

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

CRIMINAL APPEAL NO. 687 OF 2008

Vikas s/o Vilas Chandane,
Age : 29 years, Occu. Service,
R/o Vijay Chowk, Osmanabad,
Tq. & District Osmanabad

**APPELLANT
(Orig. Accused)**

VERSUS

The State of Maharashtra

**RESPONDENT
(Prosecution)**

Mr. Satej S. Jadhav, Advocate for the appellant
Mr. S.N. Moranpalle, A.P.P. for the Prosecution/State

**CORAM : SUNIL P. DESHMUKH AND
SANGITRAO S. PATIL, JJ.**

DATE : 5th OCTOBER, 2017

JUDGMENT (PER : SANGITRAO S. PATIL, J.) :

Heard the learned counsel for the appellant
and the learned A.P.P., representing the
prosecution/State.

2. The appellant has challenged the judgment
dated 10th October, 2008, delivered in Sessions Case
No. 33 of 2008 by the learned Sessions Judge,

Osmanabad, whereby he has been convicted for the offence punishable under Section 302 of the Indian Penal Code ("IPC", for short) and sentenced to suffer imprisonment for life and to pay a fine of Rs.5000/-, in default to suffer rigorous imprisonment for one year.

3. The deceased Shivaji Jyotiram Bhanage was serving as an Assistant Lineman, while the appellant was serving as a Line-Helper with Maharashtra State Electricity Distribution Company Ltd. ("MSEDCL", for short), Osmanabad (Rural). The appellant was initially posted at Baramgaon. On the request of the deceased Shivaji, he was posted at village Baramgaon in the place of the appellant and the appellant was posted at Osmanabad Rural Sub-Division. There were some complaints against the deceased Shivaji from the villagers and therefore, Assistant Engineer Dipak Kothle transferred the deceased Shivaji from village Baramgaon to Bembli Sub-Station and re-posted the appellant at village Baramgaon. It is alleged that there was some dispute between the deceased Shivaji and the appellant on account of transfer of the deceased Shivaji from village Boramgaon.

4. It is the case of the prosecution that on 22nd

April, 2007 at about 2.00 p.m. to 2.15 p.m., one Pandurang Sopanrao Pade and the informant namely Chhatrapati Narayan Chavan were proceeding on a scooter along the road from near the water tank of village Baramgaon. At that time, they saw the deceased Shivaji and the appellant quarrelling by the side of the road. Pandurang Pade and the informant stopped their scooter. At that time, the appellant gave a blow of a clamp (i.e. pliers) on the left side of the head of the deceased Shivaji and exclaimed that he would kill the deceased Shivaji. The deceased Shivaji fell down on the ground and became unconscious. Pandurang Pade went to village Ruibhar and informed the wife of the deceased Shivaji namely Sunita about the incident. He further called a rickshaw (tuntum), in which the deceased Shivaji was taken to the Civil Hospital at Osmanabad. The medical Officer examined him and declared that he was dead.

5. Chhatrapati Chavan lodged a report in Police Station, Bemli in respect of the incident. Crime No. 39 of 2007 came to be registered against the appellant for the offence punishable under Section 302 of the IPC. The investigation followed. The spot panchanama was prepared. The inquest of the body of the deceased

Shivaji was prepared. The Medical Officer conducted the post-mortem of the body of the deceased Shivaji on 22nd April, 2007 between 5.30 p.m. and 6.30 p.m. He opined that Shivaji died due to shock and haemorrhage due to head injury. The statements of the witnesses were recorded. The appellant was arrested on 26.04.2007. A full shirt and pant which were on his person came to be seized at that time. On 28th April, 2007, when the appellant was in the police custody, he gave a disclosure statement and offered to produce a clamp from near that water tank. It came to be seized. The clothes of the deceased Shivaji also were seized. Samples of plain earth and blood stained earth were seized from the spot of the incident. All the seized articles were sent to Chemical Analyst for analysis and report. After completion of the investigation, the appellant came to be chargesheeted for the above mentioned offence in the Court of Judicial Magistrate First Class (2nd Court), Osmanabad. Since the case was triable by the Court of Session, the learned Magistrate committed it to the Sessions Court.

6. The learned Trial Judge framed charge against the appellant for the above mentioned offence vide Exh-7

and explained the contents thereof to him in vernacular. The appellant pleaded not guilty and claimed to be tried. His defence is that of total denial. According to him on 22nd April, 2007, he was proceeding on his motorcycle from village Ruibhar, Osmanabad. His motorcycle dashed the motorcycle of one Ramdas Kolge. Both of them fell down on the road and sustained injuries. Thereafter, Ramdas Kolge and Rajaram Kolge beat him by fists and kicks on his face, chest, nose and hands. Blood was oozing from his nose. It fell on his person. In that condition, he went to Police Station, Bembli and lodged report against Ramdas Kolge and Rajaram Kolge at about 5.00 p.m. He was referred to Primary Health Centre, Bembli where he was extended primary treatment. He was then referred to Civil Hospital at Osmanabad at about 11.30 p.m. since he had severe pains. On 23rd April, 2007, PHC Chavan obtained his signatures again on some report on the say that it was the same which was lodged by him on the previous day. He denied that he lodged any report on 23rd April, 2007.

7. The prosecution examined seventeen witnesses to bring home guilt to the appellant. After evaluating the

evidence of the prosecution, the learned Trial Judge found the appellant guilty of the above mentioned offence. He, therefore, convicted and sentenced the appellant as stated above.

8. The learned counsel for the appellant submits that none of the alleged eye witnesses supports the case of the prosecution. There is no direct evidence to connect the appellant with the incident in question. The prosecution relied on the circumstance that there were blood stains on the shirt of the appellant and the group thereof was found to be "O". The blood stains on the shirt, pant and Kopri of the deceased Shivaji also were stained with the blood having group "O". Therefore, the presence of the appellant at the spot of the incident has been inferred by the learned Trial Judge. He submits that the appellant has come with a specific case that he was beaten by one Ramdas Kolge and Rajaram Kolge in respect of the incident of road-rage that took place on 22nd April, 2007 in the afternoon. His own blood had fallen on his shirt. The blood sample of the blood of the appellant was sent to Chemical Analyst. However, the group thereof could not be determined. The possibility of group "O" of the blood of the appellant

has not been ruled out by the prosecution. Therefore, on that basis, the appellant could not have been connected with the incident in question.

9. The learned counsel for the appellant then submits that the alleged discovery of clamp at the instance of the appellant is said to be another circumstance to connect him with the incident in question. According to him, the medical evidence shows that the injury found on the body of the deceased Shivaji was possible if one gets dashed against the electric pole. The clamp is stated to have been seized from an open place accessible to all. It was not suppressed/concealed anywhere. The panchas to the alleged memorandum of the disclosure statement of the appellant and consequential seizure of the clamp did not support the prosecution. In the circumstances, the alleged discovery of clamp could not have been used against the appellant.

10. He then submits that the prosecution relied on the FIR (Exh-65) dated 23rd April, 2007, alleged to have been lodged by the appellant against the deceased Shivaji. He submits that the appellant had lodged the report on 22nd April, 2007 and not on 23rd April, 2007.

The prosecution suppressed the report lodged by the appellant and by replacing the report (Exh-65) and tried to connect the appellant with the incident in question. He submits that even otherwise, the report (Exh-65) would not be admissible in evidence to the extent it incriminates the appellant. According to him, the learned Trial Judge wrongly relied on the contents of the report (Exh-65), which were not admissible in evidence. According to him, the learned Trial Judge wrongly held that the defence set up by the appellant that he was beaten by some other persons on 22nd April, 2007, is not believable, in view of the report (Exh-65). According to him, the appellant has been wrongly convicted by the learned Trial Judge.

11. On the other hand, the learned A.P.P. submits that though there is no direct evidence to connect the appellant with the incident in question, there is strong circumstantial evidence in the form of finding of blood stains of group "O" on the shirt of the appellant. The discovery of clamp at the instance of the appellant connects the appellant with the incident in question in view of medical evidence indicating that the injury found on the left frontal bone of the deceased Shivaji

was possible by forceful blow of the said clamp. The evidence of the witnesses showing presence of the appellant at the spot of the incident has been supported by the contents of the report (Exh-65) lodged by the appellant himself. According to him, the learned Trial Judge has rightly appreciated the facts as well as the evidence on record and rightly convicted the appellant.

12. The prosecution examined Pandurang (PW1) (Exh-13), Sampat (PW2) (Exh-15), Shankar (PW3) (Exh-16), Popat (PW7) (Exh-25), Amar (PW8) (Exh-26) and the informant Chhatrapati (PW12) (Exh-33), who allegedly had witnessed the incident. All of them did not support the prosecution. They denied that they witnessed any incident in which the appellant gave blow of clamp on the head of the deceased Shivaji, causing him serious injuries to which he succumbed. Thus, their evidence is of no help to the prosecution to connect the appellant with the incident in question.

13. The learned A.P.P. pointed out to the evidence of Pandurang (PW1), wherein he states that on 22nd April, 2007, at about 2.00 p.m., he was proceeding from village Ruibhar to Baramgaon on his scooter. Chhatrapati (PW12)

was the pillion rider. When they reached near water tank of village Baramgaon, they saw the deceased Shivaji and the appellant lying on the road. Both of them stopped and got down from the scooter. There was bleeding injury on the head of the deceased Shivaji and he had become unconscious. He then went to the house of the deceased Shivaji and informed about the incident to his wife Sunita. Then he brought Sunita on his scooter to the spot of incident. The deceased Shivaji was then taken to the Civil hospital at Osmanabad in the rickshaw. According to the learned A.P.P., the evidence of Pandurang (PW1) proves presence of the appellant at the time of the incident with the deceased Shivaji. Therefore, the appellant should have explained the circumstances under which the deceased Shivaji sustained head injury. His failure to explain the said circumstance would incriminate him.

14. It has come in the cross-examination of Pandurang (PW1) that he had stated before the police that when he reached near the spot of incident, he saw the appellant lying on the road on the spot of the incident. However, he did not assign any reason for omission of this fact in his statement before police.

This omission has been proved through the evidence of API Gaikwad (PW-15) (Exh-47), who recorded the statement of this witness. As such, it is clear that this witness improved his version and stated before the Court for the first time that he saw the appellant lying at the spot of the incident, besides the deceased Shivaji. This is material omission in the evidence of Pandurang (PW1). Had he seen the appellant on the spot of the incident as claimed by him, he would not have forgotten to mention it before the police when his statement was recorded. His evidence, therefore, would not be helpful to the prosecution to establish presence of the appellant with the deceased Shivaji at the time of the incident.

15. The appellant was arrested on 26th April, 2007. His full-sleeve shirt and pant are stated to have been seized vide panchanama (Exh-22) on 26th April, 2007, in the presence of Firozkhan (PW5) (Exh-21) and Manmath (PW6) (Exh-24). Both of these witnesses did not support the prosecution. They denied that the shirt and pant of the appellant were seized by the police in their presence as shown in the panchanama (Exh-22). Thus, their evidence is of no use to the prosecution.

16. API Gaikwad (PW15) deposes that at the time of the arrest of the appellant, he seized the full-sleeve shirt and pant, which were on the person of the appellant, vide panchanama (Exh-22). He states that there were faint stains of blood on the shirt at the time of the seizure. He does not state that he wrapped those clothes properly and sealed them in the presence of panchas. The learned counsel for the appellant cited the judgment in the case of **Ashraf Hussain Shah Vs. State of Maharashtra 1996 CRI.L.J.3147 (Bombay)**, wherein it is held that not only should the prosecution adduce evidence that after seizure the articles were sealed, but should also lead link evidence to the effect that till being sent to the Chemical Analyst, they were kept throughout in a sealed condition. This is required to be done to eliminate the suspicion that blood might not have been put on the articles subsequent to the recovery and prior to being sent to the Chemical Analyst.

17. In the present case, the panchas do not support the prosecution on the point of seizure of the full-sleeve shirt and the pant from the person of the appellant. API Gaikwad (PW-15) does not state that after seizure of the clothes, they were wrapped and sealed on

the spot. If that be so, the possibility of manipulation with the seized clothes cannot be ruled out.

18. The incident took place on 22nd April, 2007. the arrest panchanama (Exh-49) shows that the appellant was arrested on 26th April, 2007 at 4.00 p.m. in Police Station, Bembli. It is difficult to accept the case of the prosecution that from 22nd April, 2007 till the time of the arrest of the appellant on 26th April, 2007, the appellant would wear the same blood stained shirt in order to facilitate the police to collect evidence against him.

19. The report (Exh.53) of Chemical Analyst shows that the shirt (Exh-3), pant (Exh-4) and Kopri (Exh-5) of the deceased Shivaji were stained with blood of "O" group. The shirt (Exh-6) of the appellant also was found stained with blood of "O" group. However, the C.A. Report (Exh-54) in respect of the blood sample of the appellant shows that the group of his blood could not be determined since the results were inconclusive. The appellant has come with a specific defence that in the incident of road-rage with third persons, he sustained bleeding injuries. If that be so, the blood stains found on his shirt (Exh-6) cannot be said to be

that of the deceased Shivaji only and possibility of the said blood being that of the appellant cannot be ruled out. Had the prosecution proved that the blood group of the appellant was other than "O", then only the prosecution would have been in a position to connect the appellant with one of the circumstances to connect him with the incident in question on the basis of finding of the blood of group "O" on his shirt. No such evidence is produced by the prosecution. In the circumstances, the C.A. Report (Exh-53) would not be helpful to the prosecution to connect the appellant with the incident in question.

20. API Gaikwad (PW15) deposes that on 26th April, 2007, the appellant gave a disclosure statement and offered to produce clamp from near the water tank of village Baramgaon. He prepared memorandum (Exh-23) of the statement of the appellant in the presence of Firozkhan (PW5) and Manmath (PW6). He then states that the appellant took both the panchas to the water tank and produced a clamp from an agricultural land situate behind the water tank, which came to be seized vide panchanama (Exh-23/1). Firozkhan (PW5) and Manmath (PW6) did not support the prosecution. They denied that the

appellant gave any disclosure statement as mentioned in Exh-23 in their presence and produced any clamp in pursuance of that statement as mentioned in panchanama (Exh-23/1).

21. The learned counsel for the appellant submits that the evidence of API Gaikwad (PW15), in the absence of corroboration from independent witnesses namely Firozkhan (PW5) and Manmath (PW6), cannot be believed since he is very much interested in seeing the appellant convicted. The place from where the clamp is alleged to have been seized was open and accessible to all. The clamp was not found to have been concealed anywhere. In the circumstances, the alleged discovery of clamp would be of no use to the prosecution to connect the appellant with the incident in question. We find substance in this contention. The place from where the clamp is alleged to have been seized was accessible to all. There is nothing on record to show that it was concealed at any particular place which was referred to by the appellant in his alleged disclosure statement. The seized clamp is of such a nature that it would be available in the open market. It does not have any specific signs or identification marks to ensure that it was the same

which was used at the time of commission of the offence. The said clamp was not stained with blood as seen from the C.A. Report (Exh-53). In the circumstances, the seizure of the said clamp cannot be used against the appellant.

22. The appellant has come with a specific defence that on 22nd April, 2007 when he was proceeding along the road from Ruibhar to Osmanabad on his motorcycle, it dashed to the motorcycle of one Ramdas Kolge. At that time, Ramdas Kolge and Rajaram Kolge beat him on his face, chest, nose and hand. Blood was oozing from his nose. He went to Police Station, Bembli and lodged a report against Ramdas Kolge and Rajaram Kolge at 5.00 p.m. He was admitted firstly in Primary Health Centre at Bembli and then was referred to Civil Hospital, Osmanabad on the same day at about 11.30 p.m., where he was admitted for treatment.

23. PHC Chavan (PW16) (Exh-64) deposes that on 23rd April, 2007, he went to the Civil Hospital at Osmanabad and recorded the report (Exh-65) as narrated by the appellant. The contents of Exh-65 have weighed the learned Trial Judge to a great extent in holding the appellant guilty for the above mentioned offence.

24. It is well settled that the FIR is not a substantive piece of evidence. It can be used to corroborate or contradict the version of the author thereof. The contents of the FIR lodged by the accused of an offence would not be admissible in evidence to the extent they incriminate him. In the present case, even if it is accepted for a while that the report (Exh-65) was lodged by the appellant, the contents thereof, which connect him with the circumstances, which have the tendency to incriminate him, would not at all be admissible in evidence. The statement made in the FIR (Exh-65) that the appellant was on the spot of the incident with the deceased Shivaji is very much an incriminating circumstance. Therefore, the said statement also would be inadmissible in evidence. However, the learned Trial Judge wrongly relied on the inadmissible contents of the report (Exh-65) to connect the appellant with the incident in question.

25. It has come in the evidence of API Gaikwad (PW15) that on 22nd April, 2007, PHC Holkar was working as P.S.O. in Police Station, Bembli. On that day, at about 4.30 p.m., the appellant had been to the Police Station, Bembli. He narrated the entire incident which

was taken down in detail in Entry No. 20 on 22nd April, 2007 at about 4.30 p.m. itself. API Gaikwad (PW15) added that the said incident was in respect of the quarrel of the appellant with the deceased Shivaji. This version of API Gaikwad (PW15) was not admissible in evidence, being hearsay, since he was not present when the said incident took place. Anyway, the evidence of API Gaikwad (PW15) shows that the entire incident was narrated by the appellant before PHC Holkar on 22nd April, 2007 at about 5.30 p.m. However, he does not explain as to why the FIR was not recorded on the basis of that narration on 22nd April, 2007 itself. No explanation is coming forth for recording the FIR (Exh-65) by PHC Chavan (PW16) again on 23rd April, 2007, when on the basis of the same information station diary entry (Article 'C') was taken by PHC Holkar. It is not explained as to why the report (Exh-65) again came to be recorded on 23rd April, 2007 in respect of the same incident disclosing non-cognizable offences. It is, thus, clear that the information which was given by the appellant first in point of time before PHC Holkar on 22nd April, 2007 has been suppressed by the prosecution and the report (Exh-65) came to be substituted for that information. Anyway, the contents of FIR (Exh-65) cannot be used against the

appellant to connect him with the incident in question.

26. When there is neither direct, nor circumstantial evidence to connect the appellant with the incident in question, the medical evidence coming through Dr. Bandkhadke (PW11) (Exh-30) showing that the injury caused to the deceased Shivaji was possible by means of a clamp produced before the Court, by itself would not be sufficient to establish guilt of the appellant for the above mentioned offence.

27. The prosecution has failed to produce sufficient, cogent and dependable evidence on record which would be consistent only with the hypothesis of the guilt of the appellant and would exclude every hypothesis but the one that has been proposed to be proved by the prosecution. There is no evidence on record which would establish a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the appellant. The learned Trial Judge did not appreciate the evidence on record properly and even on the basis of inadmissible evidence, held the appellant guilty of the above mentioned offence. The findings of the learned Trial Judge holding the appellant guilty for the above

mentioned offence being not legal and proper, are not sustainable. The impugned judgment and order are liable to be quashed and set aside. In the result, we pass the following order:-

O R D E R

- (i) The Criminal Appeal is allowed.
- (ii) The impugned judgment and order are quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 302 of the Indian Penal Code.
- (iv) The bail bonds of the appellant are cancelled. He is set at liberty.
- (v) The appeal is disposed of accordingly.

[SANGITRAO S. PATIL]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE