

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 267 OF 2018

Umesh Bharat Gaikwad,
Age 25 years, Occu. Agriculturist,
R/o. Samarkundi, Tq. Washi,
Dist. Osmanabad.

....Appellant.

Versus

The State of Maharashtra

....Respondent.

Mr. S.J. Salunke, Advocate for appellant.

Mrs. V.S. Choudhary, APP for respondent/State.

**CORAM :T.V. NALAWADE AND
SMT. VIBHA KANKANWADI, JJ.**

DATED : 03/10/2018.

JUDGMENT : [PER T.V. NALAWADE, J.]

1) The appeal is filed against judgment and order of Sessions Case No. 126/2014 which was pending in the Court of learned Additional Sessions Judge, Bhoom, District Osmanabad. The appellant is convicted for the offence punishable under section 302 of Indian Penal Code (hereinafter referred to as 'IPC' for short) and he is sentenced to suffer imprisonment of life and to pay fine. Heard both the sides.

2) The facts leading to the institution of the appeal can be stated as follows :-

Deceased Kashinath Gaikwad was the father of first

informant Satish (PW 1) and husband of Ashrubai (PW 2). They were living in village Samarkundi and they had three acres of land in land Gat No. 117 situated at Samarkundi Shivar. Bharat Gaikwad (accused No. 2) is from Bhavki of this family and he was owner of three acres portion from the said Gat number. This portion was sold by Bharat to Chand Tamboli (accused No. 3) of the same village. Accused No. 4 Papa is brother of accused No. 3. Accused No. 1 Umesh, who is convicted by the Trial Court is son of Bharat. Bharat died during the pendency of case in Sessions Court.

3) The incident in question took place on 25.12.2013. On that day the first incident of quarrel took place at 12.00 noon in aforesaid filed. The deceased, first informant and the wife of deceased were all present in their portion of the land and at that time, all the accused came there with J.C.B. machine. When accused started creating *Bandh* between the portion of land of complainant's family and portion of land purchased by Chand, the deceased went ahead and requested the accused not to create *Bandh* unless respective portions were got measured. Due to that, accused became angry. They stopped the work and left the filed after giving threat to teach them lesson.

4) On 25.12.2013 itself at 7.00 p.m. when the first

informant, deceased and Ashrubai were returning from aforesaid field on motorcycle, their motorcycle was intercepted by accused Nos. 2 to 4 at Samarkundi Phata, a Chowk. After intercepting the vehicle, accused Nos. 2 to 4 said that they wanted to have talk with deceased and so, the deceased got down from motorcycle and started having talk with them at some distance from motorcycle. Accused No. 1 Umesh then emerged on scene of offence all of a sudden and he came running with iron bar and gave blow of iron bar on the head of Kashinath from the backside of Kashinath. The first informant felt that accused No. 1 Umesh had intention of murder. Kashinath collapsed due to this blow and he sustained bleeding injury. The first informant and his mother rushed to the spot. Then all the accused ran away. First informant and Ashruba first shifted the deceased to Washi Government Hospital. From there, the deceased was shifted to Osmanabad Civil Hospital and from there, deceased was shifted to Civil Hospital, Solapur. In Solapur, operation was performed on Kashinath. He was unconscious through and he succumbed to injuries on 4.1.2014. On 3.1.2014 first informant Satish gave report to Washi Police Station in respect of the incident and on that basis, the crime at C.R. No. 3/2014 came to be registered at 19.15 hours for offences punishable under sections 307, 504, 506 and 34 of IPC against all the four accused. After the death of Kashinath, the crime was converted to make it for the

offence of murder.

5) On 3.1.2014 Washi police prepared panchanama of the spot where the assault had taken place in the presence of panch witnesses between 19.30 hours and 20.15 hours. Nothing was found on the spot. The statements of witnesses like Ashrubai came to be recorded during investigation. All the accused came to be arrested.

6) While in police custody, accused No. 1 gave statement under section 27 of Evidence Act in the presence of panch witnesses to police and on the basis of that statement the weapon iron bar came to be recovered. Article, iron bar was sent to C.A. Office. Chargesheet came to be filed for aforesaid offences. When the charge was framed and plea was recorded, the accused pleaded not guilty.

7) Prosecution examined in all nine witnesses to prove the offence. No defence witness is examined. The trial Court believed both the eye witnesses and convicted accused No. 1 as he had inflicted the vital blow on the head of the deceased. The points raised by the counsel of the appellant are being discussed at proper place in the reasoning.

8) The reasoning given by the Trial Court and the tenor of the cross examination of the prosecution witnesses show that the defence disputed that it is a case of homicide. Suggestion is given to PW 4 Dr. Bhoi, who conducted P.M. examination that injuries found on the head can be caused due to accidental fall. Doctor has given admission that the injury found on the left side of the head can be caused due to such kind of fall. There is no specific evidence about such probability in respect of the injury found on the right side of the head. In view of the nature of defence taken and in view of the other circumstances like delay caused in giving report and absence of the record of two hospitals like Washi Government Hospital and Osmanabad Civil Hospital, it is desirable to consider the direct evidence and also the medical evidence together to ascertain as to whether it is a case of homicide.

9) Satish (PW 1) and his mother Ashrubai (PW 2) have given evidence on motive by narrating two separate incidents of the same day. They have given evidence that accused No. 2 Bharat had sold the portion of his land from Gat No. 117 which was 3 Acre to accused No. 3 Chand. Evidence is given that the land of the family of the first informant is situated adjacent to the land of accused No. 2. Evidence is given that the transaction of sale had taken place about one and half months prior to the date of incident. Evidence is given

by these two witnesses that at 12.00 noon on the day of incident all the accused came to the portion purchased by Chand with J.C.B. machine and they started creating *Bandh* between the portions of family of complainant and of Chand. Evidence is given that the deceased, first informant and Ashrubai were already present in the field and after starting of the work of creating *Bandh* the deceased went ahead and requested the accused to get measure the land first and then make the construction of *Bandh*. These two witnesses have given evidence that, upon that, the work was stopped and all the accused gave threat to teach lesson to them and they went away.

10) The evidence of Satish (PW 1) shows that the portion which was purchased by them from Bharat was initially owned by Shiva, uncle of Kashinath. From Shiva, land was purchased by Bharat and then that portion was sold to Chand. This circumstance shows that already boundaries were known and in ordinary circumstances, there must have been *Bandh* created between the two portions prior to the date of sale deed. Thus, there was probability that there was no question or requirement of creation of new *Bandh* for accused Chand. There is circumstance like police never visited land Gat No. 117 to ascertain as to whether on the day of incident, accused had done some work by using J.C.B. machine and so, not much weight can be given to the evidence given on

motive by Satish (PW 1) and Ashrubai (PW 2) of aforesaid nature.

11) The evidence of Satish (PW 1) and Ashrubai (PW 2) shows that Washi - Samarkundi road is situated adjacent to the land Gat No. 117. The lands of others like Babasaheb, Vasant and others are situated in the vicinity of land Gat No. 117. There is no witness on the incident which took place in the noon time in land Gat No. 117. From other fields or from the road somebody could have witnessed the incident. When J.C.B. machine was brought, it must have been brought there with the driver or the owner of J.C.B. machine. The evidence of Investigating Officer shows that inquiry was made with the owner of J.C.B. machine and it revealed that J.C.B. machine was not taken to Gat No. 117. That witness is not examined by the prosecution and so, this Court holds that there is lacuna in the case of prosecution about the evidence on motive. This lacuna has created doubt about the case of prosecution on motive, reason behind the incident. When it is specific case of first informant and his mother that the work of excavation of length of 5 to 10 feet was done and J.C.B. machine was used, it was necessary for investigating agency to visit that spot and prepare the panchanama. Due to absence of such material, this Court holds that the evidence on motive is not believable. However, it cannot be said that the complainant's side had the grievance against the accused and the

dispute must have been started after sale of land by Bharat to Chand.

12) Satish (PW 1) and Ashrubai (PW 2) have given evidence that on the day of incident after completing work, they left the field in the evening and they together were returning to Samarkundi village on motorcycle. They have given evidence that at Samarkundi Phata, their motorcycle was intercepted by accused Nos. 2 to 4 and it was after 7.15 p.m. Evidence of Satish (PW 1) in the cross examination shows that other adjacent field owners go to village Samarkundi directly from their respective fields and they do not go by Samarkundi Phata. Ashrubai (PW 2) has specifically admitted that their village Samarkundi is situated on the south side of the field and Samarkundi Phata is situated to the eastern side of the field. It is also brought on the record that there are more than 40 shops and other commercial activities were going on at Samarkundi Phata and there are hotels. It is also admitted that so many persons of Samarkundi village go to Samarkundi Phata every day. In spite of all these admissions and the circumstances that the incident took place at 7.15 p.m. and as there is always traffic at the spot, there is no evidence of independent witness on the incident of assault. In the cross examination of the witnesses, it is brought on the record that sweet mart shop of accused No. 3 Chand is situated at Phata. It can

be said that there was reason for accused Nos. 3 and 4 to remain present in the vicinity of Phata. But that does not mean that all the accused knew that deceased was to return by Phata. The distance between the Phata and Samarkundi village is said to be 2 k.m. by Satish (PW 1). Evidence is given that accused No. 1 was not seen initially by both the witnesses and he all of a sudden emerged on scene of offence and he came running with iron bar. This evidence does not appear to be probable in nature. If three accused who were already present on the spot and they had some intention, they would have started the incident immediately after intercepting the motorcycle. But that did not happen. There is no independent corroboration to the evidence of Satish (PW 1) and Ashrubai (PW 2) even when the incident must have been continued for quite some time as after interception of the vehicle the deceased had started having talk with accused Nos. 2 to 4 after walking up to some distance with them.

13) The evidence of Satish (PW 1) shows that after interception of vehicle he had parked his vehicle. Evidence is given that he could see that accused No. 1 was running towards the deceased and he was having iron rod in his hand. In ordinary course, he would have rushed forward to prevent accused No. 1 from assaulting the deceased and Ashrubai (PW 2) also would have

rushed forward. Their evidence does not show that they rushed forward and their evidence shows that only after giving one blow on the head of the deceased from backside by accused No. 1, they rushed forward. Evidence is given that only one blow was given and all accused went away, ran away. The evidence does not show that accused Nos. 2 to 4 had even picked up quarrel with the deceased at Phata.

14) The evidence of Satish (PW 1) and Ashrubai (PW 2) in the cross examination shows that they could get the conveyance (Tumtum) immediately after the incident for shifting the deceased to Washi Government Hospital. They were not required to search for conveyance. The spot panchanama shows that one shop is situated at the distance of hardly 10 ft. from the spot of incident, but even that shop keeper did not come forward to narrate the incident to police. The spot panchanama speaks loud about all these things. The owner of the conveyance could have been traced and police could have recorded his statement, but that was not done. These circumstances show that the investigation was not made fairly.

15) Evidence is given by Satish (PW 1) and Ashrubai (PW 2) that deceased was first shifted to Washi Government Hospital. From there, he was shifted to Osmanabad Civil Hospital and then to Civil

Hospital, Solapur. Though in the night time itself deceased was reached to Civil Hospital Solapur, the fact remains that the deceased was first taken to two Government Hospitals and there some record must have been created about the injuries sustained by the deceased and about the history given. In view of the nature of injury, the case must have been treated as medico legal case. No such record was collected by the investigating agency. There is only transfer certificate issued by Osmanabad Hospital to shift the deceased to Civil Hospital, Solapur. In the history of Solapur Hospital, there is a mention that it was M.L.C. In view of these circumstances and in view of the circumstance that much delay was caused in giving the F.I.R. by Satish (PW 1), it was necessary for investigating agency to collect the record from aforesaid two hospitals. Absence of such record shows that investigating agency was not fair. There is clear probability that the history, which is not suitable to prosecution case was given and such inference can be drawn due to such lacuna.

16) The evidence given by Satish (PW 1) and Ashrubai (PW 2) that from the spot, they directly went to Washi Hospital does not appear to be probable in nature. Their evidence shows that for going to Washi from Samarkundi Phata one has to go by Samarkundi village. It does not look probable that they avoided to go to village.

Some arrangement atleast of collecting money for giving treatment needs to be made. Evidence of Satish (PW 1) shows that he was using mobile phone. He did not contact anybody of village Samarkundi and his evidence shows that he did not talk to in-laws, who are residents of Washi. All these circumstances show that nothing was natural and the witnesses have tried to hide many things.

17) Dr. Bhai (PW 4) who conducted P.M. examination has given evidence on P.M. report, Exh. 39. He noticed two injuries on the dead body. There was one therapeutic stitched wound of craniectomy operation on right side of head and there was other injury on the left side of head which was abrasion of the size of 2 cm x 1 cm. Scab was developed in the second injury and age of the injury is said to be seven days. No specific evidence is given by Doctor that due to injury which was found on the left side of the head, damage was caused to the skull and to the brain. On the contrary, evidence is given by the doctor that the injury on the right side was caused by hard and blunt object, due to assault and that injury had caused depressed fracture on right side and there was hemotoma of the size 20 cm x 13 cm on right side and it was on the backside also of the size of 10 cm x 8 cm. Subdural hemorrhage was also present all over the brain surface. Evidence is given that death

took place due to head injury which is mentioned in column No. 19. The case papers show that injury from column no. 19 was caused depressed fracture.

18) The evidence of Dr. Bhoi (PW 4) shows that there were two separate injuries on the head. According to Satish (PW 1) and Ashrubai (PW 2), only one blow of iron bar was given, but that too from backside. It is not their case that the left side injury was caused on the spot. In view of the age of injury given by the doctor, it can be said that there is no explanation about the injury No. 2 from Satish (PW 1) and Ashrubai (PW 2). For these reasons also the record of Washi Government Hospital and Osmanabad Civil Hospital was necessary. The depressed fracture was at right parietal occipital side of the bone and the direct evidence is to the effect that from backside one blow was given. All these circumstances show that the direct evidence is not that consistent with the medical evidence. The doctor has, however, not given specific evidence that injury mentioned in column No. 19, depressed fracture of skull can be caused by simply fall and due to this circumstance, there is clear probability that this injury was caused in an assault and it is a case of murder.

19) The prosecution has given evidence on statement given

under section 27 of Evidence Act by accused No. 1 to police in presence of panch witnesses. This statement is proved in the evidence of panch witness Shri. Ingole (PW 7). The statement was given on 5.1.2014. On the basis of that statement, one iron bar was recovered from a drainage channel situated near Yashoda Hotel which is in the vicinity of Samarkundi Phata. The record is at Exhs. 63 and 64. The cross examination of panch witness shows that two welding shops are situated in the vicinity of this drainage channel. Thus, the recovery was made from open space. No blood was detected on it. In view of these circumstances, it is not possible to safely infer that the same iron bar was used to assault the deceased.

20) There is one more circumstance. The evidence shows that panch witnesses were either relatives of the complainant's family or they were known to the complainant's family. Though evidence of panchanamas is not that incriminating in nature, the fact remains that this circumstance shows that the investigation was not made fairly and evidence is of all the interested witnesses.

21) It is already observed that no evidence of owner of J.C.B. machine is given. Evidence on spot panchanama also shows that not a single drop of blood or any circumstance was found on the spot shown by the first informant to create probability that some incident

had taken place there. This may be due to delay caused in giving of the F.I.R. But the fact remains that there is no circumstantial check, corroboration to the direct evidence even of the nature of spot panchanama. That circumstance creates doubt about the case of prosecution that all the accused were waiting for the deceased at Samarkundi Phata and they had intention to assault him.

22) The aforesaid oral evidence has created following circumstances against the prosecution case.

(i) The F.I.R. was given very late. When the incident took place on 7.30 p.m. of 25.12.2013, the F.I.R was given on 3.1.2014 at 19.15 hours. There is virtually no explanation on this delay.

(ii) The record of medical treatment which must have been prepared in Washi Government Hospital and Osmanabad Civil Hospital is not collected by police. The record of Solapur Civil Hospital shows that the case was treated as M.L.C. and Osmanabad hospital had transferred the deceased to Solapur Hospital. The absence of record of the two hospitals has created a probability that the information given to other two hospitals was not consistent with the case of prosecution. Thus, the first information given to doctor

and police on 25.12.2013 is suppressed by the prosecution. There is clear probability that F.I.R. dated 3.1.2014 is afterthought. Four accused are shown as persons participated in the incident and so, it is difficult to believe that accused No. 1 gave the blow of iron bar on the head of deceased in the presence of PW 1 and PW 2.

(iii) The evidence of prosecution witnesses Satish (PW 1) and Ashrubai (PW 2) that they did not disclose the incident to anybody prior to 3.1.2014 shows that their conduct was not natural. Their evidence shows that they probably did not witness the incident of assault. There is no circumstantial check to their direct evidence.

(iv) The evidence given by Satish (PW 1) and Ashrubai (PW 2) and the evidence of spot panchanama shows that in the vicinity of the spot shown by PW 1 as spot of offence, there are more than 40 shops. One shop was at the distance of 10 ft. In spite of these circumstances and also the admission that the villagers of Samarkundi village regularly visit Samarkundi Phata, there is no independent witness with the prosecution to show that some incident of assault took place at 7.15 or 7.30 p.m. at Samarkundi Phata.

(v) The auto, conveyance in which the deceased was shifted from the spot was not traced. The first disclosure must have been made to the driver of the auto vehicle. The absence of evidence of such witness also creates doubt about the direct evidence given by PW 1 and PW 2.

(vi) Many lacunae noticed by the Court show that investigation was not made fairly and competently. The first disclosure which could have been treated as F.I.R. under section 154 of Cr.P.C. is suppressed.

(vii) Dr. Bhoi (PW 4), who conducted P.M. examination gave opinion that the injury found on the left side of head can be caused due to fall. The age of the injury is given as seven days. No evidence is given by PW 1 and PW 2 that such injury was caused in any fall. This again creates doubt about the version of PW 1 and PW 2 that in their presence assault was made on the deceased.

(viii) In ordinary course, if PW 1 and PW 2 were present on the spot, they would have intervened in the incident and they would have scuffle with accused. No such evidence is given and that circumstance also shows that conduct of PW 1 and PW 2 was not natural.

(ix) No investigation was made by police by visiting the

field to ascertain as to whether some work was done by using J.C.B. machine in the land of accused Chand when there is oral evidence of aforesaid nature given by the prosecution witness. The owner of J.C.B. machine was known. His statement was recorded. The evidence of Investigating Officer shows that the inquiry did not reveal that any incident had taken place in the field in the noon time. Thus, the evidence on motive is very weak in the present matter. In the present matter, four persons are shown as accused, one fatal injury was found and there is belated F.I.R. that accused No. 1 gave the blow on the head of the deceased. He is son of accused No. 2 and in ordinary course, when the land was already sold, there was no reason for accused No. 1 or accused No. 2 to go to the field after one and half months of the incident and to create dispute. This circumstance creates probability that out of suspicion the names of the accused were given. Further, there is no circumstantial check to the direct evidence. Due to all these circumstances, the direct evidence has become highly doubtful in nature and it is difficult to base conviction on the basis of such direct evidence.

23) The learned counsel for appellant placed reliance on the observations made by the Apex Court in the case reported as **AIR 1973 SUPREME COURT 501 [Thulia Kali Vs. The State of T.N.]**. This case is on the consequences of delay caused in giving of F.I.R. and the observations are at para No. 12 as under :-

"12. It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami PW was not found at his house till 10.30 p.m. on March 12, 1970 by Valanjiaraju, it is, not clear as to why no report was lodged by Valanjiaraju at the police station. It is, in our opinion, most difficult to believe that even though the accused had been seen at 2 p.m. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came, to know of the death of Madhandi deceased on the evening of March 12, 1970. They did not then know about the

actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as names of eye witnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia, daughter-in-law of Madhandi deceased, according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, stepson of the deceased, is also alleged to have arrived near the scene of

occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it."

There are also observations on effect of non examination of material witness and they show that adverse inference is possible as provided in section 114 of Evidence Act.

24) In the present matter, no explanation at all is there on the delay caused in giving of the report. On the contrary, the evidence is given that the incident was not disclosed to anybody till 3rd of the next month. As there is no independent witness on the incident and there is no circumstantial corroboration, the circumstance of delay caused in giving F.I.R. is fatal in the present matter. The non production of record of Washi Police Station of the day of incident showing that intimation was received from Washi Government Hospital and non production of the record of Washi

Government Hospital and Osmanabad Civil Hospital is also important lacuna in the present matter. Benefit of that circumstance also needs to be given to the accused. For corroboration of direct evidence given under section 3 of the Evidence Act, there ought to have been material which can be treated as relevant under provisions of sections 6, 7 and 8 of the Evidence Act and that material ought to have been collected and produced before the Court. That is not done and so, the conviction is not possible on the basis of direct evidence. This Court holds that it is not safe to give conviction and interference is warranted in the decision given by the Trial Court against the appellant. In the result, following order.

ORDER

1. The appeal is allowed.
2. The judgment and order in Sessions Case No. 126 of 2014 dated 23.2.2018 of the learned Additional Sessions Judge, Bhoom, District Osmanabad convicting the present appellant for the offence punishable under section 302 of Indian Penal Code sentencing him for imprisonment for life and pay fine is hereby set aside.
3. He stands acquitted of offences for which charge was framed.
4. He is to be set at liberty forthwith from jail.
5. Fine amount, if any, deposited is to be returned to him.

6. Personal bond of Rs.15,000/- (Rupees fifteen thousand) with surety bond of similar amount is to be obtained from him as provided under section 437-A of the Code of Criminal Procedure.

[SMT. VIBHA KANKANWADI, J.]

[T.V. NALAWADE, J.]

SSC/

Salim
Shafi
Choudhari

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by Salim Shafi
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