

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.153 OF 2016

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| 1. Bilal Abdul Rahmean Shaikh. |] | |
| Age : 37 years, Occ : Rickshaw Driver, |] | |
| R/o. S. No.5, Back Side of Kakade Wasti, |] | |
| Kondhwa, BK, Pune. |] | |
| 2. Tukaram @ Sachin Mahadev Kshirsagar. |] | |
| Age : 28 years, Occ : Labour, |] | |
| 3. Suraj Pandurang Khandagale. |] | |
| Age - 22 years, Occ : Driver, |] | |
| 4. Ranjeet Maruti Jadhav. |] | |
| Age : 23 years, Occ : Labour, |] | |
| 5. Narayan Gautam Gaikwad. |] | |
| Age : 23 years, Occ : Labour, |] | |
| Nos.2 to 5 R/o. S. No.657, Shelkewasti, |] | |
| Upper Indira Nagar, Bibvewadi, Pune. |] | |
| (All Appellants presently lodged at |] | |
| Yerawada Central Prison, Pune). |] | ... Appellants |

Versus

The State of Maharashtra	]	
(Through Senior Inspector, Bibvewadi, Pune)	]	... Respondent

Ms. Nagma Tandon for Appellants.
Ms. R. M. Gadhvi, APP for State.

**CORAM :- A. A. SAYED &
SARANG V. KOTWAL, JJ.**

RESERVED ON :- 16 AUGUST, 2017

PRONOUNCED ON :- 29 AUGUST, 2017

JUDGMENT (PER : SARANG V. KOTWAL, J.) :-

1. The present Appeal is filed by the Appellants challenging the Judgment and Order dated 05/02/2016 passed by the learned Additional Sessions Judge, Pune, in Sessions Case No.59 of 2014 on his file. The Appellants were the original Accused Nos.1 to 5. The Appellants were convicted under Section 302 read with Section 149 of the IPC, under Section 120-B read with Section 109 of the IPC, under Sections 147 and 148 of the IPC and under Section 4 read with Section 25 of the Arms Act. The Appellants were sentenced to suffer imprisonment for life for the offence punishable under Section 302 read with Section 149 of the IPC and were directed to pay a fine of Rs.5,000/- each and in default, to undergo R.I. for three months. For the offence punishable under Section 302 read with Section 120-B of the IPC, they were sentenced to suffer imprisonment for life and to pay a fine of Rs.3,000/- each and in default, to suffer R.I. for three months. The Appellants were further sentenced to undergo R.I. for three years and to pay a fine of Rs.2,000/- each and in default, to suffer R.I. for one month for commission of offence punishable under Section 148 of the IPC. They were further sentenced to undergo R.I. for two years and to pay a fine of Rs.1,000/- each and in default, to undergo R.I. for one month for commission of offence punishable under Section 4 read with Section 25 of the Arms Act. The Appellants were acquitted of the offence punishable under Section 37(1) read with Section 135 of the Bombay Police Act and under Section 7 of the Criminal Amendment Act.

2. The Appellants were facing the trial along with other three accused out of which Accused no.6 Aba Machindra Landge and Accused no.7 Nilesh Hanumant Kamble were acquitted from the charges framed under Section 302 read with Section 120-B of the IPC. Accused no.8 Chandrakant Arjun Mule was acquitted of the offence punishable under Section 212 of the IPC.

3. We have heard Ms. Nagma Tandon, learned Counsel for the Appellants and Ms. R. M. Gadhvi, learned APP for the State and with their assistance, we have perused the record and proceedings of the case.

4. The case pertains to the murder of one Dinesh Tupere. According to the prosecution case, the said Dinesh was assaulted by the present Appellants on 26/09/2013 at around 4.15 p.m. at Bibvewadi within the jurisdiction of Bibvewadi Police Station, Pune. The FIR was lodged by one Ganesh Tupere who is the brother of the deceased. The FIR was registered vide C.R.No.132 of 2013.

5. According to the said first informant PW 1 Ganesh, on 26/09/2013 at around 4.15 p.m., he was proceeding towards his house from Ganesh Nagar and at that time, PW 2 Suresh Dayalu and PW 5 Ravi Sable met him and informed him that 5 to 6 persons had assaulted his brother Dinesh with sickles in a tin shed at Khadkewasti. The first informant went towards the tin shed and at that time, one Rohit Shirsat alerted the assailants and thereafter they ran away from

the shed with sickles in their hands. In the FIR, Ganesh has named the present Appellants as the persons who were running away from the tin shed with sickles in their hands. He called the police who reached at the spot. Dinesh was removed to Sasoon Hospital but was declared dead.

6. The Appellant No.1 was arrested on 28/09/2013 and the other Appellants were arrested on 27/09/2013. The investigation was carried out. The statements of witnesses were recorded and various panchanamas were carried out and at the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions for trial.

7. In its support, the prosecution examined 8 witnesses. PW 1 Ganesh Tupere is the brother of the deceased and has lodged the FIR. He claims to have seen the Appellants running away from the spot with the weapons in their hands. PW 2 Ravi Sable was examined as an eye witness to the actual assault but he did not support the prosecution and was declared hostile. PW 3 Rahul Bhalerao was examined as the panch who was present when the spot panchanama was carried out. However, even this witness has not supported the prosecution and was declared hostile. PW 4 Sandip Dhaware was examined as a panch who had witnessed the recovery of sickle at the instance of Appellant No.5 Narayan Gaikwad. Even this witness did not support the prosecution. PW 5 Suresh Dayalu was examined as another eye witness who had witnessed the assault but even this

witness did not support the prosecution case and was declared hostile. PW 6 Dr. Abhijeet Bandgar had conducted the post-mortem and had noted down 48 incised wounds all over the body of the deceased and had opined that the cause of death was due to chop injuries over head. PW 7 Laxman Ghalme was examined as a panch to the recovery of clothes and sickle, under Section 27 of the Evidence Act, at the instance of the Appellant no.1. Even this witness did not support the prosecution case and was declared hostile and finally, PW 8 API Bramhanand Naikwade was examined as the Investigating Officer who had carried out the investigation. The prosecution also relied on the CA reports in respect of the clothes and the weapons recovered and seized during the investigation. All these articles showed presence of human blood but the blood grouping was inconclusive.

8. Ms. Nagma Tandon, the learned Counsel for the Appellants, submitted that the evidence led by the prosecution is very weak and unreliable and the conviction cannot be based on such evidence. She has submitted that all the witnesses, except PW 1 Ganesh Tupere, have turned hostile and there is nothing on record against the present Appellants. She has further submitted that even the evidence of PW 1 Ganesh is unreliable and his falsehood is clearly seen from his deposition. She further submitted that if the entire evidence is read in totality, it is clear that the names of the Appellants were not known to the PW 1 and they were referred to by him much later and there are circumstances which point beyond doubt that initially, the PW 1 has not mentioned the names of the Appellants.

She has further submitted that the evidence showed that he PW 1 has not even seen any part of the incident, including the Appellants running away from the spot. She has further submitted that since all the panchas for recovery and seizure of clothes and weapons have turned hostile, their evidence does not support the prosecution case. Ms. Tandon has also relied on a few Judgments and she has emphasized on the Judgment in the case of ***Govindraju alias Govinda Vs. State of Srirampuram P. S. and Anr.***¹, wherein the Hon'ble Supreme Court, in para 12, has held that when the prosecution relies upon the testimony of a sole eye witness, then such evidence has to be wholly reliable and trustworthy and that presence of such witness at the occurrence should not be doubtful and it was further held that if the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a foundation of the conviction of the accused. Ms. Tandon has further relied on the observations of the Division Bench of this Court in the case of ***Mohan @ Bapu Khushal Pendam and Another Vs. State of Maharashtra***², wherein it was held that if the report which is lodged by the first informant first in point of time is not brought on record, the Court should draw an adverse inference against the prosecution and the benefit thereof must go to the accused. Ms. Tandon submitted that in the present case also, the report and information which were given first in point of time prior to lodging of the FIR, are not brought on record and therefore, an adverse inference must be drawn against the prosecution and in favour of the Appellants.

¹ AIR 2012 SUPREME COURT 1292

² 2017 ALL M.R. (Cri.) 393

9. As against the submissions made by the learned Counsel for the Appellants, Ms. R. M. Gadhvi, learned APP for the State, submitted that the evidence of PW 1 is cogent and reliable. Moreover, though the other eye witnesses have turned hostile, their statements before the police were proved through the evidence of the I.O. and those statements did support the version of the prosecution. She further submitted that though the panchas to various panchanamas have turned hostile, there is no bar in relying on such recovery on the basis of the evidence given by the I.O.

10. We have given our anxious consideration to the above submissions and to the evidence on record. From the evidence, it is quite clear that only the PW 1 has supported the prosecution case and PW 2 and PW 5, the alleged eye witnesses, have turned hostile. Therefore, this case remains as that of a solitary eye witness. Therefore, we have to carefully scrutinize the evidence of PW 1 to see whether his evidence is wholly trustworthy. We also have to see whether his presence at the occurrence is proved by the prosecution beyond any reasonable doubt. PW 1 has not seen the incident of actual assault but he claims to have seen the assailants running away from the spot with weapons in their hands.

11. The learned trial Judge has mainly relied on the evidence of PW 1 Ganesh Tupere and PW 8 API Naikwade who had investigated the crime. PW 1 Ganesh Tupere has stated that while he was proceeding towards his house at the relevant time, PW 2 Ravi Sable

and PW 5 Suresh Dayalu met him and informed him that 5 to 6 persons had assaulted his brother Dinesh with sickles. Here, even as per his own evidence, both these witnesses had not mentioned the names of the assailants. Thereafter, the said witness PW 1 claims to have gone near the tin shed where one Rohit Shirsat had alerted the assailants. In this connection, the cross-examination reveals that he was not knowing the person who had given a call and alerted the assailants. PW 1 has further stated that the person who gave a call to alert the assailants, was at a distance of 25 to 30 ft. from him. He has also added that the said person was running from the spot with a weapon. We find that even the answers in the cross-examination show that he was not knowing Rohit Shirsat who had alerted the assailants. Thus, there is a clear attempt on the part of the PW 1 to involve Rohit Shirsat. Therefore, there is no guarantee that he had not involved the other accused falsely in this case. The said Rohit Shirsat was a juvenile and therefore did not face the trial along with the present Appellants. In this connection, we can advantageously refer to the case of *Sujit Gulab Sohatre and others Vs. The State of Maharashtra*³. The Division Bench of this Court has held that when a witness implicates one accused falsely, there is no guarantee that he will not implicate the other accused persons. The observations of the Division Bench in this connection are mentioned in paragraph nos.14, 16 and 17 of the said Judgment which read thus :

“14. We have carefully considered the entire statement of Suresh Kamble P.W.2 and we are constrained to observe that it does not inspire any confidence. In the first instance

³ 1996 (5) Bom.C.R. 630

we may mention that this witness is not only an interested witness, inasmuch as he has admitted that he was a friend of the deceased but we find him to be also enimical to the appellants.

P.W.4 Gajanan Jadhav, another witness who is a friend of this witness and the deceased, in his cross-examination admitted that it was true that he, deceased Babu and Suresh Kamble were on enimical terms with the appellants. This naturally means that the evidence of this witness has to be scrutinised with utmost caution. Bearing this in mind we find that the evidence of this witness does not merit confidence. This witness both in the FIR and in his statement in the trial Court categorically stated that all the six appellants (meaning the four armed with sticks also) assaulted the deceased with the respective weapons. To our dismay, we find that the deceased did not even suffer a solitary injury attributable to stick. We may also mention that in the FIR this witness stated that all the six accused persons were hitting, both he and the deceased with knives and sticks. However, we find that he also did not suffer even a solitary injury attributable to stick. This, in our view, made him modulate his statement in the trial Court, wherein he mentioned that he was only attacked by the appellants and did not sustain any stick injury. If the statement of this witness is tested in the light of the medical evidence the irresistible inference is that he has falsely implicated the four appellants shown to be armed with sticks, namely, Kailas, Ravi, Raju and Naresh.

Another circumstance which shows that the appellants who have been shown to be armed with sticks have been falsely implicated is that on none of the three sticks which were recovered was any blood found. In our view when the deceased was being simultaneously assaulted by four persons with sticks, one with a knife and one with a sword-stick, blood must have gushed out from his injuries and therefore there should have been some blood on the sticks. The nature of the injuries sustained by the deceased shows that there must have been profuse instantaneous bleeding.

Yet another circumstance which shows that the persons armed with sticks have been falsely implicated in the instant case is that in the history of assault given out by the deceased to P.W.7 Dr. Kendre at the time of his admission in the Municipal Dispensary Panvel it is only mentioned that Manoj and Ravi had assaulted him. At that time he did not mention the names of Kailash, Raju and Naresh who are alleged to be armed with sticks. It may be emphasised that although he had taken Ravi's name but the prosecution case that Ravi assaulted with a stick is false because as mentioned earlier no injuries attributable to stick were found on the person of the deceased or on the injured.

We also have our reservations when this witness states that appellant Sujit assaulted the deceased with a sword-stick. As mentioned above in the history of assault given by the deceased to Dr. Kendre there is no mention about the name of this appellant.

16. The question which arises is as to what would be the implications of our finding that the four appellants viz. Kailas, Ravi, Raju and Naresh who are shown to be armed with sticks have been falsely implicated in the instant case ? Whether on account of their false implication the whole prosecution case would crumble or would it survive against the remaining appellants, namely Manoj and Sujit ? We have carefully considered this question and for the reasons given hereinafter our answer would be that the prosecution case even against appellants Manoj and Sujit would crumble.

17. It is true that the principle Falsus Uno Falsus Omnibus has been repeatedly held by Apex Court as not applicable to our criminal jurisprudence. It is also true that the Court should make every endeavour to separate grain from the chaff but the same can only be done in certain permissible limits. This exercise is not resorted to by the Courts where an integral part of the prosecution case is false. Then the whole case would fall. In the case before us there is no denying the

fact that the solitary eye-witness of the incident Suresh Kamble has falsely implicated appellants Kailash, Ravi, Raju and Naresh who are shown to have assaulted with sticks. In our view it would be very hazardous and unsafe to accept the residual portion of his testimony.”

12. Now the core question in this case is as to whether the PW 1 Ganesh has seen the assailants running away from the spot and if it was so, did he mention this fact to the police at the first instance.

13. The cross-examination of this witness PW 1 Ganesh reveals that he had informed the police through a telephonic message that 'somebody' assaulted Dinesh and committed his murder. This version is further supported by the evidence of API Naikwade when he has admitted in the cross-examination that PSO Maner of his police station had received the information from PW 1 that his brother was murdered by 'somebody'. Thus, on the first occasion when the first informant PW 1 Ganesh made a phone-call and gave the information about the assault, he had, admittedly, not mentioned the names of any of the assailants, including the present Appellants. He had not even mentioned that he had seen any of the assailants.

14. The cross-examination of this witness PW 1 Ganesh further shows that the police had recorded his complaint at Sasoon Hospital. Now, it is the prosecution case that from the spot of incident, the deceased was taken to Sasoon Hospital by PW 1 and others and when the PW 1 states that his complaint was recorded at Sasoon Hospital, the evidence should have shown existence of such

complaint recorded at the Sasoon Hospital. However, the evidence of PW 8 API Naikwade mentions that he had come back to the police station and thereafter he had prepared the report of the PW 1 which was treated as FIR and it is on record at Exh.40 and based on this report, the crime was registered. API Naikwadi had not gone to the Sasoon Hospital. Therefore, when he says that he had prepared a report of PW 1 Ganesh at the police station, it seems that this report was different from the complaint given by PW 1 Ganesh at the Sasoon Hospital and which was reduced into writing. The FIR was registered at 8.45 p.m. and there is no explanation as to why it was not recorded earlier right from 5.00 p.m. when the first informant and the other eye witnesses were available to the police for recording the FIR. There is also no explanation as to why the FIR was not recorded and registered before carrying out the spot panchanama. It leads us to draw an adverse inference against the prosecution that the statement recorded at the Sasoon Hospital was deliberately suppressed as it was not supporting the prosecution case and was favouring the accused.

15. There is another indication to show that the PW 1 was not knowing the names of the Appellants. The inquest panchanama was carried out in the Sasoon Hospital between 7.20 p.m. to 9.00 p.m. Even the recitals in the inquest panchanama show that the PW 1 Ganesh had merely informed that 'somebody' had committed murder of his brother Dinesh. The defence had admitted the inquest panchanama when the prosecution had produced it. Therefore, the recitals in the inquest panchanama can be read in evidence. The spot

panchanama was carried out between 4.55 p.m. to 8.05 p.m. According to the prosecution case, PW 1 himself had shown the spot. PW 1 Ganesh also concurs that he had shown the spot of incident to the police. The time of the spot panchanama and the time he was supposed to have gone to the Sasoon Hospital, are overlapping and, therefore, the presence of the PW 1 at the stage of carrying out spot panchanama is doubtful. Therefore, though the spot panchanama mentions the names of the assailants, the said document cannot be used in favour of the prosecution because even as per the prosecution case, at that point of time, the PW 1 was in the Sasoon Hospital and his statement was recorded in the Sasoon Hospital. Significantly, even the panch for spot panchanama has not supported the prosecution case. PW 8 API Naikwade has mentioned that he himself had drawn the spot panchanama in the presence of the panchas but he has not stated that the PW 1 has informed him about the names of the assailants when he drew the spot panchanama. Therefore, in the absence of any substantive evidence to that effect, it is not possible to rely on the recitals in the spot panchanama wherein it is mentioned that the PW 1 had stated the names of the present Appellants. The sequence of events during the investigation is also not brought on record clearly by the prosecution. In the cross-examination of PW 8 API Naikwade, he has stated that the spot panchanama was prepared before registration of crime. PW 1, in his cross-examination, has stated that on the same day at evening, they had gone to the spot of incident and at that time, the police prepared the spot panchanama and the map. Significantly, the map which is produced on record with

the spot panchanama mentions the C.R.No.132 of 2013. This also indicates that the spot panchanama and the map were prepared subsequent to the registration of FIR (Exh.40). Thus, the prosecution has not led a clear evidence and from the evidence of PW 1, it is indicated that the spot panchanama and the map were prepared subsequent to the lodging of the FIR and therefore the mentioning of the names in the spot panchanama cannot be a circumstance against the Appellants which the learned trial Judge has erroneously held against the Appellants.

16. PW 8 API Naikwade, in his cross-examination, has stated that on receiving the information, he reached the spot of incident and at that time, the eye witnesses were present at the spot. He has further stated that he was present at the spot for about 1.1/2 hours but during this period, he had not recorded the statement of the first informant or other eye witnesses which also throws doubt on the prosecution case and it appears that even at that point of time, the names of the Appellants were not disclosed to the police. All the circumstances lead us to the conclusion that the PW 1 had not seen the assailants running away from the spot with the weapons in their hands and that he had not given their names to the police because he had not seen them running away. It is only at the stage of recording the FIR much later, the names of the Appellants as the assailants, were introduced.

17. The evidence of PW 2 shows that though he was declared hostile and was cross-examined by the learned APP, he has stated that he had informed the PW 1 that unknown persons who had covered their faces by cloth, had assaulted Dinesh. This part of his cross-examination was not challenged by the prosecution by further cross-examining him or by way of re-examination. Therefore, even though the PW 2 was declared hostile, even otherwise, his version that the assailants had covered their faces and that he had informed PW 1 Ganesh that unknown assailants has assaulted deceased Dinesh, has remained unchallenged.

18. As far as the recovery of weapons is concerned, the prosecution has examined only PW 4 Sandip Dhaware for recovery of sickle at the instance of the Appellant no.5 and PW 7 Laxman Ghalme for recovery of sickle at the instance of Appellant No.1. Both these panchas have turned hostile and have not supported the prosecution case. As far as the other recoveries of clothes and weapons are concerned, the panchas are not examined by the prosecution and no explanation is offered as to why those panchas were not examined. In any case, the clothes and weapons though show the presence of human blood, the blood group shown on them is inconclusive. In these circumstances, even the evidence of recovery of clothes and weapons is not reliable. Apart from the panchas who had turned hostile, there were other panchas shown present during these panchanamas. However, none of such panchas is examined and no explanation is offered for their non-examination.

19. In these circumstances, we find it unsafe to rely on the sole testimony of PW 1 Ganesh Tupere. Therefore, we give benefit of doubt to the Appellants.

20. In the result, the Appeal is allowed. The conviction and sentence awarded to the Appellants under the impugned Judgment and Order are set aside. The Appellants are acquitted of all the charges.

21. The Appellants shall be released forthwith, if not required in any other case.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)