incident from Police Patil PW-2 Tukaram.

21. There is also corroborating evidence of PW-1 Fulaji Godambe, who is the brother and uncle of deceased Sunil and Dhananjay, respectively. According to his evidence, on the date of incident, he received phone call from his cousin Subhash Godambe informing about the assault on Sunil and Dhananjay and the fact that they were taken to Sai-Jyoti Hospital. When he started going to hospital, he received a phone call from his other brother that injured were taken to Aundh Hospital. Hence, he went to Aundh Hospital. There he saw the dead bodies having injuries caused by sharp weapons on their persons. Thereafter, he went to the Police Station and lodged complaint (Exhibit-85).

22. Thus, there is consistent, cogent and reliable evidence of two eye witnesses, coupled with corroborating evidence of PW-2 Tukaram and PW-1 Fulaji.

23. The evidence of the eye witnesses, especially of PW-3 Shankar Mandekar, is challenged on the ground that he is related to both the deceased and, therefore, reliance cannot be placed on his testimony. The

law in this respect is very well settled that merely because the eye witness is a relative of the deceased, his evidence cannot be thrown out, at the threshold itself. The law merely requires that his evidence be accepted after careful scrutiny. Here in the present case, even after such careful scrutiny, we do not find any reason to disbelieve the evidence of this witness, as his cross-examination has not made any dent in his testimony. Conversely, all the details of the incident, as stated above, are brought out in cross-examination itself.

24. His evidence is also challenged on the ground that even after witnessing the incident, he went to the village fare to watch the wrestling programme and, therefore, his conduct is not natural. However, this submission also cannot be accepted because his immediate response and conduct was to inform about the incident of assault to the Police Patil PW-2 Tukaram, which conduct appears to be quite natural. Secondly, when he witnessed the incident, he might not have gauged the gravity of the same or might not have anticipated that it might result into the death of two persons. Moreover, his cross-examination shows that he stopped at wrestling programme only for 20 to 25 minutes and then returned and after coming to know about the death, attended the funeral. Therefore, there is nothing unnatural in his conduct so as to disbelieve him.

25. The evidence of PW-4 Ganesh Shinde is also challenged on the same ground that his conduct after the incident was totally unnatural. It is urged that in his cross-examination, this witness has admitted that he has also not disclosed about the incident to anyone. Only on the next day, when Police called him, he had gone to Police Station and his statement came to be recorded. It is urged that this conduct is again unnatural. In our considered opinion, however, in the absence of any universal rule of law stating in which manner the witness should behave after watching the offence, the evidence of eye witnesses cannot be discarded merely because he has not reacted or responded in a particular way. Each person reacts in his special way and there are no set of rules of natural reaction. As observed by the Apex Court in plethora of its authorities, *“people react differently in different situations. It is difficult to probe into minds of people as to how they act in a particular way. Hence, evidence of a witness cannot be rejected on the ground that he did not behave in a particular manner”*. Especially in the present case, when this witness is totally an independent witness and his testimony has remained unshattered on record, being corroborated with the evidence of other witnesses, there is no reason at all to disbelieve him.

26. The next submission made by learned Counsel for the Appellants is that the evidence of these two eye witnesses that deceased sustained the

injuries due to the assault, is falsified by the evidence of PW-13 Dr. Vaishali Suryavanshi, who was attached to Sai-Jyoti Hospital at the relevant time and has examined both the injured when they were brought there. She found them unconscious and declared them dead. However, in the certificates, she has mentioned that *“the history given was of road traffic accident”*. It is urged that this is the immediate disclosure made by the Police or the persons, who had taken the injured to the hospital, and the said version of accidental cause contradicts the evidence of two eye witnesses.

27. In our considered opinion, however, when injured were taken to PW-13 Dr. Vaishali Suryavanshi, the details of the assault and actual incident were not known, as yet the complaint was to be recorded. Secondly, in the certificates (Exhibits 136 and 137), it is not stated who has given the history of the patients. Therefore, on the basis of a mere vague statement made in the certificates, pursuant to some hear-say information, the evidence of two eye witnesses cannot be disbelieved.

28. Next submission of learned Counsel for Appellants is that the medical evidence belies the ocular account of these two eye witnesses that deceased were assaulted with the iron pipes and bamboo sticks. It is urged by him that PW-12 Dr. Ashok Ingale, who has conducted the

postmortem, has admitted in his cross-examination that there were three incised wounds on the body of Sunil and three incised and three punctured wounds on the body of Dhananjay. He has further opined that these incised or punctured wounds are possible by hard and sharp object, whereas, the other injuries are possible by hard and blunt object. In his cross-examination, he has also stated that the incised wounds are not possible by iron pipes and bamboo sticks, as they are having rough edges.

29. While dealing with this submission, we would like to first place on record that the medical evidence, being opinion evidence, it cannot override the ocular account of the incident given by the eye witnesses. If the eye witnesses are credible and trustworthy, medical opinion suggesting alternative possibility cannot be accepted as conclusive. As observed by the Supreme Court in ***Mahmood Vs. State of U.P., AIR 2008 SC 515***, priority should be given to the oral evidence, as medical evidence is mainly opinion evidence.

30. Moreover, in the present case, the evidence of PW-3 Shankar Mandekar goes to prove that the Appellants were beating the deceased by pipes, sticks and “weapons”, thereby indicating that some other means were also used to assault the deceased. Merely because those weapons

are not recovered, it cannot be said that sharp edged weapons were not used in the commission of the offence. Further, as regards evidence of PW-3 Shankar Mandekar, though he has not stated about the use of other weapons, as admitted by him, he has not witnessed the entire incident. He was driven away from the spot by the co-accused Raghu, as deposed by him. He was there only for five minutes and hence even if the other sharp edged weapons were used in the offence, he might not have witnessed the same.

31. Therefore, in the present case, it cannot be said that medical evidence is totally at variance with ocular evidence or it should prevail over the ocular account so as to disbelieve these two eye witnesses, whose testimonies are found to be cogent, reliable, forthright and credit-worthy.

32. There is one more clinching piece of evidence by which Prosecution has succeeded in proving the complicity of the Appellants. It is the motor driving license, which was found at the scene of offence, immediately after the incident, when the Spot Panchanama was drawn. This fact is proved through the evidence of Panch Witness PW-6 Rahul Balkawade and PW-15 SI Maruti Khavle. The said driving license is produced as Article No.3 and it was seized under Panchanama (Exhibit-109). It is standing in the

name of Appellant No.1. Though in his statement recorded under Section 313 of the Code of Criminal Procedure, Appellant No.1 has tried to offer explanation for the same by stating that it was lost and hence he has obtained duplicate license, in para (59) of its Judgment, the Trial Court has rightly dealt with this aspect by observing that on the copy of license produced by the Appellant No.1, there was no mention that it was issued due to loss of original license. It was also not having endorsement as 'duplicate license'. Conversely, it showed that it was a original smart driving license. In the copy of the F.I.R., which Appellant No.1 has produced, there was no mention of loss of license. Thus, the case put up by Appellant No.1 that his original license was lost, is not rightly accepted by the Trial Court. We also do not find any reason to defer with this finding of the Trial Court.

33. The Prosecution has also placed reliance on the recovery of the weapons, like, iron pipe and wooden sticks, at the instance of the Appellants and also the recovery of the blood stained clothes of the Appellants. The Trial Court has disbelieved the same as those articles and clothes were not proved to be sealed with the wax seal. The Prosecution, therefore, cannot rely upon the C.A. Reports also. We are also excluding from our consideration the evidence relating to recovery of weapons and blood stained clothes.

34. In our considered opinion, even then the Prosecution case stands proved against the Appellants on the basis of the evidence of eye witnesses and the seizure of the motor driving license of Appellant No.1 from the spot of incident. The Trial Court has, therefore, rightly held the guilt of the Appellant Nos.1 and 2 to be proved beyond reasonable doubt for the offence punishable under Section 302 r/w. 34 of the IPC.

35. Consequently, Criminal Appeal No.1504 of 2011 stands dismissed, confirming the conviction and sentence of the Appellants for the offence punishable under Section 302 r/w. 34 of the IPC.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]