

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

CRIMINAL APPEAL NO.169 OF 2013

Shaikh Shakil Shaikh Khalil,
Age: 29 Years, Occupation: Labour,
R/o. Jam Mohalla, Bhusawal,
Tq. Bhusawal, Dist. Jalgaon. **APPELLANT**
[Orig.Accused No.3]

VERSUS

State of Maharashtra **RESPONDENT**
WITH
CRIMINAL APPEAL NO.263 OF 2013

Kadir Yakub Gawali,
Age: 25 years, Occupation Nil,
R/o.Bhusawal, Taluka Bhusawal,
District Jalgaon. **APPELLANT**
[Orig.Accused No.2]

VERSUS

The State of Maharashtra,
Through P.I. Bazarpeth
Police Station, Bhusawal. **RESPONDENT**

WITH
CRIMINAL APPEAL NO.430 OF 2013

Mohammad Nadeem Abdul Rashid Bagwan,
Age 32 yrs, Occ. Nil,
R/o. Bhusawal, Tq. Bhusawal,
Dist. Jalgaon. **APPELLANT**
[Orig.Accused No.1]

VERSUS

The State of Maharashtra
Through P.I. Bazarpeth,
Police Station, Bhusawal. **RESPONDENT**

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Mr.N.S.Ghanekar, Advocate for appellant in Criminal Appeal No.169/2013

Mr.V.D.Sapkal, Advocate for appellant in Criminal Appeal No.263/2013

Mr.V.B.Jagtap [Appointed], Advocate for appellant in Criminal Appeal No.430/2013.

Ms. Preeti V. Diggikar, APP for the Respondent / State.

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**CORAM: S.S.SHINDE &
K.K.SONAWANE, JJ.**

Reserved on : 04.01.2017

Pronounced on : 10.01.2017

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

1. All these three Criminal Appeals are arising out of the judgment and order dated 30th March, 2013 passed by the Sessions Judge, Jalgaon in Sessions Case No.187 of 2009, thereby convicting the appellants for the offences punishable under Sections 302, 324 r/w. 34 of the Indian Penal Code. Therefore, these Appeals are heard together and being disposed of by the common judgment and order.

2. The prosecution case in nutshell is as under:

It is the case of the prosecution that on 10.08.2009 in the morning Kesharlal Pralhad Patil and Mukesh had been to Shirpur for admission of Mukesh in Engineering College. Pankaj was on duty at Jalgaon from 3.00 p.m. to 12.00 p.m. After work of admission at Shirpur was over, Kesharlal and Mukesh came to Amalner by bus. From Amalner they boarded Surat-Bhusawal Passenger train to come to Bhusawal. Pankaj joined them in the same train at Jalgaon at around 1.15 a.m. Trio reached Bhusawal Railway Station at around 2.10 a.m.

3. On getting down at Railway Station, Bhusawal, Pankaj started on foot ahead and Kesharlal and Mukesh were behind on bicycle. They were proceeding towards their house. At around 2.30 a.m., Pankaj was passing through

the road in front of Shalimar Hotel near Amardeep Talkies in Jam Mohalla at Bhusawal. That time 5-6 persons sitting on Ota of Shalimar Hotel called Pankaj. He did not respond. It is contended that one of them abused Pankaj and asked him to stop. Then Pankaj stopped. Those persons called Pankaj so he went to them. One of those persons was tall, fair and wearing yellow shirt. He enquired from Pankaj which train has arrived. In reply, Pankaj stated it was a Surat Passenger. Those persons asked Pankaj where is he going. Pankaj told them that he is going to home. By that time, Kesharlal and Mukesh, who were behind on bicycle reached there. They got down from bicycle and then trio started walking so as to go to their home.

4. It is alleged that those 5-6 persons were in drunken condition and they hurled abuses to Kesharlal and his sons. But

ignoring abuses, Kesharlal, Pankaj and Mukesh walked ahead. Those persons followed them till Amardeep square. At Amardeep Square one of them gave slap to Pankaj on his head from back and others too started beating Pankaj. Kesharlal and Mukesh tried to intervene and save Pankaj. That time a person in yellow shirt caught hold neck of Pankaj while another gave a blow with knife at the abdomen of Kesharlal. Kesharlal fell down. When Mukesh tried to hold his father, he was assaulted with knife by that person on his left shoulder. Pankaj raised alarm. As people started assembling, accused persons fled away. According to prosecution witnesses, they must be in the age group between 20-30 years.

5. Pankaj then called his cousin Deepak Pundlik Patil on mobile. Within few minutes, Deepak Patil along with his father Pundlik Nath Patil arrived on the spot. Kesharlal was

lying in a pool of blood. He was taken to the Hospital of Dr.Santosh Chaudhari by Deepak and his father on motorcycle. Pankaj and Mukesh followed them on bicycle. From the Hospital of Dr.Santosh Chaudhari, Kesharlal was taken to Municipal Dispensary Bhusawal where he was declared as dead.

6. On 11.08.2009 at 3.15 a.m. Pankaj lodged report with Bazarpeth Police Station Bhusawal. Crime No.136/2009 was registered for the offences punishable under Sections 302, 143, 147, 148, 149, 324, 323 and 504 of the Indian Penal Code.

7. After registration of FIR by Pankaj, the investigation was set in motion, and thereafter after investigation was complete, charge-sheet came to be filed. The appellants were tried and stands convicted for the offences punishable under Sections 302, 324 r/w.34 of the I.P. Code. Hence these Appeals.

8. The learned Advocate Mr.V.D.Sapkal appearing for the appellant namely Kadir Yakub Gawali in Criminal Appeal No.263/2013 submits that, the identification parade before the Court, after one year from the date of incident, could not have been believed by the trial Court. It is submitted that the identification parade which was carried out before the concerned Authority suffered from inherent procedural defects and also the same was of no use since the photographs of the accused were already published in the leading news paper published at Bhusawal, prior to conducting the identification parade by the Tahsildar. It is submitted that, in the said identification parade before the Tahsildar, the appellant namely Kadir Yakub Gawali was not identified by PW2-Mukesh Kesharlal Patil. He submits that, there is no any other independent evidence which lends support to the version

of Pankaj Kesharlal Patil (PW1) and Mukesh (PW2). It is submitted that the prosecution has not brought on record the evidence which would indicate that the accused had any motive/reason to commit the alleged offences in question. It is submitted that, since the accused were not known to the prosecution witnesses the identification parade assumes importance and in the facts of the present case the identification parade which was carried out before the Tahsildar was disbelieved by the trial Court. It is submitted that the evidence of PW-1 Pankaj and PW-2 Mukesh suffers from inherent contradictions, omissions and improvements. In support of his contention that in absence of proper identification parade and identification of the accused first time in the Court, the benefit of doubt ought to have been given to the appellant, pressed into service the judgment of the Supreme Court in

the case of *Girdhar Vs. State (NCT of Delhi)*¹ in particular para 8 thereof.

9. The learned Advocate Mr. N.S.Ghanekar appearing for the appellant namely Shaikh Shakil Shaikh Khalil in Criminal Appeal No.169 of 2013 in addition to the arguments advanced by the learned Advocate Mr. V.D.Sapkal submits that, once the identification parade before the Tahsildar was disbelieved by the trial Court on the ground that the said identification parade was not in accordance with the procedure/rules and also the photographs of the accused were already published in the news paper, the identification parade before the Tahsildar or an identification of the accused before the court by the Pankaj (PW1) and Mukesh (PW2), cannot be believed. He submits that, since there was no any motive/intention to commit the alleged

1 2012 AIR SCW 425

offences, the benefit of doubt deserves to be given to the appellant.

10. The learned Advocate Mr.Vijay B. Jagtap [Appointed], appearing for the appellant namely Mohammad Nadeem Abdul Rashid Bagwan in Criminal Appeal No.430 of 2013 submits that, the Medical Officer has not firmly stated that the death of Kesharlal was homicidal. In fact, the injuries sustained by the deceased Kesharlal was due to accidental cause. He submits that, in absence of identification parade of the accused and weapons used, the benefit of doubt should have been given to the appellant. He submits that, the prosecution has utterly failed to bring on record any motive for commission of offences by the appellant. Therefore, he submits that, the Appeal filed by the appellant deserves to be allowed.

Without prejudice to the arguments

already advanced, the learned counsel by way of alternate submission argued that, there was no motive for commission of offences. At the most it can be said that, appellant in the heat of anger in sudden provocation appears to have committed the alleged offences, and therefore, the sentence for the offence punishable under Section 302 of the appellant be modified and may be brought down under Section 304 (II) of the Indian Penal Code.

11. It appears that, the prosecution did examine as many as 12 witnesses. However, the evidence of Pankaj (PW1) and Mukesh (PW2) assumes importance inasmuch as they are eye witnesses to the incident. It clearly emerges from the evidence available on record that, the alleged incident had taken place on 11th August, 2009 at about 2.30 a.m. Immediately thereafter Pankaj lodged report with Bazarpeth Police Station, Bhusawal and the

FIR came to be registered. It further appears that the injured Mukesh was treated at Bhusawal Municipal Dispensary immediately after the incident and the Medical Officer noticed contused lacerated wound on left upper arm and on left scapular region on back of Mukesh. Therefore, the presence of Mukesh at the time of incident is proved by the prosecution beyond reasonable doubt. Pankaj was also assaulted by the accused.

12. It appears that even the spot panchanama was immediately drawn between 3.35 a.m. to 4.20 a.m. in the presence of panchas namely Pradeep Madhukar Sutar and Ravindra Jagannath Dhage. Immediately on 11.08.2009 at about 6.20 a.m. the accused no.1 Mohammad Nadeem Abdul Rashid Bagwan and accused no.2 Kadir Yakub Gawali were arrested. Therefore, there is no manner of doubt that there was prompt lodging of FIR, carrying out the spot panchanama referring the Pankaj to the

medical examination. Kesharlal Pralhad Patil (deceased) was immediately taken to the Hospital after the incident, but he was declared as dead and his post mortem was conducted between 7.10 a.m. to 8.10 a.m.

13. Medical Officer Dr.Ajay Bajirao Sonowane (PW8) stated in his deposition before the Court that, on external examination he found that stab wound of size 9 cm x 5 cm over the epigastric region on anterior abdominal wall just 10 cm from umbilical site. Depth of wound was up to 5 cm extended up to peritoneal region. Stab wound was present over the right neck side over the carotid triangle. Size of the stab wound was 6 cm x 3 cm. Its depth was upto 15 cm. These were cut sharp injuries. Edges were sharp. Injuries were grievous in nature. Both the stab wounds were ante-mortem. After external examination, he started post mortem. During internal examination, he found first stab

wound up to peritoneum region. No internal abdominal bleeding was found. The depth of second wound shows rupture of carotid artery and jugular vein showing internal haemorrhage. He opined that, probable cause of death is due to haemorrhage and shock due to stab injuries. Both the injuries stated by him are possible with a sharp knife. Death is possible due to these injuries. Upon careful perusal of his cross examination, his version in examination in chief remained unshattered. Therefore, the prosecution has proved beyond reasonable doubt that death of Kesharlal was homicidal.

14. Pankaj Kesharlal Patil (PW1) in his evidence stated that, his brother had passed 12th standard. He was selected at Engineering College Shirpur. His father and brother had been to Shirpur on 10.08.2009. On that day, he was on duty from 3.00 p.m. to 12.00 p.m. After attending duty, he came to Jalgaon

Railway Station. His father and brother were coming by Amalner-Bhusawal passenger. They met him at Jalgaon Railway Station on 11.08.2009 at 1.10 hours. After getting down at Bhusawal Railway Station, he was proceeding to his home. Followed by his father and brother on bicycle behind him. When he was going by Amardeep Talkies through Jam Mohalla, he noticed that near Shalimar Talkies 5-6 persons were sitting on the Ota / Platform. One of the accused Shaikh Shakil asked him to stop. He did not stop. Said Shakil abused him. He stopped him between 2.15 to 2.30 hours. A tall boy with Yellow Shirt asked him 'कौनसी गाडी आयी, कहाँ जा रहा है' (about the name of train arrived and where are you going), he stated that he came by Surat passenger and he is going to his home. His father and brother then arrived there. He further stated that those 5-6 persons were under the influence of liquor. He himself,

his father and brother reached at Amardeep Talkies square. The accused persons were abusing them from behind. They ignored it. Then Kadir Gawali slapped on back of his head. While he was beating him, other accused also came there and they started beating him. His father—Kesharlal came to save him. Shaikh Shakil caught hold his neck. When his father was coming to save him, Nadim inflicted knife blow on the stomach of his father. He could rescue himself. When his brother intervened to save his father, Nadim had given a knife blow on his brother's left shoulder. They raised cries then accused started running. He called his cousin Deepak Pundlik Patil on mobile and Deepak came there by two-wheeler. His father was taken to the Hospital of Dr.Santoch Chaudhari on the said two-wheeler. However, his father was declared as dead by the said Doctor and then his father was taken to the Municipal Hospital. He also stated

details about the registration of FIR and seizure of clothes of deceased. He further stated that on 18.08.2009, he was called for identification parade at tahsil office, Bhusawal. He stated details about the manner in which the identification parade was carried out. It appears from his evidence that, he identified the present appellants as assailants in identification parade before the Tahsildar and also before the Court.

15. During his cross examination, he stated that, police caught some suspects, they were shown to him in between 4.00 to 5.00 a.m., but they were not accused persons. When suggestion was given to him, whether he had seen accused on BCL Channel or the photographs of the accused on news paper, he denied the said suggestion. Be that as it may, the said identification parade before the Tahsildar was not believed by the trial Court for the reasons which are assigned in

the impugned judgment. It appears from the evidence of Pankaj (PW1) that, there was no any specific reason or motive for commission of offence by the accused persons. It appears from his evidence that, the accused were of the age group between 25 to 30 years. The entire beginning or starting point of episode as appearing in his evidence is that, near Shalimar Talkies 5-6 persons were sitting on the Ota/Platform. Out of 5-6 accused persons, one of the accused namely Shaikh Shakil told him 'रुख' (Stop). He did not stop and then accused started abusing him and accused stopped him in between 2.15 to 2.30 hours. It further appears that a tall boy out of 5-6 accused persons asked him about the name of train and where PW-1 is going.

16. It is further stated by Pankaj (PW1) that his father and brother arrived there. Upon reading the evidence of Pankaj (PW1), it

clearly emerges that, the prosecution did not bring on record the evidence showing that as a matter of fact other accused knew that, Nadim was possessing knife and he is likely to use the said knife in the commission of offence. It appears that, Nadim inflicted knife blow in the stomach of Kesharlal and also when the brother of Pankaj (PW1) i.e. another witness Mukesh (PW2) intervened to save his father, Nadim had given a knife blow on the hand of Mukesh (PW2). Mukesh (PW2) sustained injuries on his shoulder due to said assault by the Nadim.

17. Mukesh (PW2) in his deposition stated that, on 10.08.2009 he himself and his father had been to Shirpur for his admission. On that day, his brother i.e. Pankaj (PW1) was on duty at Jalgaon from 3.00 p.m. to 12.00 p.m. Their train reached to Jalgaon at 1.00 a.m. to 1.25 a.m., that time they met his brother Pankaj (PW1) in the train. Then

they three started for Bhusawal. They reached Bhusawal at 2.00 to 2.15 a.m. on 11.08.2009. They got down at the station. His father had kept bicycle at R.P.F. office. His brother Pankaj (PW1) told them that, both i.e. Mukesh and Kesharlal can come by bicycle, and Pankaj (PW1) started proceeding to their home. His father took bicycle from R.P.F.office. His brother was walking ahead. He started riding bicycle. His father was sitting behind. They reached near Shalimar Hotel. They saw that, 5-6 persons had stopped his brother Pankaj near Shalimar Hotel. They went close to his brother. 5-6 persons were abusing his brother. He asked his brother what happened? Pankaj (PW1) replied that, these persons are abusing him. However, they ignored abuses and went ahead.

18. When they were going ahead, his brother Pankaj (PW1) informed them that, those 5-6 persons were sitting near Shalimar

Hotel. He stated that, a tall and fair person asked him come here (इधर आव). However, Pankaj ignored their call and then accused started abusing him. Then Pankaj stopped. Then 5-6 persons asked Pankaj by which train he has arrived and where he is going.

Mukesh (PW2) further stated in his deposition that, he was slowly riding bicycle. His father was pillion rider. His brother was on foot. They reached near Amardeep Talkies. That time Kadir Gawali slapped on the back of head of Pankaj. Then he along with his father got down from bicycle. Put bicycle on stand and went to rescue his brother. Accused Sk. Shakil a fair and tall boy caught neck of his brother Pankaj (PW1). That time Sk.Shakil was wearing yellow shirt. They tried to rescue his brother but they could not rescue him, that time Nadim assaulted his father on stomach by knife. He tried to rescue his father. That

time, Nadim gave knife blows on his left hand and back. With the same knife, he gave blow on the neck of his father. He himself and his father sustained injuries and there was oozing of blood. He made his father lie on the floor. Then he himself and his brother shouted. People assembled there. Then they fled away from the said place. He called his cousin and his uncle. They arrived at the place of incident.

19. If the evidence of Pankaj (PW1) and Mukesh (PW2) is considered in its entirety, the genesis or starting point of the incident is one of the accused namely Shaikh Shakil asked Pankaj (PW1) to stop. Pankaj (PW1) did not stop, then accused started abusing him. As already observed, it has not come on record that, they had any particular motive or object for commission of offence. It clearly emerges that, the father of Pankaj (PW1) and Mukesh (PW2) got down from the

bicycle and went to rescue Pankaj (PW1). When he went to rescue Pankaj (PW1), that time Nadim assaulted Kesharlal on the stomach with a knife blow and when Mukesh (PW2) tried to rescue Kesharlal, Nadim gave knife blows to Mukesh (PW2) and again knife blow on neck of Kesharlal. Therefore, it can safely be concluded that, Nadim gave knife blow not only to Kesharlal but also to Mukesh, had intention to kill Kesharlal. The fact that he had given more than one knife blows on the neck and stomach of Kesharlal is sufficient to hold that the accused / appellant Nadim is rightly held guilty of offence punishable under Section 302, 324 r/w.34 of the Indian Penal Code by the trial Court for the murder of Kesharlal and also for inflicting knife injuries on Mukesh (PW2).

20. It is true that, the identification parade, which was conducted before the Tahsildar, has been disbelieved by the trial

Court, though Pankaj (PW1) identified all three appellants in the said identification parade and Mukesh (PW2) was able to identify two appellants accused. Be that as it may, Pankaj (PW1) and Mukesh (PW2) identified all three accused before the Court. The submission of the learned counsel appearing for the appellants that, such identification parade before the Court, that too, after one year from the date of incident deserves to be discarded has no substance in the peculiar facts of this case. Pankaj (PW1) and Mukesh (PW2) had ample opportunity to clearly notice the appearances and physical features of the accused as there was sufficient light. Since the incident had taken place on public road for considerable period, we are not prepared to accept the submission of the learned counsel appearing for the appellants that, such identification parade before the Court should not be believed. In the present case,

Pankaj (PW1) and Mukesh (PW2) had opportunity to witness the entire incident and their evidence corroborates each other. Apart from that, there is evidence of Medical Officer wherein it is clearly stated that the death of Kesharlal was homicidal and caused due to injuries inflicted by knife by Nadim. At this juncture, it would be apt to refer the authoritative pronouncement of the Supreme Court in the case of *S Vs. Sunil Kumar and another*², the Supreme Court while reversing acquittal of the respondent therein held in para 11 that:

"11. It has consistently been held by this Court that what is substantive evidence is the identification of an accused in court by a witness and that the prior identification in a test identification parade is used only to corroborate the identification in court. Holding of test

² (2015) 8 SCC 478

identification parade is not the rule of law but rule of prudence. Normally identification of the accused in a test identification parade lends assurance so that the subsequent identification in court during trial could be safely relied upon. However, even in the absence of such test identification parade, the identification in court can in given circumstances be relied upon, if the witness is otherwise trustworthy and reliable. The law on the point is well settled and succinctly laid down in Ashok Debbarma."

21. In that view of the matter, in our considered view the identification of the appellants by the Pankaj (PW1) and Mukesh (PW2) in the Court has been rightly considered and believed by the trial Court.

22. So far other accused are concerned, in the light of evidence brought on record by the prosecution, it can not be safely

concluded that the prosecution has proved beyond reasonable doubt that, accused namely Shaikh Shakil Shaikh Khalil and Kadir Yakub Gawali were sharing common intention to kill Kesharlal or inflicted injuries / assaulted Mukesh (PW2) by any weapon. It is also not the case of the prosecution that, accused namely Shaikh Shakil Shaikh Khalil and Kadir Yakub Gawali were holding/possessing any weapon. However, the fact remains that, one of the aforesaid accused gave slap to Pankaj and another accused caught hold his neck. As already observed, though accused namely Shaikh Shakil Shaikh Khalil and Kadir Yakub Gawali cannot be held guilty for the offences punishable under Section 302, 324 r/w. 34 of the Indian Penal Code nevertheless since one of the accused gave slap and another accused caught hold his neck, they are liable to be convicted for the lesser offence punishable under Section 323 of the Indian Penal Code.

23. In the light of discussion in the foregoing paragraphs, in our considered view the prosecution has not brought on record sufficient evidence / circumstances which would unequivocally and beyond reasonable doubt would establish that, the accused appellant namely Shaikh Shakil Shaikh Khalil in Criminal Appeal No.169/2013 and appellant namely Kadir Yakub Gawali in Criminal Appeal No.263/2013 were sharing common intention with Mohammad Nadeem Abdul Rashid Bagwan to kill Kesharlal or to assault/inflict stab injuries to Mukesh (PW2).

24. In that view of the matter, so far conviction of the appellant namely Shaikh Shakil Shaikh Khalil in Criminal Appeal No.169/2013 and appellant namely Kadir Yakub Gawali in Criminal Appeal No.263/2013 for the offences punishable under Section 302 r/w.34 of the Indian Penal Code and sentenced to suffer imprisonment for life and a fine of

Rs.5,000/- (Rupees Five Thousand) each, in default each to suffer further rigorous imprisonment for one year and for the offence punishable under Section 324 r/w.34 and sentenced to suffer rigorous imprisonment for two year each, cannot sustain and the benefit of doubt deserves to be given to them, and accordingly, their conviction for the offence punishable under Section 302 r/w.34 of the Indian Penal Code and for the offence punishable under Section 324 r/w. 34 of the Indian Penal Code, stands quashed and set aside and they stands acquitted from the said offences.

25. However, conviction of appellant namely Mohammad Nadeem Abdul Rashid Bagwan in Criminal Appeal No.430/2013 for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer imprisonment for life and a fine of

Rs.5,000/- (Rupees Five Thousand), in default to suffer further rigorous imprisonment for one year and his conviction for the offence punishable under Section 324 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for two year, stands confirmed.

26. Set off under Section 428 of the Criminal Procedure Code be given to him as already ordered by the trial Court.

27. In the light of discussion in the foregoing paragraphs, appellant - accused no.2 namely Kadir Yakub Gawali and appellant accused no.3 namely Shaikh Shakil Shaikh Khalil are held guilty for the offence punishable under Section 323 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for one year each. They were in jail during trial and also subsequently they are not released on bail, already they have

undergone more than 1 year sentence, therefore they be released forthwith if not required in any other case.

28. In the result, Criminal Appeal No.430 of 2013 filed by Mohammad Nadeem Abdul Rashid Bagwan is dismissed and Criminal Appeal No.169 of 2013 and Criminal Appeal No.263 of 2013 are partly allowed in above terms.

Since Mr.V.B.Jagtap, the learned counsel is appointed to prosecute the cause of the appellant namely Mohammad Nadeem Abdul Rashid Bagwan, we quantify his fees Rs.7500/-.

Sd/-
[K.K.SONAWANE]
JUDGE

Sd/-
[S.S.SHINDE]
JUDGE