

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.573 OF 2008

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| 1. Krushna @ Kisan Ramchandra Kharpade. |] | |
| Age – 30 years, |] | |
| Residing at Village Shirasgaon, |] | |
| Post – Khodala, Taluka – Mokhada, |] | |
| District – Thane. |] | |
|
2. Bhagwan Kashinath Gangurde. |] | |
| Age – 49 years, |] | |
| Residing at Belgaon Dhaga, |] | |
| Taluka – Trambakeshwar, District – Nashik, |] | |
| (At present in Nashik Central Prison, |] | |
| Nashik) |] | ... Appellants |

Versus

The State of Maharashtra	]	... Respondent
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ALONG WITH

CRIMINAL APPEAL NO.266 OF 2010

Vilas Laxman Dive.	]	
Age – 22 years, Occ. : Carpenter,	]	
Residing at Aadoshi, Shirasgaon,	]	
Taluka – Mokhada, District – Thane.	]	
(At present C-6987 in Nashik Road Central	]	
Prison, Nashik)	]	... Appellant

Versus

The State of Maharashtra.	]	
Through Mokhada Police Station,	]	
District – Thane, (C.R.No.11/2006).	]	... Respondents

Mrs. Anjali Awasthi, Appointed Advocate for Appellants in Criminal Appeal No.573 of 2008.

Mrs. Sonia Miskin, Appointed Advocate for Appellant in Criminal Appeal No.266 of 2010.

Ms. R. M. Gadhvi, APP for State / Respondent in both Appeals.

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

RESERVED ON :- 08 SEPTEMBER, 2017

PRONOUNCED ON :- 19 SEPTEMBER, 2017

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

1. Both these Appeals are filed challenging the Judgment and Order dated 30/04/2008, passed by the IV Additional Sessions Judge, Thane, in Sessions Case No.298 of 2006. Therefore, both these Appeals are disposed off by this common Judgment. The Criminal Appeal No.573 of 2008 is filed by the original accused nos.2 and 3 and the Criminal Appeal No.266 of 2010 is preferred by the original accused no.1 in Sessions Case No.298 of 2006. All the accused are convicted by the learned IV Additional Sessions Judge, Thane, under Section 302 read with 34 of the IPC and each of them was sentenced to suffer life imprisonment and to pay a fine of Rs.500/- each and in default of payment of fine, to suffer R.I. for six months.

2. For the sake of convenience, all the Appellants are referred to as the accused as per their serial numbers in Sessions Case No.298 of 2006. The Appellant in Criminal Appeal No.266 of 2010 is the original accused no.1 Vilas Laxman Dive and the Appellants in Criminal Appeal No.573 of 2008 are the original accused no.2

Krushna @ Kisan Ramchandra Kharpade and original accused no.3 Bhagwan Kashinath Gangurde respectively in the said sessions case.

3. The said case pertains to the commission of murder of one Mohan Babu Patil on 08/05/2006 around 3.30 p.m. at Shirasgaon bypass ('Phata'), within the jurisdiction of Mokhada Police Station, District – Thane. According to the prosecution case, the accused no.1 assaulted the deceased by means of knife and cycle chain. The accused nos.2 had caught hold of the deceased to facilitate the assault and the accused no.3 was instigating the accused nos.1 and 2. The deceased Mohan Babu Patil was the Sarpanch of Village Adoshi, Shirasgaon. The prosecution case against the accused no.1 is that, he was a carpenter and he was not satisfied by the lesser amount procured for him by way of loan by the deceased, for purchase of articles for carpentry. The accused no.1 held another grudge against the deceased, as he thought that, the deceased was deliberately not giving him certificate of residence from the Grampanchayat. The accused no.2 was Head of water supply project and was a political opponent of the deceased. According to the prosecution case, the deceased used to find faults with allotment of the work made by the accused no.2 and was a constant source of interference. According to the prosecution case, the accused no.3 was given work of digging some wells and the deceased was also finding faults with his work. Therefore, all the three accused held grudge against the deceased and therefore committed his murder on 08/05/2006.

4. Surprisingly, the FIR in this case was lodged by the accused no.3 himself at about 8.05 p.m. on 08/05/2006. However, the prosecution has not led any evidence to explain the circumstances in which this FIR came to be lodged. This FIR was brought on record through the cross-examination of the I.O. on behalf of the accused no.3. The accused no.1 was arrested on 08/05/2006, the accused no.2 was arrested on 18/05/2006 and the accused no.3 was arrested in July 2006. C.R.No.I-11/2006 was lodged at Mokhada Police Station under Section 302 of the IPC at 8.05 p.m. on 08/05/2006 based on the statement given by the accused no.3. According to the prosecution case, the incident took place near Shirasgaon bypass. The deceased was removed to the hospital by his son and nephew. The deceased was declared dead before admission in Primary Health Centre at Khodala. As mentioned earlier, the accused no.1 was arrested on 08/05/2006 itself. Thereafter, different panchanamas like inquest panchanama and spot panchanama were carried out. A broken knife and other articles were recovered from the spot.

5. On 11/05/2006, the brother of the deceased namely Digambar Patil made a grievance in writing to the police mentioning that all the three accused had committed murder of the deceased. He had informed that there were two eye witnesses namely Chandrabhaga Patil and Sunderabai Bande. He had informed the police that the deceased had told his nephew Vaibhav on the spot that all the three accused had assaulted him. The police recorded statements of various witnesses including the aforementioned two eye

witnesses, son of the deceased namely Kunal and nephew of the deceased namely Vaibhav who spoke about the oral dying declaration. The cycle chain was recovered at the instance of the accused no.1. Clothes of the accused were seized and after completion of investigation, charge-sheet was filed in the Court of JMFC, Jawhar. Thereafter, the case was committed to the Court of Sessions for trial. Charge under Section 302 read with 34 of the IPC was framed against the accused to which they pleaded not guilty and claimed to be tried,

6. During trial, the prosecution examined 14 witnesses. PW 5 Chandrabhaga Patil and PW 6 Sunderabai Bande claim to be eye witnesses. PW 8 Kunal Patil, son of the deceased and PW 9 Vaibhav Patil, nephew of the deceased, were examined on the point of oral dying declaration made by the deceased to Vaibhav. PW 2 Digambar Patil, younger brother of the deceased and PW 3 Chandrakala Patil, widow of the deceased, deposed about the enmity between the accused and the deceased and they have also deposed about the fact that the deceased was taken by the accused no.3 on his motorcycle. They have further deposed that at about 4.00 p.m., the accused no.3 came to their house and informed that the deceased was assaulted by the accused no.1 and he was lying near Shirasgaon bypass. Besides these important witnesses, PW 1 Dinkar Khade was the panch who was present when the spot panchanama was carried out. PW 4 Barkat Inamdar was the panch for inquest panchanama. PW 10 Vasant Gare was a panch for recovery of the cycle chain at the instance of the accused no.1. PW 11 Afzal Shaikh was the panch for seizure of

clothes of the accused no.1. PW 12 Pandurang Dalvi was another panch for seizure of the clothes of the accused no.1. PW 13 PI Shivaji Shelar was the first Investigating Officer and PW 14 PSI Sidhram Ghate had conducted the further investigation. PW 7 Dr. Surajkumkar Pandirkar was the Medical Officer who had conducted the post-mortem examination on the dead body of the deceased and he had found about 10 injuries including 2 stab wounds and 2 incised wounds on the dead body of the deceased. There were imprint chain marks also on the dead body. In his opinion, the stab wound over the left 9th intercostal space and another stab wound on the stomach were sufficient to cause death in the ordinary course of nature and according to him, the death was due to massive hemorrhage due to injuries to spleen. In his cross-examination, he has admitted that there was profused bleeding and he has further admitted, that in the event of such profused bleeding, because of rupture of spleen, instant death is probable and that because of such profused bleeding, instant death was certain. After recording the evidence and the statements of the accused under Section 313 of the Cr.P.C. and hearing the arguments of both sides, the learned trial Judge was pleased to convict and sentence the accused as mentioned hereinabove.

7. We have heard Mrs. Anjali Awasthi, learned Counsel for the Appellants in Criminal Appeal No.573 of 2008, Mrs. Sonia Miskin, learned Counsel for the Appellant in Criminal Appeal No.266 of 2010 and Ms. R. M. Gadhvi, learned APP, on behalf of the State of Maharashtra in both these Appeals. With their assistance, we have

read the entire evidence and we have gone through the record and proceedings.

8. The prosecution case is based on the direct evidence as well as the circumstantial evidence. The direct evidence consists of the deposition of PW 5 Chandrabhaga Patil and PW 6 Sunderabai Bande. PW 5 Chandrabhaga has deposed that on 08/05/2006 at about 4.00 p.m., she and Sunderabai were returning home after fetching water from the well belonging to Shri Mombala. When they reached Shirasgaon bypass, she saw that the accused no.2 was holding hands of Mohan Patil and the accused no.1 was assaulting him by means of chain and knife. The accused no.3 was instigating them and was telling them to kill him. She has further deposed that the accused no.3 threatened them and told them not to come forward. After the incident, the accused nos.1 and 2 went towards Village Devbandh and accused no.3 went towards Village Adoshi. This witness, along with PW 6 Sunderabai then gave water to Mohan and thereafter Mohan's son Kunal and nephew Vaibhav came there on the motorcycle. Mohan was made to sit on the motorcycle and was taken to the hospital. PW 6 Sunderabai Bande has also deposed exactly the same story. Both of them have identified the knife and the chain produced before the Court and they have identified the accused before the Court. During the cross-examination of PW 5, she has admitted that there was one well near the river of the village and villagers used water from that well for drinking purposes. She has admitted that Shirasgaon bypass is at a distance of about one mile from her residence. She has further

admitted that the well situated at Umbarde is near in comparison and that it was exactly opposite to the well situated at Mombala. She has further admitted that at the relevant time, digging work of the well at Mombala was going on. PW 6 Sunderabai, in her cross-examination, has admitted the fact that she had gone to fetch water from the well known as Mombala well, was not appearing in her police statement.

The analysis of their evidence shows that they are purely chance witnesses. They had no reason to go to the Mombala well to fetch water as the work of digging that well was still going on. PW 6 had not even told the police that she had gone to fetch water at Mombala well. Therefore, their evidence needs to be scrutinized carefully. PW 8 and PW 9 who had come on the spot, have not deposed to about the presence of these two witnesses PW 5 and PW 6 at the spot. This assumes even more importance because PW 5, in para 8 of her cross-examination, has stated that she had narrated the incident to PW 8 Kunal and PW 9 Vaibhav. However PW 8 and PW 9 have not stated about any such disclosure in their evidence. Importantly, these witnesses PW 5 and PW 6 have not given their statements to the police immediately and their statements came to be recorded on 11/05/2006. PW 6, in fact, in para 6 of her cross-examination, has admitted that the police had suggested them to be the witnesses and therefore they acted as witnesses in the present case. PW 6 has also stated that the statement of PW 5 was recorded in her presence and their statements were recorded under one tree. The evidence of PW 5 shows that she was in constant touch with the family of the deceased and had narrated the incident to the family of

the deceased and yet none of them had asked her to approach the police and tell the story. She, on her own, also did not approach the police to give her story. This witness has tried to suppress the fact that she was a relative of the deceased and she had denied the suggestion that her husband was cousin of the deceased Mohan. This deliberate suppression of the fact shows that she is an interested witness and is not telling the truth, whereas PW 8 Kunal, in para 8 of his cross-examination, has admitted that this PW 5 is his 'cousin aunt'. In these circumstances, we do not find that evidence of PW 5 and PW 6 is reliable.

9. PW 8 Kunal and PW 9 Vaibhav are the son and nephew of the deceased Mohan respectively. PW 8 Kunal has stated that at about 3.45 to 4.00 p.m., one Pandurang came to their field and shouted that Kunal's father Mohan was lying near Shirasgaon bypass. Thereafter both he and PW 9 Vaibhav rushed to the spot on motorcycle and saw that Mohan was lying in a pool of blood and had sustained knife injury on his stomach. He has deposed that PW 9 Vaibhav asked Mohan as to what had happened to which Mohan replied that all the three accused had assaulted him. Thereafter he was taken to Khodale Government Hospital but he was declared dead. Similar version is deposed to by PW 9 Vaibhav. Their versions have to be tested in the light of the medical evidence and the deposition of Dr.Pandirkar. According to these witnesses PW 8 and PW 9, they were present in the field. Pandurang came and told them that Mohan was lying near Shirasgaon bypass. Now, obviously, Pandurang had

seen him lying on the spot after the incident had taken place. Therefore, he had reached the field after some time from the incident and thereafter it took further time for Kunal and Vaibhav to reach the spot. PW 8 Kunal, in para 7 of his cross-examination, has stated that their field is about 5 to 10 minutes walk from the Shirasgaon bypass where the deceased was lying. Therefore, at least some time must have been consumed before Kunal and Vaibhav reached the spot after the incident. The Medical Officer has opined that looking at the nature of injuries and the profused bleeding, the instant death was certain. Therefore in this view of the matter, it is extremely doubtful as to whether the deceased was surviving when both these witnesses reached the spot and therefore it was not possible for him to make any oral dying declaration before these two witnesses. Significantly, even the statements of these two witnesses were not recorded by the police immediately. PW 8 Kunal has admitted that on 08/05/2006 itself police had been to their residence and yet these witnesses have not told police about the oral dying declaration. Nobody from their family had lodged any report with the police on 08/05/2006. PW 9 Vaibhav has admitted that when they had reached the hospital, the police were there but even this witness has not disclosed the incident narrated by the deceased to police. It is only on 11/05/2006 that for the first time, the statements of these two witnesses were recorded and the theory of oral dying declaration was informed to the police. Thus, the evidence of these two witnesses is not reliable to hold that the deceased had made any dying declaration to them implicating the accused.

10. Further reference to the evidence of these witnesses indicates that PW 9 Vaibhav has admitted that deceased Mohan was physically stout and PW 5 Chandrabhaga has admitted that the accused no.1 was physically handicapped and for walking and even for standing he needed to take help of his hands. Therefore, it is very difficult to believe that the accused no.1 could have assaulted the deceased in the manner alleged even with the help of accused no.2.

11. PW 2 Digambar Patil, the younger brother of the deceased and PW 3 Chandrakala Patil, widow of the deceased, were examined on two aspects i.e. to establish the enmity between the accused and the deceased and also to establish the fact that the accused no.3 had taken the deceased with him on that day and had further informed them at about 4.00 p.m. that the deceased was assaulted by the accused no.1. Even the statements of these two witnesses were not recorded immediately and it is only after 11/05/2006 that their statements came to be recorded. In our opinion, as rightly submitted by the learned Counsel for the Appellants, there was sufficient time for deliberation and consultation amongst all the prosecution witnesses to name the accused. There is absolutely no reason as to why the facts which were known to these witnesses were not informed to the police immediately. The motive as alleged by these two witnesses PW 2 and PW 3 appears to be feeble. Just because the accused no.1 was not given sufficient loan amount or was not given the certificate of residence, it can hardly be a motive to commit murder. There is no piece of corroborating evidence to show that the

accused no.1 had applied for certificate of residence or had applied for loan from the Grampanchayat. Therefore, we are inclined to hold that this motive was not strong enough for the accused no.1 to commit the murder of the deceased. Both these two witnesses have deposed that the accused no.2 held a grudge against the deceased because he was interfering with the allotment of work of digging wells. The accused no.2 was in-charge of allotting the work and he did not like the interference caused by the deceased. Even this does not seem to be a strong enough motive for the accused no.2 to take this extreme step. The accused no.3 was given work of digging a few wells and the prosecution has not brought on record that there was any irregularity in the said work or that the deceased had caused any loss to the accused no.3 in that behalf. Therefore, even this motive does not appear to be strong enough. In any case, the version of these witnesses is an afterthought because they have given their statements after an unexplained delay of at least three days.

12. The prosecution has relied on the document dated 11/05/2006 described as the complaint given by the PW 2 which is exhibited at Exh.22. The learned Counsel for the Appellants rightly submitted that this document should not have been exhibited as it is neither an FIR nor an admissible document. However, the said document was marked as Exh.22 in the said trial. Since we hold that, this document was not admissible, we need not refer to the same, except for the fact that the said witness PW 2 had made some grievance in writing before the police.

13. There is another disturbing aspect of this case in respect of lodging of FIR by the accused no.3 himself. The prosecution made no attempts to bring the said document on record. However, the evidence indicates that the investigation started only after this FIR was lodged by the accused no.3 and based on it, an offence was registered vide C.R.No.I-11/2006 at Mokhada Police Station under Section 302 of the IPC. This document was referred to in the cross-examination on behalf of the accused no.3 of PW 13. The learned Judge, in the impugned Judgment, has relied on the said report. However, as rightly pointed out by the learned Counsel for the accused no.1, the contents of this document were not proved because, firstly, the author of this document was accused no.3 himself and he was not a witness and secondly, none of the prosecution witnesses has proved the contents of this document. Therefore, the contents of this document having not been proved, cannot be taken into consideration. However, the fact remains that the accused no.3 had lodged some FIR at 8.05 p.m. at Mokhada Police Station which was the starting point of the investigation. Again, there is a serious lapse on the part of the prosecution because they have not provided the link as to at exactly what point of time the accused no.3 was shown as an accused instead of the first informant. The statements of the witnesses were recorded on 11/05/2006 implicating the accused no.3 and he was arrested only in the month of July 2006 and there is nothing to show on record that the accused no.3 was absconding. Therefore, it is not clear as to how and when the accused no.3 was roped in as an accused. It appears

from the investigation that it is a result of the statements given by the witnesses after consultation and deliberation amongst themselves and therefore their evidence of the prosecution case cannot be held to be proved beyond reasonable doubt against the accused.

14. There are other circumstances alleged against the accused. The first of these is recovery of cycle chain at the instance of the accused no.1 and for this purpose, PW 10 is examined as a panch who was present at the time of recovery of cycle chain from the house of the accused no.1 at his instance. However, his deposition merely states that after production of the cycle chain, it was seized by the police but there is no further reference to show that it was sealed properly by the police and therefore though the CA report shows presence of 'O' group blood on the said cycle chain, in the absence of cogent evidence regarding proper sealing of the said chain, the said circumstance cannot be held against the accused no.1. For the purpose of seizure of clothes of accused no.1, the prosecution has examined PW 11 Afzal Shaikh and PW 12 Panduang Dalvi. Though these clothes show presence of blood of 'O' group which, apparently, was the blood group of the deceased, the seizure of the clothes from the accused no.1 was not proper because PW 11, in his examination-in-chief itself, has stated that those clothes were already taken out and kept on table and they were told that those clothes were of the accused Vilas. In such circumstances, not much reliance can be placed on the seizure and subsequent analysis of the clothes of the accused no.1. Moreover, the prosecution has not eliminated the possibility

that even the accused no.1 was having blood group 'O'. Therefore, even this circumstances is not in favour of the prosecution.

15. Thus, after analyzing the evidence as above, we are of the opinion that the prosecution has failed to prove its case against all the accused beyond reasonable doubt. Hence the following order.

ORDER

- (i) Both the Appeals are allowed.
- (ii) The conviction and sentence awarded by the IV Additional Sessions Judge, Thane, in Sessions Case No.298 of 2006, in respect of the accused nos.1, 2 and 3 convicting them for an offence punishable under Section 302 read with 34 of the IPC and sentencing them to suffer life imprisonment and to pay a fine of Rs.500/-, are set aside and the accused are acquitted of the charges levelled against them.
- (iii) The accused are in jail. They be released forthwith, if not required in any other case.
- (iv) High Court Legal Aid Service Authority is directed to pay Rs.10,000/- (Rupees Ten Thousand Only) each to Mrs. Anjali Awasthi and Mrs. Sonia Miskin, Appointed Advocates, for their efforts in assisting this Court during the hearing of both the Appeals.
- (v) Both the Appeals are disposed off in the aforesaid terms.

(SARANG V. KOTWAL, J.)

(A. A. SAYED, J.)