

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

CRIMINAL APPEAL NO. 722 OF 2002

1. Gangadhar s/o Waghji Shinde,
Age 25 years, Occu. Agri.,
2. Shivaji s/o Waghji Shinde,
Age 22 years, Occu. Agri.,
3. Nilkant s/o Maroti Shinde,
Age 20 years, Occu. Agri.,
4. Maroti s/o Namdeo Shinde,
Age 38 years, Occu. Agri.,
5. Raghunath s/o Namdeo Shinde
Age 46 years, Occu. Agri.,
6. Waghji s/o Vithalrao Patil,
Age 65 years, Occu. Agri.,

All r/o Dhosi, Taluka Degloor,
(All presently in jail)

.. Appellants

Versus

. The State of Maharashtra

.. Respondent

Mr Hemantkumar Pawar, Advocate for appellants
Mr R.V. Dasalkar, A.P.P. for respondent

- WITH -

CRIMINAL APPEAL NO. 728 OF 2002

1. Maroti Waghoji Panchare,
Age 30 years, Occu. Agri.,
- [2] Permeshwar Waghoji Panchare,
Age 25 years, Occu. Agri.,
- [3] Vishwanath Waghoji Panchare,
Age 22 years, Occu. Agri.,

}Appeal abated against
}Resp.nos.2 and 3 as per
}Court's order dated
}17.11.2017

R/o Dhosi, Taluka Degloor,
District Nanded

.. Appellants

Versus

. The State of Maharashtra

.. Respondent

Mr S.M. Kulkarni, Advocate for appellants
 Mr R.V. Dasalkar, A.P.P. for respondent
 Appeal abated as against respondent nos.2 and 3 as per Court's
 order dated 17.11.2017

- WITH -

CRIMINAL APPEAL NO. 195 OF 2003

The State of Maharashtra
 through P.S. Degloor,
 At the instance of Dilip
 s/o Nivrutti Waddekar,
 r/o Dhosni, Taluka Degloor
 District Nanded

..Appellant

- Versus -

1. Gangadhar s/o Waghji Shinde,
Age 25 years, Occu. Agri.,
2. Shivaji s/o Waghji Shinde,
Age 22 years, Occu. Agri.,
3. Nilkant s/o Maroti Shinde,
Age 20 years, Occu. Agri.,
4. Maroti s/o Namdeo Shinde,
Age 38 years, Occu. Agri.,
5. Raghunath s/o Namdeo Shinde
Age 46 years, Occu. Agri.,
6. Waghji s/o Vithalrao Patil,
Age 46 years, Occu. Agri.,
7. Maroti Waghoji Panchare
Age 30 years, Occu. Agri.,

- [8] Permeshwar Waghoji Panchare
Age 25 years, Occu. Agri.,
- [9] Vishwanath Waghoji Panchare,
Age 22 years, Occu. Agri.,

} Appeal abated against
 } R.Nos.8 & 9 as per
 } Court's order dated
 } 17.11.2017
 }

All r/o Dhosni, Taluka Degloor,
 District Nanded

.. Appellants

Versus

. The State of Maharashtra

.. Respondent

Mr R.V. Dasalkar, A.P.P. for appellants
 Mr Hemantkumar Pawar, Advocate for respondents no.1 to 6
 Mr S.M. Kulkarni, Advocate for respondents no.7
 Appeal abated against respondent nos.8 and 9 as per Court's
 order dated 17.11.2017

**CORAM : T.V. NALAWADE AND
 A.M. DHAVAL, JJ**

**DATE OF RESERVING
 THE JUDGMENT : 8.12.2017**

**DATE OF PRONOUNCING
 THE JUDGMENT : 21.12.2017**

JUDGMENT (Per A.M. Dhavale, J.)

1. These appeal arises out of a common judgment in Sessions Case No.19/2001 delivered by the learned Additional Sessions Judge, Biloli on 12.12.2002 whereby all the nine accused were convicted and sentenced as follows :

Section	Sentence	Fine	In default
148 IPC	R.I. one year	Rs.1,000/- each	R.I. for 15 days
326 r/w 149 IPC	R.I. five years	Rs.1,500/- each	R.I. for 1 month
435 r/w 149 IPC	R.I. one month	Rs.1,000/- each	R.I. for 1 month

The accused were acquitted of main charge under Section 302 read with Sec. 149 of Indian Penal Code.

2. The aggrieved accused nos.1 to 6 have preferred Criminal Appeal No.722 of 2002 against conviction. Aggrieved accused nos.7 to 9 have preferred Criminal Appeal No.728 of 2002 against their conviction and the State has preferred Criminal Appeal No. 195 of 2003 against acquittal under Section 302 read with Sec.149 of Indian Penal Code.

3. During the pendency of the appeal against accused no.8 Parmeshwar and accused no.9 Vishwanath have died and their appeal stood abated.

4. The facts relevant for deciding these appeals may be stated as follows :

P.W.4 Deelip aged 28 years is son of the deceased Nivrutti and the informant. On 19.10.2000 at 7.50 p.m., he lodged F.I.R. Exh.45 at Degloor Police Station in writing. The F.I.R. shows that his father was cultivating land of one Bhaurao Krushnaji from Dhosni on crop sharing basis and there was land dispute over 20 years between Bhaurao Krushnaji and Maruti Waghji (A-7). On that day at 4.00 p.m., his father was ploughing the said land by using tractor of Yasin Shaikh. That time, Maroti Waghji (A-7), Vishwanath Waghoji (A-9), Parmeshwar Waghoji (A-8), Raghunath Shinde (A-5), Maroti Shinde (A-4), Neelkanth (A-3), Vitthal (A-6), Gangadhar (A-1) and Shivaji (A-2) came there armed with weapons axe and kattis. They assaulted his father, inflicted blow of kattis and axe on his father's legs and ribs and killed him. Besides, they had set on fire the tractor brought for ploughing operations. He was witness to the incident. Hanmant Shinde, tractor owner Yasin and one Hanmant from Kalegaon and Gopal had witnessed the incident, while Bhaskar had witnessed the accused running away from the spot. On the basis of F.I.R., crime was registered at C.R. No.118/2000 for the offences punishable under Sections 302, 147, 148, 435, 427 r/w 149 of Indian Penal Code and was investigated into by P.W.8 P.I. He drew spot panchnama, inquest panchnama, He got the post mortem done on the dead body and

recorded statements of material witnesses. He seized weapon Katti from Raghunath (A-5) and the clothes of the deceased. He forwarded the seized articles to Chemical Analyst. After completion of investigation, charge-sheet was submitted in the Court of Judicial Magistrate, First Class.

5. In due course, the case was committed to the Court of Additional Sessions Judge, Biloli. Learned Additional Sessions Judge, Biloli initially framed charge against six accused persons and later against three accused persons for offences punishable under Sections 143, 147, 148, 302, 427, 435 read with Sec.149 of Indian Penal Code. The accused pleaded not guilty. The prosecution examined eight witnesses. Defence of the accused is of total denial. The learned trial Judge accepted the prosecution case partly and convicted the accused and sentenced them as referred above. Hence, these appeals.

6. Learned Advocate Mr Pawar for accused nos.1 to 6 (Cri.Appeal No.722/2002) argued that the evidence of informant Deelip (P.W.4) is totally improbable. It is not possible to accept that when his father was being killed, he was a silent spectator. He also argued that as per the post mortem notes, the deceased could not have met with an instant death and in that case after the incident was over, P.W.4 Deelip could have taken his father for medical aid, but there is no such evidence. Even during the entire night, Deelip did not halt in the field when his father's body was lying there. He argued that the recovery of one katti from accused no.5 is meaningless, as it was recovered after two years from the incident. The spot panchnama shows that there was no tractor. There is delay of four hours in

lodging the F.I.R. The conduct of P.W.4 Deelip and P.W.5 Prakash is not proper. There is old enmity. There are only three injuries, whereas nine persons are implicated. Evidence of the prosecution witnesses is not trustworthy and reliable. Therefore, it should be discarded.

7. Learned Advocate Mr Kulkarni for appellants in Criminal Appeal No.728 of 2002 (accused no.7) has adopted the arguments of learned Advocate Mr Pawar and submitted that the evidence against the accused no.7 is vague. There cannot have been only three injuries when the attack was by nine persons. Accused no.7 has undergone the sentence.

8. Per contra, learned A.P.P. Mr Dasalkar supported the judgment and argued that there was land dispute. The incident was witnessed by son of the accused and P.W.5 had supported him. The medical certificate shows that deceased sustained three incised wounds and one fracture. The medical evidence is consistent with the oral evidence about assault by axe and katti. Accused no.5 has recovered one Katti. The prosecution evidence should be relied and the appeal of the State should be allowed and all the accused should be convicted under Section 302 read with Sec.149, Section 147, 148 and 435 read with Sec.149 of Indian Penal Code.

9. The point for our consideration with our findings is as follows:

- (I) Whether deceased Nivrutti met
with homicidal death ? .. In the affirmative

- (II) Whether accused nos.1 to 9 by formed an unlawful assembly with a common object to commit murder of Nivrutti and used criminal force? .. In the negative
- (III) Whether accused nos.1 to 9 while being members of an unlawful assembly were armed with deadly weapons and thereby committed offence under Section 148 of IPC ? .. Not proved
- (IV) Whether accused nos.1 to 9 by forming an unlawful assembly with a common object committed murder of deceased Nivrutti ? .. Not proved
- (V) Whether accused nos.1 to 9 by forming an unlawful assembly with a common object committed mischief by fire to destroy a tractor worth Rs.2,90,000/- ? .. Not proved
- (II) What order ? .. Appeal filed by the State (Cri.Appeal No.195 of 2003 is dismissed and Cri. Appeals No.722 and 728 of 2002 filed by the accused are allowed

- REASONS -

10. Evidence of eye witnesses disclose that deceased Nivrutti had sustained three incised wounds and one fracture. There is also

inquest panchnama Exh.31 proved by P.W.1 Atmaram. The material evidence regarding homicide is of P.W.3 Dr. Janardhan Bhume. He has conducted post mortem on 20.10.2000 on the dead body of Nivrutti and noticed following injuries :

1. Incised wound on left buttock just below iliac crest, posterior side, size 10 x 2 x 5 cm horizontal in direction, with sharp edges tapering from medial to later side. It was bone deep.

2. Incised wound on left thigh posteriorly just above knee. It was bone deep muscles were exposed and cut, edges were sharp and tapering from medial to lateral side, horizontal and just oblique in direction towards knee. Size 10 x 4 x 8 cm

3. Fracture of underlying femur bone was palpable and the fracture was horizontal showing unwashable small hemorrhage at its irregular edges. Size of fracture was 4 x 4 cm

4. Incised wound on right leg laterally 10 x 2 x 10 cm depth crossing towards foot obliquely. Edges were sharp tampering towards lateral side from medial end.

11. All the three incised wound were showing signs of inflammation, i.e. they were red, blood clots were seen at the edges and at the depth. All the injuries were ante mortem. Those were possible by sharp weapon like axe. He opined that the deceased died due to "cardio-respiratory arrest due to hemorrhagic shock due to multiple injuries with fracture of left femur bone." The viscera report shows that it was not a case of poisoning. He, therefore, confirmed his

opinion. Hence, on the evidence, we hold that it was a case of homicidal death.

12. Prosecution has examined following witnesses :

(I) Eye witnesses :

P.W.4 informant Deelip (F.I.R. Exh.45) } Eye witnesses
P.W.5 Prakash }

(II) Medical evidence :

P.W.3 Dr. Bhume Post mortem notes Exh.41

P.W.1 Atmaram Inquest panchnama Exh.31

(3) Other circumstantial evidence :

Panchas P.W.1 Atmaram (Spot Panchnama Exh.32)

Seizure of clothes of deceased (Exh.33)

P.W.2 Hanmant – discovery of Katti by accused no.5

Raghunath. Memorandum Exh.38, Panchnama Exh.39

(His evidence regarding memorandum of accused no.5

is not as per Section 27 of Evidence Act. He did not

state that accused no.5 Raghunath stated that he was

ready to discover the weapon of offence Katti from a

particular place. His evidence regarding recovery of

Katti by accused no.5 Raghunath from garbage, is

admissible as *res gestae* but no blood was found on the

same. There is no evidence that it was weapon of offence.

13. P.W.6 Ganesh, panch to recovery of weapons jointly by accused no.4 Maruti and accused no.9 Vishwanath. His evidence about statement given by the accused is not as contemplated under Section 27 of the Evidence Act, but has stated that the accused led him and the Police to their house and Maruti produced one axe and then seizure panchnama Exh.50 was drawn. He also deposed that accused Vishwanath and Parmeshwar had shown willingness to discover weapons concealed in the house. Then they led the panchas and the police to their house and two Kattis were recovered. Those were washed and wiped. The seizure panchnama is at Exh.51 and weapons discovered are articles 1 to 3.

14. P.W.7 is Shravan Shinde. He stated that three accused were absconding. He learnt that they were in Andhra Pradesh. He went there and arrested them. He is also witness to the discovery of axe and Kattis from the accused later arrested (Memorandum and seizure panchnama Exhs.50 and 51). P.W.8 P.S.I. Chavan is the Investigating Officer.

15. It is defence of the accused-appellants that due to criminal cases amongst the parties, the appellants are implicated. Admittedly, there was criminal cases against each other. The land dispute was decided in favour of the accused and certified copy of the said order of Secretary State Government dated 22.1.1998 is filed on record. The second appeal preferred by Bhaurao was partly allowed only to the extent of monetary claim and decree for specific performance was rejected on 17.1.1996. The certified copy of the judgment of High Court is filed on record.

16. Thus, there is evidence of enmity. After going through the evidence of Medical Officer and the injuries shown by him in the post mortem notes, we agree that though it was a case of homicidal death, it was not an assault with intention to commit murder. There are three injuries with one fracture. The incised wounds were found on buttock, thigh and right leg. When several persons assault any person with deadly weapon with intention to commit murder, then the person assaulting will select the vital part like chest, neck, head for assault and not buttock, thigh and leg. It seems that the injuries caused were not sufficient in ordinary course of nature to cause death. There is no certificate to that effect, but those injuries caused profuse bleeding which resulted into death.

17. It is obvious that the prosecution solely relied on the evidence of P.W.4 Deelip and P.W.5 Prakash to show the involvement of accused persons.

18. As far as the recoveries are concerned, evidence of panchas as well as Investigating Officer is not at all satisfactory. It is necessary that the prosecutor should be trained as to how to record the evidence regarding discovery of weapons.

19. Learned trial Judge relied on the evidence of P.W.4 Deelip and P.W.5 Prakash to hold that all the accused in prosecution of common object of the assembly inflicted the injuries sustained by deceased Nivrutti and there were witnesses to the incident. Since there was a land dispute, the assault by them was also probable. The non-examination of material witnesses was not held significant. The

learned trial Judge rightly held that besides the oral evidence of P.W.4 Deelip and P.W.5 Prakash, there is no other supporting evidence credible and trustworthy.

20. After going through the evidence of P.W.4 Deelip and P.W.5 Prakash, we find that their evidence also is not trustworthy and reliable.

21. As per P.W.4 Deelip, on 19.10.2000, at about 4.00 p.m., his father was ploughing land of Bhaurao Krushnaji by means of a tractor. That time, all the accused came there from crops of pulse-Tur. They accosted him, why he was ploughing the land and they assaulted him by means of axe and katti on leg, back and buttock. His father raised shouts. While he was proceeding towards his father, Hanmant told him not to go as he was also likely to be assaulted. He stated that his father expired on the spot. The accused persons took out diesel from the tank of the tractor and accused no.4 Maruti set it on fire and thereafter he went to the police station and lodged F.I.R. Exh.45.

22. P.W.5 Prakash has stated that on the material day and time, while he was returning from his land, he saw deceased Nivrutti carrying out ploughing operations and his son present in the land of Bhaurao. Nivrutti was cultivating the land on batai basis. He stated that nine accused persons came there and all of a sudden assaulted Nivrutti and to him. Accused Maruti and Vishwanath were armed with Katti and Parmeshwar was holding an axe. Raghunath was holding katti and remaining accused were armed with sticks. He stated that P.W.4 Deelip was proceeding to intervene but he was not allowed to go

as he was also likely to be assaulted. Then Nivrutti fell down and all the accused persons went towards tractor. The tractor driver ran away. Accused no.4 Maruti poured diesel on the tractor and set it on fire.

23. It is obvious that deceased Nivrutti died due to profuse bleeding. He has not received any injury on the vital part. There was no damage to the brain and lungs. If profuse bleeding was a cause, it is obvious that deceased Nivrutti could not have died instantly on the spot. He would have survived for sufficiently long time and if P.W.4 Deelip and P.W.5 Prakash were eye witnesses, they would have provided medical aid to him, but evidence of P.W.4 Deelip and P.W.5 Prakash is contrary to this situation.

24. Besides, P.W.4 Deelip and P.W.5 Prakash have deposed that there was assault by nine persons, whereas there are only three injuries (incised wounds) on the person of deceased, which can be by sharp weapon. Axe is sharp weapon, but katti will not be sharp weapon. Considering the size of all the three injuries (1) 10 X 2 X 5 cm; (2) 10 x 2 x 8 cm; (3) 10 x 2 x 10, it appears that all the injuries were caused by only one type of weapon. It is certain that these injuries could have been caused by maximum three persons and not by nine persons. Since only three injuries are disclosed, it is not possible to accept the evidence of P.W.4 Deelip and P.W.5 Prakash that the assault was committed by nine persons.

25. The post mortem report shows that only 20 ml. of greenish yellow liquid with no food was found in the stomach. It seems that the deceased had merely taken morning tea and had gone to the field and

thereafter at some time within four to five hours, he must have died. The evidence of Medical Officer does not show whether main arteries of Nivrutti were cut or not. He admitted that if the main artery is not cut, the deceased could have survived for six hours. In any case, the deceased would have survived for some hours. There were eye witnesses to the incident. They would have immediately taken Nivrutti to provide medical treatment, but since he was found in the field itself, there was no eye witness to the assault on the deceased.

26. Pertinently, P.W.4 Deelip who was in shock and grief has lodged written report at the police station

27. There is no corroborative evidence in the form of recovery of blood stained clothes of the accused or recovery of blood stained weapons from the accused. The evidence regarding recovery is not reliable and there is no Chemical Analyst's report showing blood on the weapons.

28. The evidence of two eye witnesses P.W.4 Deelip and P.W.5 Prakash cannot be believed for the reasons stated above. Hence, the judgment of conviction under any offence is not sustainable. In the result, the State appeal deserves to be dismissed, while appeals filed by the accused deserve to be allowed. We accordingly answer points formulated by us and pass the following order :

- ORDER -

- (I) Criminal Appeal Nos.722 of 2002 and 728 of 2002 are allowed.
- (II) The conviction and sentence of all the accused, passed by learned Additional Sessions Judge, Biloli vide judgment dated

12.12.2002 in Sessions Case No.19 of 2001 is hereby set aside. All the accused are acquitted of all the charges. Their bail bonds stand cancelled. Fine, if deposited be refunded to them.

(III) Criminal Appeal No.195 of 2003 filed by the State stands dismissed.

(IV) The muddemal shall be preserved till the appeal period is not over.

(A.M. DHAVALA, J.)

(T.V. NALAWADE, J.)

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