

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.858 OF 2008

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| 1. Yasin Khalil Inamdar. |] | |
| Age : 22 years, Occ : Business, |] | |
| R/at Gandhi Colony, Sangli. |] | |
| 2. Mujib Khalil Inamdar. |] | |
| Age : 25 years, Occ : Business, |] | |
| R/at Gandhi Colony, Sangli. |] | |
| 3. Naseer Khalil Inamdar. |] | |
| Age : 23 years, Occ : Business, |] | |
| R/at Khanbhag, Sangli. |] | |
| 4. Imran Abdul Jamadar. |] | |
| Age : 22 years, Occ : Business, |] | |
| R/at Sanjay Nagar, Sangli. |] | |
| 5. Jameer Jainuddin. |] | |
| Age : 19 years & 6 months, Occ : Business, |] | |
| R/at Rajapur, Tal. Shirol, Dist. Kolhapur. |] | ... Appellants |

Versus

The State of Maharashtra	]	... Respondent
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Dr. Yug Mohit Choudhry for Appellant Nos.1, 4 & 5.

Ms. Amita Kuttikrishnan for Appellant Nos.2 & 3.

Ms. R. M. Gadhvi, APP for State.

CORAM :- A. A. SAYED &

SARANG V. KOTWAL, JJ.

RESERVED ON :- 28 AUGUST, 2017

PRONOUNCED ON :- 07 SEPTEMBER, 2017

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

1. The present Appeal is preferred by the original accused nos.1 to 5 who faced the trial in Sessions Case No.134 of 2006 before the learned Sessions Judge, Sangli. At the conclusion of the trial, the learned Sessions Judge, Sangli, by his Judgment and Order dated 07/07/2008, was pleased to convict all the Appellants for the offence punishable under Section 302 read with Section 149 of the IPC and each of them was sentenced to suffer life imprisonment and to pay a fine of Rs.1,000/- and in default of payment of fine, to suffer R.I. for one year. All the Appellants were also convicted for the offence punishable under Section 147 of the IPC and each of them was sentenced to suffer R.I. for six months and to pay a fine of Rs.500/- and in default of payment of fine, to suffer R.I. for one month. The Appellants were further convicted for the offence punishable under Section 148 of the IPC and each of them was sentenced to suffer R.I. for for six months and to pay a fine of Rs.500/- and in default of payment of fine, to suffer R.I. for one month.

2. These Appellants faced the charge of commission of murder of one Wahid Nazeer Rangari by means of deadly weapons like sword, razor, jambiya, knife etc. The incident had taken place in the open space in front of Manish Medical Stores and Dronagiri Medical Stores on Vishrambag-Kupwad Road within the limits of Sangli city. The FIR was registered vide C.R.No.29 of 2006 at Vishrambag Police Station, Sangli. PW 3 Tohid Nazeer Khatik @

Rangari who was the brother of deceased, lodged the FIR at 11.50 p.m. on 02/02/2006. During the course of investigation, statements of various witnesses were recorded, different panchanamas were carried out, the accused were arrested and the charge-sheet was filed before the learned JMFC, 4th Court, Sangli. Thereafter, the case was committed to the Court of Sessions for trial and was tried before the learned Sessions Judge, Sangli, vide Sessions Case No.134 of 2006.

3. In its support, the prosecution examined 14 witnesses out of whom PW 3 Tohid Rangari and PW 9 Jamir Razzak Khatik were examined as the eye witnesses. PW 4 Anup Tukaram Patil was also examined as an eye witness but he did not support the prosecution case. PW 1 Santosh Baban Nalawade was the panch for the spot panchanama. PW 2 Shekhar Sharad Potdar was a panch for the arrest panchanama of the Appellant Nos.1, 2 and 6. PW 5 Suresh Pandurang Nikam was the panch in whose presence weapon - razor was recovered at the instance of the Appellant No.3 and a sword was recovered at the instance of the Appellant No.2 on 05/02/2006. PW 6 Yashwant Wallappa Bansode and PW 7 Bassu Yallappa Tikoti were the panchas who did not support the prosecution case. PW 8 Sambhaji Bapu Parekar was a panch for arrest and seizure of clothes of the Appellant Nos.3, 4 and 5. PW 10 Ganesh Girjappa Gadade was the Police Constable who carried the articles to the CA. PW 11 Dr. Sachin Walchand Shaha was the Medical Officer who conducted post-mortem examination on the dead body of the deceased. PW 12 Jawahar Sadashiv Kinikar had drawn the map of the spot of incident. PW 13

Usman Gani Ismail Shaikh was the PI who had arrested the accused Yasin Khalil Inamdar, Mujib Khalil Inamdar and Akram Khalil Inamdar. PW 14 API Narendra Hindural Ranjane was the Investigating Officer.

4. PW 11 Dr. Sachin Shaha noticed 17 injuries on the dead body out of which barring a few abrasions and CLWs, the other injuries were incised or punctured wounds and the cause of death was mentioned as death due to craneo-cerebral injury.

5. We have heard Dr. Yug Mohit Choudhry, learned Counsel for Appellant Nos.1, 4 & 5. Ms. Amita Kuttikrishnan, learned Counsel for Appellant Nos.2 & 3, adopted the arguments of Dr. Choudhry. We have also heard Ms. R. M. Gadhvi, learned APP for the State. With assistance of the learned Counsel for the Appellants and the learned APP for State, we have perused the record and proceedings.

6. The prosecution has mainly relied on the evidence of PW 3 Tohid Rangari and PW 9 Jamir Khatik. PW 3 Tohid was the brother of the deceased. He has deposed that he knew the Appellant Nos.1 to 3 as they used to regularly visit the place in front of his mutton shop. On 02/02/2006 at about 5.30 p.m., he had gone near Laxmi Temple when he noticed that there was heated exchange of words between the Appellant Nos.2 and 3 on one side and his brother Wahid on the other. He has further stated that the dispute was regarding Wahid's contention that the Appellant No.2's niece was not having good

character and Wahid had objection for her visiting Wahid's sister. Because of Wahid's stand, the Appellants got annoyed and there was exchange of words. One Nayeem Shaikh tried to mediate and all of them left the place. At about 10.30 p.m., Wahid was standing near Manisha Medical Stores. This witness has further stated that at that time, Appellant No.1 Yasin Inamdar, Appellant No.2 Mujib Inamdar and his two employees Appellant No.4 Imran Jamadar and one Hafiji came there. Appellant No.3 Naseer Inamdar came on a motorcycle. According to the prosecution, the said Hafiji was none other than the Appellant No.5. Dr. Yug Mohit Choudhry, learned Counsel for Appellant Nos.1, 4 and 5, has seriously challenged the name of the Appellant No.5 as Hafiji and has contended that the prosecution has nowhere brought on record that the Appellant No.5 was known as Hafiji. PW 3 has further deposed that four more persons came there by walking. He has further stated that the Appellant No.2 gave a fight to him and thereafter the Appellants took out weapons and started assaulting Wahid. PW 3 has further stated that he saw the incident in the electric street light pole as he was standing near the electric pole. On seeing the incident, he rushed towards his relative Sameer Khatik who informed the police. The police reached there at about 11.45 p.m. Thereafter this witness went to the police station and lodged his FIR. In the deposition, he has stated that the persons who assaulted his brother, were all present in the Court.

7. PW 9 Jamir Khatik is another eye witness. He was a cousin of the deceased Wahid. He has narrated the sequence of

events which took place on 02/02/2006. According to him, at about 3.00 p.m., deceased Wahid complained to him about the Appellant No.2's niece and Wahid had requested this witness to tell the Appellant No.2 about his objection. At about 7.00 p.m., this witness, deceased Wahid and PW 3 Tohid were standing at a chowk behind Laxmi Temple. At that time, Appellant Nos.2 and 3 came there. One Naeem Shaikh tried to mediate and pacify both the parties and all of them went from there. At about 10.30 p.m., this witness was standing in front of Dhiraj Electronics and he heard sound of quarrel and when he reached there, he saw Wahid was lying down. Appellant Nos.2, 3, their younger brother Akram and two employees were assaulting him. The Appellant No.1 did not allow this witness to come near for rescuing Wahid. The Appellant No.1 asked the Appellant No.2 to confirm whether Wahid had expired and after that all the assailants fled away from the spot. Thereafter this witness's elder brother informed the police who came on the spot. He has further deposed that the accused before the Court were the same persons. He has deposed that Mujib was having sword, Yasin was having knife, Nasir was having razor, Hafiji was having jambia and Imran was also having Jambia. One motorcycle and razor were also recovered at the instance of Appellant No.3. At the instance of Appellant No.2, a sword was recovered from his house and a motorcycle was also recovered. Besides this recovery, the clothes of the accused were also seized as mentioned earlier.

8. Dr. Yug Mohit Choudhry, learned Counsel for Appellant Nos.1, 4 and 5, attacked the prosecution evidence on various counts. He has submitted that the spot of incident and the map show that there was no source of light in the near vicinity and therefore, the so called eye witnesses could not have seen the incident. He has further submitted that the PW 3 and PW 9 do not depose about each other's presence. Therefore, it is doubtful as to whether they were present at the spot at all. He has further submitted that though the PW 3 was also assaulted, there was no corresponding injury or medical certificate in that behalf. He has further submitted that from the narration given by both these witnesses, it was but natural that they should have mentioned each other's presence. He has further submitted that the PW 9's statement was recorded only on the next day at 11.00 a.m. and there is no reason why his statement could not be recorded immediately though he was very much available at the spot. It was further submitted that there was material contradiction in his own evidence as well as with that of the PW 3. He has further submitted that both these eye witnesses are chance witnesses and that there was no reason for them to be present on the spot and there is no reason as to why they had not worked in their shop or at their place of work on that day. He has further submitted that PW 3 is the brother and PW 9 is the cousin of the deceased and therefore, they are interested witnesses. The prosecution has not examined any independent witnesses and therefore, their evidence has to be scrutinized carefully. Dr. Choudhry has further submitted that the inquest panchanama was carried out in the headlight of the police

jeep which shows that there was no light on the spot of incident which could have enabled the eye witnesses to see the incident clearly. He has further submitted that the conduct of the eye witnesses is unnatural because on seeing the assault on the deceased, the first natural reaction would be to remove the deceased to the hospital and not rushing to the police to inform about the incident. PW 9 was not knowing the employees of the Appellant Nos.1 to 3 and therefore, identification of Appellant Nos.4 and 5 by him in Court is doubtful. Lastly, Dr. Choudhry laid much emphasis on the submission that the identity of the Appellant No.5 was seriously in dispute and the prosecution has not brought anything on record to show that the said Appellant was also known by the name Hafiji.

9. As against these submissions, Ms. R. M. Gadhvi, the learned APP for the State, submitted that the eye witnesses were natural witnesses and there is nothing in their deposition which could raise doubt about their truthfulness. Their identification of the accused in the Court was reliable. They are amply supported by the other corroborative pieces of evidence in the nature of recovery of weapons, seizure of clothes and most of these articles show the presence of blood group 'AB' which was also found on the clothes of the deceased. Therefore, the learned APP submitted that there was no merit in the Appeal and the prosecution has sufficiently proved the case against the Appellants.

10. As far as PW 3 and PW 9 are concerned, they are eye witnesses and the prosecution case is presented before the Court through their evidence. They have described the incident in great detail. The criticism that they could not witness the incident in detail and could not have seen the faces of the assailants, does not appear to be correct because the spot of incident and the map show that there was an electric pole with four mercury lamps. PW 3, in his evidence, had clearly stated that he had seen the incident in the light of the street light and he was standing near the electric pole. The evidence of the spot panch shows that there was an electric pole on the street at a distance of about 100 ft. from the spot where the blood was lying. Thus, when the assailants were known to the witnesses and when the witnesses were standing close enough to witness the incident, it cannot be said that there was no sufficient light to enable them to see the incident or identify the assailants. The submission that the police had to resort to using the headlight of their jeep to conduct the inquest panchanama also does not carry any substance because for conducting the inquest panchanama, they had to examine the injuries in depth and therefore using the headlight for the said purpose will not, by itself, mean that the light on the spot was insufficient.

11. The further submission of Dr. Choudhry that both these witnesses PW 3 and PW 9 were chance witnesses and therefore could not be relied on, does not carry any weight. Just because they had not attended their work, does not mean that they were not telling the truth regarding the incident on that day. Both these witnesses were

aware about the tension between the deceased and the Appellants and had referred to the incident during the evening and it was not unnatural for them to be present near the spot at the night time. Dr.Choudhry submitted that they were close relatives of the deceased and the prosecution did not deliberately examine any independent witness; therefore, adverse inference should be drawn. In this regard, the prosecution did examine PW 3 Anup Patil as an eye witness but he was declared hostile. It is well-settled that if the evidence of the close relatives of the deceased is cogent and reliable, then just because an independent witness is not examined, their evidence cannot be ignored. In this case, we find that the evidence of PW 3 and PW 9 is reliable and cogent.

12. Dr. Choudhry has submitted that the conduct of these witnesses is unnatural, inasmuch as, after the incident, instead of removing the deceased to the hospital to make efforts to save his life, these witnesses called the police or the relatives, and did not make any efforts to take him to the hospital. Thus, according to Dr. Choudhry, their conduct was unnatural. According to PW 3, while the incident was going on, he had gone towards his relative Sameer Khatik's house to call him and when both of them reached there, his brother Wahid was already dead and thereafter the said Sameer Khatik phoned and informed the police. This conduct of PW 3 cannot be said to be unnatural. He had gone to seek help of his relative and then that relative had informed the police. Thereafter when the police reached the spot, they conducted the inquest panchanama. Therefore,

there was no doubt that said Wahid had succumbed to his injuries on the spot itself. PW 9 was at the spot when his elder brother and others came there after the incident and his elder brother phoned the police station. Therefore, we do not find any unnatural conduct on his part if he had remained at the spot. This witness PW 9, in para 6 of his cross-examination, has stated that he made efforts to see whether the said Wahid was dead or not and he tried to shake and move the dead person. Since he was convinced that the deceased had already died on the spot at that time, therefore, there was no question of removing the deceased to the hospital.

13. Dr. Choudhry further argued that both these witnesses PW 3 and PW 9 do not speak about each other's presence on the spot of the incident. In this connection, in para 7 of his cross-examination, PW 9 has stated that Tohid i.e. PW 3 was there only. He was asked if the said Tohid came on the spot when police had come there. To this specific question, he had clearly answered that 'Tohid was there only'. There was no direct cross-examination on this aspect. In any case, PW 3 and PW 9 were standing at different places and from there they had seen the incident and just because there is no reference to each other's presence in the examination-in-chief, that by itself, will not mean that they were not present at the spot to witness the incident.

14. Dr. Choudhry has further argued that since PW 3 claimed that he was assaulted during the incident and since there is no medical evidence to that effect, his presence at the spot at the time of

the incident is doubtful. In this connection, it can be seen that in para 3 of his examination-in-chief, PW 3 has stated that “Musib (accused no.2) gave fight to me.” Beyond this, no assault on himself is described by him. For one single fist blow, there could not be any medical evidence and therefore, it cannot be inferred that he was not present at the spot.

15. Dr. Choudhry has further submitted that the number of assailants described by both these witnesses differ. According to PW 3, besides the five Appellants, there were four other unknown persons i.e. total 9 persons assaulted the deceased whereas PW 9 has only referred to about six persons who were present and assaulted the deceased. Moreover, PW 9 has not specifically stated that the Appellant No.1 assaulted the deceased. We find that this variance in the versions of both these witnesses does not go to the root of the matter and in the incident of such a nature where the deceased was assaulted brutally with deadly weapons, there can easily be such discrepancy in respect of number of assailants who took part in the incident and in any case, both these witnesses have consistently spoken about the role of the five assailants. The discrepancy is only in respect of the three assailants who were unknown to the PW 3. Therefore, we do not find force in this submission of Dr. Choudhry.

16. Dr. Choudhry has further submitted that recording of FIR and the timing also does not help the prosecution and, in fact, pose doubt on the veracity of the said FIR. He submitted that when the

police arrived at the spot, PW 3 was present at the spot and therefore there was no reason as to why his statement was not recorded there and treated as FIR. Instead, PW 3 was taken to the police station and there his statement was recorded and was treated as FIR and it was registered at 11.50 p.m. We do not find this circumstance as an infirmity in the prosecution case. The evidence is consistent as far as the arrival of police at the spot is concerned and thereafter if the PW 3 is taken to the police station for recording his statement and treating it as FIR, we do not find any infirmity in such procedure.

17. Dr. Choudhry laid much emphasis on the aspect of improper identification of the Appellant No.5 in this case. Dr. Choudhry has seriously disputed the identity of the Appellant No.5 as one of the assailants in the present case. He has submitted that PW 9 has only named first three Appellants and he has stated that the other two assailants were employees of the first three Appellants. Therefore, the only eye witness deposing against the Appellant No.5 is the PW 3. PW 3 has stated that “at about 10.30 p.m. Yasin Khalil Inamdar (accused no.1), Musib Khalil Inamdar (accused no.2) and his two employees namely Imran Jamadar (accused no.4) and Hafij came there. Nasir Khalil Inamdar (accused no.3) came on Passion Hero Honda motorcycle.” While describing the incident, he has again stated that Hafij took out Jambia and inflicted blow on the face of Wahid. Thus, according to Dr. Choudhry, everywhere the other accused are indicated as accused no.1, accused no.2, accused no.3 or accused no.4 but in case of the 5th assailant, he was referred to as

Hafij only. The charge shows that it was framed against Jameer Jainuddin Pattewale as accused no.5 and he was not described as Hafij. The FIR (Exh.39) nowhere mentions the name Jameer Jainuddin Pattewale but simply mentions Hafiji and even in the examination under Section 313 of the Cr.P.C., no question is put to the Appellant No.5 that if he was known by the name Hafiji. Therefore, in these circumstances, it cannot be established that the assailant 'Hafiji' was the same person as the Appellant No.5 and therefore the prosecution has not established the identity of the Appellant No.5 clearly.

18. From the examination-in-chief, it is seen that at the end of para 3, this witness PW 3 has stated that the persons who beat his brother were all present in the Court. More importantly, in the cross-examination conducted on behalf of accused nos.3 and 4, in para 14, it is mentioned thus :

“Accused no.4 - Imran is residing at Sanjaynagar, Sangli. It is incorrect to say that Hafij (accused no.5) is taking and giving education in “mothersa.” I do not know whether in one “mothersa”, there happens to be 100 to 200 “Hafijies.” I do not know whether all Hafijies are in the front line at the time of offering “Namal”.

It appears that this witness was referring to 'madarasa' and 'namaz' in the said paragraph. Here, the said Hafij is mentioned as accused no.5 during his cross-examination. While it is true that the learned trial

Judge should have been more careful in recording the evidence so that the identity of the accused could be clearly established vis-a-vis each accused, we find that when the said “Hafij” was mentioned as accused no.5, there was no objection or further cross-examination on behalf of the Appellant No.5 in that respect. It cannot be overlooked that the said witness has stated before the Court in his examination-in-chief that all the assailants were present before the Court. The defence has not brought out any omission or contradiction and has not confronted the PW 3 with the fact that the name of the 5th assailant was mentioned as “Hafiji” in the FIR and not as Jameer Jainuddin Pattewale as was mentioned in the charge. During his entire deposition, the recording of the evidence shows that there was no dispute that the said “Hafiji” and the present Appellant No.5 was the same. There is no suggestion that the Appellant No.5 was not known as “Hafiji” as mentioned in the FIR or in the deposition. Thus, the defence has not taken a firm stand that the Appellant No.5 was never known as “Hafiji” and therefore in our considered opinion, the Appellant No.5 cannot claim that he was not known as Hafiji. Dr. Choudhry has submitted that even in the statement recorded under Section 313 of the Cr.P.C., no question was put to the Appellant No.5 that he was known by the name Hafiji. However, when the deposition proceeded on the footing that there was no dispute that the Appellant No.5 was known as Hafiji, there was no occasion for the learned Judge to have put this question to the Appellant No.5 under Section 313 of the Cr.P.C. Moreover, the English version of the examination under Section 313 of the Cr.P.C., in its title itself, mentions the

Appellant No.5 as Mr. Jameer Jainuddin Pattewale (Hafiji) and the said statement is signed by the Appellant No.5. Therefore, the Appellant No.5 now cannot take a stand that he was not known as Hafiji. The Appellant No.5 was represented by a lawyer and therefore, it cannot be said that he was not aware of how the evidence was being recorded.

19. Besides the evidence of the eye witnesses, there is evidence of PW 5 Suresh Nikam who was a panch for the recovery of razor and motorcycle at the instance of the Appellant No.3 and recovery of sword and motorcycle at the instance of the Appellant No.2. We do not find any infirmity in such recovery evidence. The clothes of the Appellant Nos.1 and 2 were seized in presence of PW 2 Shekhar Potdar. The clothes of Appellant Nos.3, 4 and 5 were seized in presence of PW 8 Sambhaji Parekar. The CA report shows presence of human blood of 'AB' group on the clothes of the deceased, of the Appellants and also on the weapons which were found on the spot and which were recovered at the instance of the Appellant Nos.2 and 3. This is an added circumstance corroborating the evidence of the eye witnesses.

20. In this view of the matter, we are satisfied that the evidence of the eye witnesses PW 3 Tohid Rangari and PW 9 Jamir Khatik is reliable and cogent. The prosecution has, thus, proved the case against the Appellants beyond reasonable doubt. Therefore, we do not find any reason to interfere with the order of conviction and

sentence awarded to the Appellants. However, Dr. Choudhry has rightly submitted that the learned Judge has not given the benefit of Section 428 of the Cr.P.C. and has not given set off to the Appellants and he has also not mentioned that the substantive sentences should run concurrently. There is no special reason why the sentences should not run concurrently. To that extent only, we agree with Dr. Choudhry and we modify the operative part of the impugned Judgment and pass the following order :-

ORDER

- (i) The conviction and sentence awarded to the Appellants by the trial Court are maintained.
- (ii) The Appellants shall be given benefit of set off under Section 428 of the Cr.P.C. for the period they have undergone in custody during the investigation and till conclusion of the trial. All the substantive sentences awarded to the Appellants shall run concurrently.
- (iii) The Appeal is partly allowed to this limited extent.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)