

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.188 OF 2000

The State of Maharashtra **APPELLANT**
[Ori. complainant]

VERSUS

1. Manoj Kantilal Nidhane,
age 26 yrs.
2. Punam Kantilal Dhandore,
age 25 yrs.

Both R/o. Gurunanak Nagar,
Jalgaon.

RESPONDENTS
[ori. accused]

...

Mr.A.A.Jagatkar, APP for the Appellant-
State.

Mr.K.C.Sant, Advocate for the respondents –
accused.

...

**CORAM: S.S.SHINDE &
S.M.GAVHANE, JJ.**

Reserved on : 21.06.2017
Pronounced on : 03.07.2017

JUDGMENT: (Per S.S.Shinde, J.):

1. This Appeal is filed by the
appellant-State, challenging the judgment and
order of acquittal passed by the Sessions

Judge, Jalgaon on 29th January, 2000 in Sessions Case No.141/1998.

2. The prosecution case in nutshell is as under:

It is the case of the prosecution that on 27th April, 1998, Vijay Pralhad Marathe [PW-4] had been to the house of Suresh Khandelwal [deceased]. In the said house, Suresh and his mother were present. He had chit-chat with them. At about 8.30 p.m. Suresh along with Vijay [PW-4] started going towards railway line so as to attend nature's call. When they reached near the house of Meerabai Patil, both of them saw Manoj and Punam coming from the railway line. It is further the case of the prosecution that Manoj abused Suresh in the name of his mother, and said that Suresh had become rude. Suresh also replied to the abuses given by Manoj in the same manner. Manoj and Punam

started giving kicks and fist blows to Suresh. Thereafter, Manoj and Punam drew chopper from their waist, and assaulted Suresh on his head, forehead, stomach and chest, by giving him blows by said weapon in quick succession. Vijay [PW-4] when tried to intervene, Manoj gave him a blow with the chopper on his head. Vijay raised hue and cry, and Manoj and Punam ran away from the spot of incident. The injured Suresh sat down at the place of incident holding his stomach. Vijay went to the house of Suresh and called his mother. With the help of mother of Suresh, Vijay took Suresh to the Police Station and later on to the Civil Hospital, Jalgaon. During treatment, Suresh expired. The PSI Jagtap of Shani Peth Police Station went to the Civil Hospital, Jalgaon to record statement of Suresh. However, the Medical Officer informed him that, Suresh is not in a position to give statement. Then PSI Jagtap

went to the injured Vijay [PW-4], who was also admitted in the same Civil Hospital wherein Suresh was admitted, and recorded his statement.

On the basis of the statement of Vijay [PW-4], Shani Peth Police Station registered Crime No.16/1998 for the offences punishable under Sections 302, 324 r/w. 34 of the I.P. Code. The Police Inspector Mr. Jawale carried out investigation. On 28th April, 1998, he visited the place of incident, and prepared the spot panchnama. He referred the dead body of Suresh for postmortem examination after preparing inquest panchnama. He attached the clothes on the person of Suresh and Vijay under the seizure panchnama. He recorded the statements of the witnesses, and also arrested the accused. It is further the case of the prosecution that when the accused were in the

Police custody on 10th May, 1998, they made statement that, they had kept knife at their respective houses, and accordingly, memorandum statements of both the accused came to be prepared. The knives produced by the accused came to be attached under the panchnama. Lateron, the Investigating Officer referred the attached articles to the C.A. at Aurangabad. On receipt of the P.M. report, and also report from the C.A., and on completion of the investigation, the Investigating Officer submitted the charge-sheet before the Competent Court, who committed the case to Sessions Court.

3. The trial Court framed charge against accused for the offences punishable under Sections 302, 324 r/w. 34 of the Indian Penal Code. The accused have denied to have committed any offence and have contended that they have been falsely implicated in the case.

4. After full-fledged trial, both the accused were acquitted by the Sessions Court at Jalgaon. Hence this Appeal filed by the appellant – state.

5. Learned APP appearing for the appellant-State invites our attention to the impugned judgment, and submits that the trial Court though made reference to the deposition of Vijay [PW-4], nevertheless did not record any specific findings why his evidence cannot form basis for conviction of the accused. It is submitted that Vijay [PW-4] sustained injury on his head. He was hospitalized. His statement was recorded by the Police Officer immediately within few hours. Since he himself is injured witness, and his oral testimony gets corroboration in material particulars from the medical evidence, there was no reason for the trial Court to acquit the respondents. It is submitted that by

ignoring the substantive piece of evidence in the nature of oral testimony of Vijay [PW-4] which gets complete corroboration from the medical evidence, and other attending circumstances, the view taken by the trial Court of acquitting the respondents was not possible at all. It is submitted that the evidence of other witnesses also fully supports prosecution case. There was immediate lodging of FIR, and that ruled out possibility of having any concocted version in the FIR. Learned APP invites our attention to the evidence of Vijay [PW-4], and also other two prosecution witnesses, and also other evidence brought on record, and submits that the appeal deserves to be allowed thereby setting aside the order of acquittal passed by the trial Court.

6. On the other hand, Mr.K.C.Sant learned counsel appearing for respondents—

accused, placing reliance upon the findings recorded by the trial Court, submits that the trial Court has taken a possible view, and the findings recorded by the trial Court are in consonance with the evidence brought on record. It is submitted that the Panch to the spot panchnama has stated that the spot of incident is near the railway line at Chaugule plot, and the prosecution witnesses have stated different spot of incident, and therefore, the trial Court reached to the conclusion that the prosecution was not able to prove the actual spot of incident. It is submitted that it has come on record that the alleged incident had taken place during night time, and there was no sufficient light so as to have opportunity to see assailants by the prosecution witnesses.

7. He invites our attention to the evidence of the prosecution witnesses and submits that it suffers from contradictions,

omissions and improvements. There was delay of one day in recording the statement of Sanjeev [PW-5] and Nivrutti [PW-6], and said delay has not been explained by the prosecution. The trial Court, upon appreciation of the evidence of Sanjeev [PW-5] and Nivrutti [PW-6], has reached to the correct conclusion that they have not witnessed the actual incident. An alleged recovery of the clothes and weapon is disbelieved by the trial Court by assigning sufficient reasons. Therefore, relying upon the findings recorded by the trial Court, and notes of evidence, learned counsel appearing for respondents submits that the appeal may be dismissed.

8. We have given careful consideration to the submissions of the learned APP appearing for the appellant-State, and the learned counsel appearing for the respondents – accused at length. With their able

assistance, perused the entire notes of evidence, and also reasons / findings assigned / recorded by the trial Court. We are at pains to note that the trial Court except producing the contents of the deposition of Vijay [PW-4] before the Court, has not given any reasons/findings for not accepting his evidence, so as to appreciate the evidence in its entirety so as to reach to correct and just conclusion. There is not even single comment made by the trial Court about acceptability or rejection of the evidence of Vijay [PW-4], who was injured in the alleged incident. Therefore, there is complete failure on the part of the trial Court to exercise jurisdiction vested in it and appreciate the evidence in its entirety. In fact, Vijay [PW-4] is a star witness of the prosecution, who was injured in the incident. He was hospitalized. His statement was immediately recorded within four hours

from happening of the incident.

9. In his deposition before the Court, he stated that he is staying in Kanchan Nagar at Jalgaon. He knows Suresh Khandelwal [deceased]. On the date of incident at about 8.00 p.m. in the evening, he went to the house of Suresh. In his house, his mother Leelabai was present. They had chit chat, and he himself and deceased Suresh went to answer nature's call. They went for the said purpose near to railway line. Both the accused met them near the house of Patilbai. The accused said to Suresh that you have become very rude [तू बहोत मात गया है]. There was scuffle between the accused and Suresh. At this juncture, it needs to be noted that in vernacular it is stated that, there was scuffle between Suresh and Poonam. However, while recording the deposition in English, it is written that there was scuffle between two accused and

Suresh. Both the accused started assaulting Suresh with knife and fell him down. They assaulted Suresh on his head, face and stomach. When he tried to intervene to pacify the quarrel, accused persons assaulted him on his head. When he shouted, people came there and the accused ran away. Nivrutti Digambar Koli, Sanju Onkar Gondhali and Anil Dagdu Mali came at the spot of incident. He went to the house of Suresh and brought his mother at the spot of the incident. They took Suresh to the Police Station and later on to the Civil Hospital. Thereafter, Suresh expired within 15 minutes. He lodged complaint with the Police Station, and the Police reduced his complaint into writing. The same was read over to him. He admitted the contents of the said complaint. He put his thumb mark on the said complaint/FIR. He stated that it is the same complaint, which was narrated by him to the Police.

10. During his cross examination, he [PW-4] stated that the incident took place in an open space, which is between the house of Suresh and Meera Patil. The house of Meera Patil is at a distance of about 5 to 10 feet from the place of incident. The accused were standing at the place of incident, when they reached there. The exchange of words took place, and thereafter, at the same place accused assaulted Suresh. Besides Vijay, nobody intervened. There were 4-5 persons standing at a distance of about 10 to 15 feet from the place of incident. Blood was oozing from the injury caused on his head and blood stains spread over his clothes. He did not make Suresh to sleep. He made Suresh to sit. He caught hold Suresh and made him to sit in sitting position. He went to the house of Suresh and called his mother within 5 minutes. He carried Suresh to a distance about 50 feet and then hired rickshaw. First

they went to the Shani Peth Police Station, which is at the distance of about half kilometer from the place of incident. When he went to Shani Peth Police Station, he was cool and calm. There was no panic in his mind as to whether first to go to Police or the Hospital or to the Leader. The story narrated by him in the Court was also earlier told by him to the mother of Suresh. He narrated the incident to the PSI at Shani Peth Police Station when he went to give complaint. He took about half an hour to narrate the said incident to the PSI. When he narrated the incident, Suresh was made to sleep on the bench at the Police Station. Suresh was taken to the Hospital in a police jeep. He cannot tell the registration number of the riksha or the name of driver of the riksha. The PSI followed them to the Civil Hospital. When he took Suresh to Shani Peth and later on to Civil Hospital, Suresh was unconscious. The

PSI Jawale inquired with him about the incident at the Hospital. PSI made enquiries with him at about 9.15 or 9.30 p.m. After his statement was recorded, he was discharged from the Hospital. Again he was called at the police station on the next date at about 9.00 a.m. or so. At that time, his thumb impression was taken on the complaint, which was written on the previous date. Thereafter, he was not called at the Police Station. He has shown the place of incident to the Police on the next day of incident. After the postmortem was over, he shown the place of incident to the police.

11. He further stated that, he worked as a labourer for the centering work. He denied suggestion that he had sustained injury on his head on account of falling of brick, seven or eight days prior to the incident. He does not know Suresh was an accused in the cases of causing grievous hurt, kidnapping,

robbery etc. He is not an accused in any criminal case. He denied suggestion that the police suspected him, Anil, Nivrutti and Sanju for assaulting Suresh and that they were made to sit at Shani Peth Police Station through out the night. He denied suggestion that thereafter with a view to save their skin, they narrated false story to the police. He denied suggestion that they have falsely implicated the accused in the case. He denied suggestion that the accused were not present when the incident took place. He denied suggestion that he has not seen any incident. He denied suggestion that Suresh was assaulted by unknown person.

12. Dr.Sharadsingh Gulabsingh Pardeshi [PW-9], who was working as an Medical Officer, Primary Health Centre, Mehunbare, District Jalgaon. Dr.Sharadsingh [PW-9] examined Vijay [PW-4] and found contusion 2 inch over the left parietal region. The said

injury was simple in nature. The prosecution proved the injury certificate at Exh.43 through PW-9. It is true that he stated that such injury can be possible by fall against rough substance. However, keeping in view the evidence of Vijay [PW-4] that accused assaulted him on head, gets fortified from the medical evidence. An alleged incident narrated by Vijay [PW-4] was about 8.30 to 9.00 p.m. on 27th April, 1998. While narrating the incident to the Police, he stated that the incident had taken place on 27th April, 1998, in between 8.30 to 8.45 p.m. near the Chaugule Plot. The deceased Suresh was immediately taken to the Police Station, and thereafter to the Hospital. Vijay [PW-4] was also admitted in the same Hospital where Suresh was taken for treatment.

13. The police recorded the statement of Vijay [PW-4] in the hospital at 11.00 p.m. as it is apparent from the perusal of the

contents of FIR, wherein there is an endorsement made by the Medical Officer that Vijay [PW-4] was conscious at the time of giving statement. The said endorsement is given at 11.00 p.m., and the time of recording of the FIR is mentioned as 23.30 hours. By that time Suresh was no more. It has also come on record from the spot of incident that when Suresh was taken to the Police and Hospital, he was unconscious. There is no slightest doubt that Vijay [PW-4] took immediate steps to go to the Police Station, and thereafter, Suresh was taken to the Hospital. Therefore, it is abundantly clear that the FIR was lodged within two hours from the alleged incident, which completely ruled out possibility of any concoction or exaggeration by Vijay [PW-4] while narrating the FIR. The presence of Vijay [PW-4] is proved beyond reasonable doubt by the prosecution inasmuch as he

sustained injuries as it is noticed by Dr.Sharadsingh Pardeshi [PW-9] while examining Vijay [PW-4]. The evidence of Vijay [PW-4] gets corroboration from the medical evidence, and the prosecution has proved the presence of Vijay at the spot of incident, and he has actually witnessed the incident.

14. The prosecution examined Ramakant Vasantrao Jawale as PW-8, who conducted the investigation. Upon careful perusal of his evidence, he has narrated in detail the events occurred and further investigation carried by him. It is clear from reading his evidence that the First Information Report was registered within 4 hours from the date of alleged incident. It appears that as stated by Vijay [PW-4] the incident had taken place in between 8.30 to 8.45 p.m., and his statement in the Hospital was recorded at about 11.00 p.m. on the same day.

15. The Investigating Officer has brought on record the memorandum of postmortem examination of deceased Suresh Ramkisan Khandelwal. The said postmortem report is exhibited at Exh.44. The Medical Officer, who performed the postmortem, opined that 'death due to shock due to multiple injuries. In column no.17, there are as many as 13 injuries, which are as under:

- 1] Incised wound behind right mastoid oblique, elliptical 3cmx1cm bone deep.
- 2] Incised wound above right pinna, temporal area 2½cm x 1cm, elliptical, bone deep.
- 3] Incised wound right parietal area 4 cm x 1cm elliptical, bone deep.
- 4] Incised wound right temporo-parietal area 7cm above right pinna, oblique, elliptical, bone deep 6 cm x 1 cm.
- 5] Incised wound right forehead above right eyebrow 6cm x 1cm bone deep.

- 6] Incised wound left parietal area, elliptical bone deep 6 cm x 1 cm.
- 7] Stab wound below right costal margin on anterolateral aspect, vertical, 5 cm, vertical stitched margins sharp.
- 8] Stab wound on left side chest in 8th Ics in midclavicular line, vertical, sharp margins, omentum coming out.
- 9] Linear scratch abrasion above umbilical 10 cm x $\frac{1}{2}$ cm.
- 10] Incised wound over right wrist on matial aspect 2 cm x 1 cm bone deep.
- 11] Incised wound over left thmb eminence on palmer aspect 2 cm x $\frac{1}{2}$ cm.
- 12] Abrasion over right spine at scapula 3 cm x 2 cm.
- 13] Incised wound on right side at scapular angle 2 cm x 1 cm.

16. Upon careful perusal of the aforementioned injuries, there is no slightest doubt in the mind that Suresh died homicidal

death, and assaulted by sharp weapon as stated by Vijay [PW-4]. Since there is no challenge to the Exhibit-44 by the defence whether the Medical Officer who performed the postmortem report is examined or otherwise is of no consequences.

17. In the light of evidence of Vijay [PW-4], and also Dr.Sharadsingh Pardeshi [PW-9], there is no manner of doubt that it was possible for the trial Court to base the conviction of the respondents-accused on the strength of the evidence of Vijay [PW-4] and Medical evidence, and other evidence in relation to the statement made by Vijay [PW-4] during recording of his deposition before the court. However, as already observed, the trial Court though reproduced the statements in examination in chief and cross examination of Vijay [PW-4] in the impugned judgment, however, did not give any reasons/findings either to accept the said

evidence or to discard the said evidence.

18. In our considered view, the view taken by the trial Court by not considering the evidence of Vijay [PW-4], and the medical evidence and also evidence of Investigating Officer was not possible. The view taken by the trial Court, acquitting the respondents-accused, was not possible, and only possible view was the conviction of the respondents – accused.

19. It appears that the prosecution so as to lend support to the prosecution case also examined Sanjeev [PW-5] and Nivrutti [PW-6] as eye witnesses. The trial Court did not believe their evidence for three reasons; *firstly*, there was delay in recording their statements by the Police. *Secondly*, Vijay [PW-4] did not mention in the FIR that Sanjay and Nivrutti were present at the spot of incident, and all of them took Suresh to the

Police Station and thereafter to the Hospital. *Thirdly*, though those witnesses stated to have accompanied the injured Suresh to Shani Peth Police Station and Civil Hospital and though they have stated to have narrated the incident at the Police Station, when they have carried the injured Suresh to the Police Station, the statements of these witnesses were not promptly recorded by the Investigating Officer, and another reason given by the trial Court is that though the incident had taken place near the railway line at Chaugule Plot as stated by the Panch witness to the spot panchnama. However, Sanjay [PW-5] stated in his evidence that the incident had taken place nearby the house of Meerabai Patil, though panch witness stated that the house of Meerabai Patil is about 100 to 150 feet. It is not necessary to go into the details of the evidence of Sanjeev [PW-5] and Nivrutti [PW-6]. However, it has come in

the evidence of the panch witness, Anil Gavli [PW-1], that the house of Sanjay [PW-5] and Nivrutti Koli [PW-6] are in the same locality where the incident had taken place and where PW-1 resides. Therefore, the prosecution has brought on record that Sanjay [PW-5] and Nivrutti [PW-6] are residing in the same locality where the incident had taken place. Therefore, their presence nearby the spot was natural. It has already come on record the time of incident was in between 8.30 to 8.45 p.m. and therefore the presence of Sanjay [PW-5] and Nivrutti [PW-6] in the said locality was but natural. It has come on record in the deposition of Sanjay [PW-5], that at the relevant time they were about 20 feet away from the spot of incident. It is true that during cross examination of Sanjay [PW-5], it is brought on record that he was on inimical term with one of the accused. However, as already observed, their presence

in the locality where the incident had taken place was natural. It is true that their names have not been mentioned in the FIR. It further appears from the evidence of Investigating Officer that the statements of Sanjay [PW-5] and Nivrutti [PW-6] were recorded by Mr.Ramakant Jawale [PW-8] on 28th April, 1998 at about 1.00 a.m. Therefore, it appears that their statements were recorded within 5 hours from the date of incident. It appears that Sanjay [PW-5] stated in his evidence about the incident and the manner in which the incident had taken place. Nivrutti [PW-6] was declared hostile, however, during his cross examination, it is brought on record by the prosecution that he himself, Anil and Sanjeev were standing at a distance of about 20 feet from Manoj and Punam at the time of incident. There was scuffle between Suresh and Manoj.

20. Be that as it may, as already observed, even if the evidence of Sanjay [PW-5] and Nivrutti [PW-6] is excluded from consideration, still the prosecution has proved from the evidence of Vijay [PW-4] and the medical evidence that, the respondents – accused have committed murder of Suresh by inflicting injuries by sharp weapon. When there is ocular evidence which gets corroboration from the medical evidence in material particular, in that case even if other evidence brought on record by the prosecution is kept out of consideration, the accused can be convicted. Even the spot of incident stated by Vijay [PW-4] is near the Chaugule Plot, and therefore, there is no any material discrepancy as such, there may be variance in telling the exact distance from the spot of incident and the house of Meera Patil, but such type of little variance could not affect upon the core of prosecution case.

21. So far the evidence of Nivrutti [PW-6] is concerned, who turned hostile, the law is well settled that the evidentiary value of such hostile witness cannot be totally wiped out as part of the statement can be taken into consideration, which supports the prosecution case. The Supreme Court in the cases of *Govindaraju alias Govinda Vs. State by Srirampuram Police Station and another*¹, *Rohtash Kumar Vs. State of Haryana*² held that the evidence of a prosecution witness cannot be rejected in toto merely because prosecution chose to treat him as hostile and cross-examined him. The law permits the court to take into consideration the deposition of a hostile witness, to the extent that same is in consonance with prosecution case and is found to be reliable upon careful judicial scrutiny. The Supreme Court in the case of

1 [2012] 4 SCC 722

2 [2013] 14 SCC 434

*Bhajan Singh alias Harbhajan Singh and others Vs. State of Haryana*³ in para 36 observed that, the evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant (s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured

³ [2011] 7 SCC 421

witness." Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. [Vide Abdul Sayeed Vs. State of M.P.⁴, Kailas Vs. State of Maharashtra⁵, Durbal Vs. State of U.P.⁶ and State of U.P. V. Naresh⁷].

22. In the light of discussion in the foregoing paragraphs, we are of the considered view that the view taken by the trial Court to acquit the respondents—accused was not possible view; on the basis of the evidence brought on record only possible view is the conviction of the respondents—accused for the offence punishable under Section 302, 324 r/w. 34 of the IPC. Therefore, they are liable to be

4 [2010] 10 SCC 259

5 [2011] 1 SCC 793

6 [2011] 2 SCC 676

7 [2011] 4 SCC 324

convicted for the said offences by allowing appeal. In the result, we pass following order:

ORDER

- i] The appeal is allowed.
- ii] The impugned judgment and order dated 29th January, 2000 passed by the Sessions Judge, Jalgaon in Sessions Case No.141/1998 stands quashed and set aside. The respondents—accused nos.1 and 2 are convicted for the offence punishable under Section 302 and 324 r/w.34 of the Indian Penal Code, and each is sentenced to suffer imprisonment for life and to pay fine of Rs.1000/-, in default to pay fine sentenced to suffer simple imprisonment for three months for the offence punishable

under Section 302 r/w.34 of the IPC, and further sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/-, in default to pay fine sentenced to suffer simple imprisonment for three months for the offence punishable under Section 324 r/w.34 of the IPC. Both the substantive sentences as above against respondents-accused nos.1 and 2 to run concurrently.

iii] The respondents-accused nos.1 and 2 to surrender their bail bonds. They should appear before the Sessions Judge, Jalgaon, forthwith to undergo the sentence. The Sessions Judge, Jalgaon, to take steps through the Superintendent of Police, Jalgaon, to take them in custody forthwith without delay to undergo sentence imposed on them.

iv] The respondents—accused be given set off under Section 428 of the Criminal Procedure Code.

v] The order regarding disposal of *muddemal* property as per the impugned judgment and order to take effect after period of appeal is over.

[S . M . GAVHANE]
JUDGE

[S . S . SHINDE]
JUDGE

DDC