

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

CRIMINAL APPEAL NO. 396 OF 2013

1. Madhukar s/o Dharma Rathod,
Age 31 years, Occ. Agriculture
R/o. Hingni, Tq. Mahur,
District Nanded
 2. Kailash s/o Kishan Rathod
Age 24 years, Occ. Agriculture,
R/o. As above.
 3. Vijay s/o Dharma Rathod
Age 26 years, Occ. Agriculture,
R/o. As above.
 4. Sudam s/o Dharma Rathod,
Age 34 years, Occ. Agriculture,
R/o. As above.
 5. Kisan s/o Somla Rathod
Age 58 years, Occ. Agriculture,
R/o. As above.
 6. Dharma s/o Somla Rathod,
Age 69 years, Occ. Agriculture,
R/o. As above.
 7. Gajanan s/o Pandu Rathod,
Age 24 years, Occ. Agriculture,
R/o. As above.
- ...Appellants
(Ori. Accused)

versus

The State of Maharashtra

...Respondent

.....
Mr. Sagar Ladda, advocate for the appellants
Mr. D.R. Kale, A.P.P. for respondent-State
.....

**WITH
CRIMINAL APPEAL NO. 170 OF 2014
WITH
CRIMINAL APPEAL NO. 441 OF 2015**

The State of Maharashtra,
Through Police Station Officer
Police Station Mahur,
Tq. Mahur, District Nanded ...Appellant

versus

1. Vijay s/o Dharma Rathod
Age 22 years, Occ. Agriculture,
2. Sudam s/o Dharma Rathod,
Age 30 years, Occ. Agriculture,
3. Kisan s/o Somla Rathod
Age 54 years, Occ. Agriculture,
4. Gajanan s/o Pandu Rathod,
Age 20 years, Occ. Agriculture,

All R/o. Hingni, Tq. Mahur, ...Respondents
District Nanded (Ori. Accused Nos. 3
to 5 and 7)

.....
Mr. D.R. Kale, A.P.P. for appellant-State
Mr. Sagar Ladda, advocate for the respondents
.....

**CORAM : S. S. SHINDE AND
V. K. JADHAV, JJ.**

**Date of Reserving
the Judgment : 04.07.2018**

**Date of pronouncing
the Judgment : 16.08.2018**

JUDGMENT (PER V.K. JADHAV, J.):-

1. By way of criminal appeal no. 396 of 2013, the appellants therein who are original accused, challenge the judgment and order dated 31.07.2013 passed by the learned Additional Sessions Judge, Nanded in Sessions Case No. 181 of 2009 thereby convicting the appellants No. 1, 2 and 6 (original accused Nos.1, 2 and 6) for the offences punishable under Section 302 r.w. 149 of I.P.C. and sentencing each of them to suffer R.I. for life and to pay fine of Rs.1000/- each i/d to suffer R.I. for three months. The rest of the appellants i.e. appellant Nos. 3 to 5 and 7 have been convicted for the offences punishable under Section 326 r.w. 149 of I.P.C. and sentenced them to suffer R.I. for four years and to pay fine of Rs.500/- each i/d to suffer further R.I. for three months.

2. The State of Maharashtra has also filed criminal appeal Nos. 170 of 2014 and 441 of 2015 against the very same judgment and order seeking enhancement of sentence of the respondents i.e. original accused Nos. 3 to 5 and 7 and against the acquittal of the respondent original accused Nos. 3 to 5 and 7 of the offence punishable under Section 302 r.w. 149 of I.P.C., respectively.

3. The prosecution version, as unfolded during trial, is as under:-

a. On 19.08.2009, at about 6.30 p.m. near Anganwadi of village Hingni, Tq. Mahur, District Nanded, all accused persons in furtherance of their common intention assaulted deceased Kailas Surose and inflicted injuries on his person with the help of *Bandati* (stick), sickle, stones and sticks on his face and chest. On the same day, deceased Kailas was taken to Mahur Hospital where he was treated primarily, thereafter he was taken to the Hospital at Yeotmal and while under treatment, he died in the same night. On the basis of the complaint lodged by P.W.1 Sambhaji Surose, father of deceased Kailas on 20.8.2009, crime

No. 74 of 2009 came to be registered at Mahur police station for the offences punishable under Sections 302, 143, 147, 148, 149, 341 of I.P.C. and Section 135 of Maharashtra Police Act. The learned Additional Sessions Judge, Nanded framed charges against the accused persons for the offences punishable under Sections 143, 147, 148, 341 and 302 r.w. 149 of I.P.C. and Section 135 of Maharashtra Police Act r.w. 149 of I.P.C. All accused persons pleaded not guilty to the charges and claimed to be tried. The prosecution has examined in all 11 witnesses to substantiate the charges levelled against the accused. The defence of the accused is of total denial and false implication out of political enmity.

b. The learned Additional Sessions Judge, Nanded, upon considering the evidence of prosecution witnesses as well as documentary evidence on record, found that all accused persons formed the unlawful assembly, as they were having knowledge that deceased Kailas was coming from Phulsangvi and for achieving the common object, they obstructed the motor cycle of deceased and prevented him from going towards his house. It is with these observations, the learned Additional Sessions Judge

has convicted the accused Nos. 1, 2 and 6 for the offence punishable under Section 302 r.w. 149 of I.P.C. and accused Nos. 3 to 5 and 7 for the offences punishable under Section 326 r.w. 149 of I.P.C.

4. Being aggrieved by the said judgment, the appellants Madhukar Dharma Rathod and others have filed criminal appeal no. 396 of 2013 thereby challenging their conviction and the State has filed criminal appeal Nos. 170 of 2014 and 441 of 2015 against the very same judgment and order seeking enhancement of sentence of the respondents i.e. original accused Nos. 3 to 5 and 7 and against the acquittal of the respondents original accused Nos. 3 to 5 and 7 of the offence punishable under Section 302 r.w. 149 of I.P.C., respectively, as aforesaid.

5. Learned counsel for the appellants submits that the learned Additional Sessions Judge, while passing the impugned judgment and order, resorted to all assumptions and presumptions and adverted to the conjectures and surmises which all have resulted in miscarriage of justice. The learned Judge did not apply his mind judiciously to the facts of the

present case. The learned Judge has resorted to the unproved documents forgetting that mere exhibition of a document does not dispel its strict proof. There was no material at all to show that the entries recorded in the said paper were true, correct and genuine. The learned Judge has not considered that the degree of proof in criminal trial is much stringent as compared with a civil case, therefore, the learned Additional Sessions Judge has committed error to proceed on the basis of the inadmissible material to convict the accused persons. The learned Judge has not appreciated the case in its proper perspectives and the material produced in support of it by the prosecution. The rule of appreciation enunciated by the catena of judgments by the higher courts have been given a go-bye and thereby the learned Additional Sessions Judge has committed error in convicting the accused persons.

6. Learned counsel for the appellants-accused submits that the learned Additional Sessions Judge has failed to take into account that none of the witnesses were of any use for the prosecution as much as to inflict the conviction when in fact the evidence of all the prosecution witnesses was crafty and fatal to

the case of the prosecution. The prosecution has failed to prove that the appellants-accused were the authors of the crime and as such the conviction of the appellants is without any evidence. The evidence of star witnesses, i.e. P.W. Nos. 1, 3, 4, 5 and 6, has destroyed the prosecution case and instead of acquitting the accused persons the trial court has convicted them. The approach of the learned Judge in deciding the case was not attentive but in fact very casual and cryptic. Learned counsel submits that during the course of investigation, none of the articles were seized and sealed. No evidence of sealing is satisfactorily adduced to lend assurance of honesty. The learned Judge has not considered the inordinate delay caused in sending the articles for chemical analysis and due to such delay the possibility of tampering with the articles cannot be ruled out. The prosecution has not furnished any explanation for causing such delay. Learned counsel submits that on the basis of faulty investigation the accused have been convicted when the Supreme Court in the case *State Inspector of Police vs. Surya Sakaram Karri*, reported in 2006 (7) SCC 172 has laid down that the investigation should have been carried out not only from the stand of the prosecution but also the defence since there may

be a legal occasion whereby the onus may have to be discharged by the accused facing the trial.

7. Learned counsel for the appellants-accused, in order to substantiate his submissions, placed reliance on the following judgments:-

- i) Raju @ Rajendra and Anr vs. State of Rajasthan, reported in 2013 CRI.L.J. 1248,
- ii) Shaji and other vs. State of Kerala, reported in 2011 AIR SCW 2903,
- iii) Shambhu Nath Singh and Ors. vs. State of Bihar, reported in AIR 1960 SC 725,
- iv) Mrs. Shakila Khader etc. vs. Nausher Gama and another, reported in AIR 1975 SC 1324
- v) Rewa Ram vs. Teja and others, reported in 1998 CRI.L.J. 2558,
- vi) Chhanni vs. State of U.P. Reported in 2006 AIR SCW 4062,
- vi) State vs. Namgonda Jayagonda Patil and Ors. Reported in AIR 1964 Bombay 5,
- vii) Mohd. Sadik (in Jail) vs. State, reported in 1976 Cri.L.J. 1398,

viii) The State vs. Motia and others, reported in AIR 1955 Rajasthan 82.

8. Learned A.P.P. for the respondent State in criminal appeal No. 396 of 2013 and appellant in criminal appeal Nos. 170 of 2014 and 441 of 2015 submits that entire prosecution case is based upon direct evidence of eye witnesses, as all these eye witnesses are not shattered in lengthy cross examination. The prosecution has proved the evidence of independent eye witnesses as consistent and corroborative to each other. Learned A.P.P. submits that the eye witnesses have given details about the incident with names of accused, their role in the assault and also stated in specific about arrival of accused persons at the spot, giving blows without any altercations. This version of the prosecution witnesses fulfills the requirement of Section 149 of I.P.C. The evidence of prosecution witnesses clearly establish the case in favour of the prosecution. Learned A.P.P. thus submits that the learned Additional Sessions Judge has not considered all these aspects while convicting respondents/original accused Nos. 3 to 5 and 7 for the offences punishable under Section 326 r.w. 149 of I.P.C. and acquitting them of the offence punishable

under section 302 r.w. 149 of I.P.C. In so far as criminal appeal No.396 of 2013, learned A.P.P. submits that the learned Additional Sessions Judge has properly considered the evidence in respect of appellants in the said appeal and has rightly convicted them for the offence punishable under Section 302 r.w. 149 of I.P.C. and there is no error committed by the learned Additional Sessions Judge to that extent.

9. Learned A.P.P. for the respondent in criminal appeal No. 396 of 2013 and for appellant in criminal appeal Nos. 170 of 2014 and 441 of 2015, in order to substantiate his submissions, placed reliance on the following judgments:-

- i) State of U.P. vs. Jagdeo and others, reported in AIR 2003 SC 660
- ii) Varghes Thomas vs. State of Kerala, reported in AIR 1977 SC 701
- iii) State of Himachal Pradesh vs. Rakesh Kumar, reported in 2009 CRI.L.J. 3060
- iv) Appabhai and another vs. State of Gujarat, reported in AIR 1988 SC 696

- v) Nathuni Yadav and others vs. State of Bihar and another, reported in AIR 1997 SC 1808;
- vi) Krishnappa and others vs. State of Karnataka, reported in 2013 MR (Cri) 1080 (S.C.)

10. The prosecution has examined in all 11 witnesses. Eye witness Subhash Rathod, who was riding the motorcycle of which deceased Kailash Surose was the pillion rider, came to be examined as a court witness. Defence of the accused is of total denial and the death has been suggested as an accidental death because of skidding of the motorcycle on slippery road. The prosecution mainly rely upon the ocular evidence of PW-1 Sambhaji Surwase, PW-3 Pundlik Harkare, PW-4 Bandu Lakde, PW-5 Praful Surwase, PW-6 Sudarshan Alat and court witness no.1 Subhash Rathod.

11. The prosecution has examined PW-9 Dr. Santosh Bhosle to prove homicidal death of deceased Kailas Surose. On 20.08.2009 in between 13.00 to 15.00 hours, PW-9 Dr. Santosh Bhosle has conducted postmortem examination on the dead body. PW-9 Dr. Santosh Bhosale has found the following external injuries which

are mentioned in column no.17 of the post mortem report

Exhibit 59:

1. Lacerated wound over Rt. Side of upper lip size 2 x 0.5 cm. x tissue deep, margins are irregular and reddish.
2. Lacerated wound present over right side of lower lip of size 1 x 0.5 cm. x tissue deep, margins irregular and reddish.
3. Abrasion over left side of lower lip of size 2 x 1.5 cm. reddish.
4. Lacerated wound over chin of size 2 x 1 cm. X muscle deep horizontally placed, margins irregular and reddish.
5. Abraded contusion over chest obliquely placed over sternum at the level of 4th and 5th intercostal space of size 10 x 1 cm. reddish. On incision, evidence of blood infiltration present in surrounding tissue.
6. Abraded contusion parallel to injury No.5 present over chest at the level of 3rd and 4th intercostal space obliquely placed of size 5 x 1 cm. reddish. On incision, evidence of blood infiltration over surrounding tissue.
7. Abrasion over left lateral aspect of chest at the level of 5th rib of size 1 x 0.5 cm. reddish.

8. Abrasion over left lateral aspect of thigh, 6 cm. down from anterior superior iliac spine of size 1.5 x 0.5 cm. obliquely placed reddish.
 9. Abrasion present over left lumbar region of size 3 x 1 cm. obliquely placed, reddish.
 10. Abrasion over left scapular region along the lateral border of size 3 x 2 cm. obliquely placed, reddish.
 11. Contusion over left side of chest at the level of T7 – T8 vertebrae of size 10 x 4.5 cm. reddish, on cut, opening evidence of blood infiltration present.
 12. Contusion over left side of chest at the level of T9-T10 vertebrae of size 7 x 5 cm. reddish. On cut-opening evidence of blood infiltration over surrounding tissue.
 13. Abrasion over abdomen 3 cm. right to umbilicus of size 0.5 x 0.5 cm. reddish.
12. In the opinion of PW-9 Dr. Santosh Bhosle, all the aforesaid injuries were ante-mortem in nature, fresh and caused by hard, blunt and rough surface object. On internal examination of head, PW-9 found evidence of under scalp contusion present over (1) frontal region of size 5 x 5 cm., (2) right supra or orbital region size 2 x 1 cm., (3) right parietal region size 2 x 2 cm. and

(4) left temporo parietal region of size 3 x 2 cm. PW-9 Dr. Santosh Bhosle has found evidence of sub-dural haemorrhage over left temporo-basal region of size 8 cm x 4 cm x 1 cm reddish and evidence of sub-arachnoid haemorrhage over both fronto basal region. In his opinion, the cause of death was 'head injury with contusion both lungs'. He has further explained that injury nos. 1 to 4 in column no. 17 can be caused by blunt edge of sickle. Injury no. 7 can be caused by stone i.e. hard, blunt and rough surface object and injury nos. 5, 6, 11 and 12 are possible by sticks. In his opinion, the injuries on lungs can be possible by a severe blow of sticks on chest and back. He has further accepted that the aforesaid injuries are possible by article no.3-stone, article no.21-stick of tick wood, article no. 22-sickle, article nos. 23, 24 and 25-bamboo sticks and article no.26-stick of teak wood. He has further explained that the injuries in column 19 under scalp are possible by the sticks and the injuries on head are from three sides from frontal and both of the parietal regions. In the opinion of PW-9 Dr. Santosh Bhosle, the injuries mentioned in column nos. 19 and 20 are individually sufficient in ordinary course of nature to cause death. PW-9 Dr. Santosh Bhosle has conducted around 1500 postmortems as

stated by him in his cross examination. He has vast experience of conducting postmortem examination. In cross-examination, PW-9 Dr. Santosh Bhosle has opined that he can say that deceased was not under the influence of liquor because there was no peculiar smell of liquor in stomach or body cavity. He has further denied the possibility that the injuries on the person of the deceased are possible by skidding of the motor over irregular and rough surface. The prosecution has proved beyond doubt the homicidal death of deceased Kailas Surose. There is nothing in the cross-examination of PW-9 Dr. Santosh Bhosle to draw any other inference about death of deceased Kailas Surose than the homicidal death as opined by PW-9 Dr. Santosh Bhosle. In the backdrop of this clear, unequivocal opinion given by PW-9 Dr. Santosh Bhosle, it is necessary to discuss the ocular evidence in this case.

13. The learned counsel for the appellants/accused has assailed the evidence of the eye witnesses on the ground that statements of the so-called eye witnesses came to be recorded belatedly and as such, in absence of honest investigation in this regard, the possibility of joining hands with the complainant to

support the prosecution case by such witnesses cannot be ruled out. The learned counsel appearing for the appellants/accused has also assailed the evidence of the eye witnesses on the ground that there evidence is contradictory, unreliable and untrustworthy. There are discrepancies in the evidence of the eye witnesses and those are not minor in nature. The learned counsel submits that on this ground alone, the ocular evidence is required to be discarded.

14. In the instant case, on careful perusal of the evidence of Investigating Officer PW-11 Rajmohan Jadhav, it appears that he was not specifically asked to explain the delay in recording statements of some of the prosecution witnesses. In this contingency, the defence cannot take benefit thereof. It cannot be laid down, as a rule of universal application that if there is delay in recording statement of a particular witness, the prosecution story overall becomes suspicious. It would depend upon several other factors.

15. In the instant case, we find that the statement of PW-6 Sudarshan Alat and court witness no.1 Subhash Rathod came to

be recorded without any delay. On 19.08.2009, PW-6 Sudarshan Alat had also gone to village Phulsangvi for purchasing articles for Pola festival along with deceased Kailas Surose and others. He had travelled on one another motorcycle. After purchasing articles, they all started returning to their village Hingni. He has further explained that while returning, court witness Subhash Rathod and deceased Kailas Surose proceeded on one motorcycle and court witness Subhash Rathod was riding the said motorcycle. He himself and his partner Dattarao were removing the mud of their motorcycle. They were removing the mud of the motorcycle in front of the house of one Jaiwanta Chavan. They heard a shout from the side of one Anganwadi school and immediately he and said Dattarao went to the spot of incident. PW-6 Sudarshan Alat has deposed about presence of all the accused on the spot and further explained that accused Kailash Rathod was beating deceased Kailas Surose with sickle, accused Dharma Rathod was beating deceased Kailas Surose with stone and the other accused persons were beating deceased Kailas Surose with stick. He has also given reference to the presence of PW-4 Bandu Lakde, PW-5 Praful Surwase and court witness Subhash Rathod.

16. We have also minutely perused the evidence of court witness Subhash Rathod. He has deposed that he was riding the motorcycle towards village Hingni and deceased Kailas Surose was the pillion rider. Before that, he had removed the mud of the motorcycle at the request of deceased Kailas Surose. He has also deposed that behind there motorcycle, there was a motorcycle of one Dattarao and PW-6 Sudarshan Alat. Both of them were on one motorcycle and he was riding the motorcycle ahead of them. He has further stated that the another motorcycle stopped near the house of Jaiwanta Chavan and he alongwith deceased Kailas Surose proceeded further and reached near Anganwadi. At that time accused Madhukar Rathod was standing there on the road having a teak *bandati* i.e. stick. Accused Madhukar Rathod had stopped the vehicle with the help of the stick. Thereafter, accused Kailash Rathod came there with a sickle and accused Madhukar Rathod dragged deceased Kailas Surose from the vehicle. They made him to fall on the ground and then all the accused had beaten deceased Kailas Surose. He has also given reference to the presence of PW-5 Praful, who happened to be the son of deceased Kailas Surose, and PW-4 Bandu Lakde.

17. PW-9 Dr. Santosh Bhosle has noted in all 13 external injuries on the person of deceased. He has explained that injury nos. 1 to 4 in column no.17 are possible by the blunt edge of a sickle, injury no.7 can be caused by stone and injury nos. 5, 6, 11 and 12 are possible by sticks. PW-9 Dr. Santosh Bhosle has further explained that injuries on the lungs can be possible by a severe blow of sticks on chest and back. By giving reference to the weapons article nos. 3, 21, 22, 23, 24, 25 and 26, PW-9 Dr. Santosh Bhosle has deposed that the aforesaid respective injuries are possible by the weapons as shown to him. The injuries on head are from three sides from frontal and both of the parietal regions.

18. On perusal of the evidence of the other eye witnesses, we find that their evidence is consistent on material parts. We find the ring of truth in the evidence of the eye witnesses for the reason that their evidence is corroborated by the medical evidence. Thus, the evidence of eye witnesses is consistent with the medical evidence. The evidence of eye witnesses is consistent on the factual aspect that accused Kailash Rathod had beaten deceased Kailas Surose with sickle on his face and chest. There

evidence is also consistent that accused Dharma Rathod had beaten deceased Kailas Surose on his chest by holding stone in hand. There evidence is also consistent to the effect that accused Madhukar had stopped the motorcycle and beaten deceased on his chest with stick.

19. The ocular evidence is also corroborated by the evidence of recovery of cloths and weapons having blood stains of blood group of the deceased. We find no fault in the findings recorded by the trial court that all the accused formed an unlawful assembly and they had committed riot with dangerous weapons. Further, considering the manner in which the accused persons assaulted the deceased, the inference could be drawn that they were having knowledge that deceased Kailas Surose was coming from village Phulsangvi. It is clear from the manner of the assault, the weapons used in the assault and the injuries on the person of the deceased that the common object of the unlawful assembly was to eliminate deceased Kailas. The learned Judge of the trial court has therefore rightly convicted accused no.1 Madhukar s/o Dharma Rathod, accused no.2 Kailash s/o Kishan Rathod and accused no.6 Dharma s/o Somla Rathod for the

offence punishable under Section 302 r/w 149 of IPC. Further, considering the role attributed to accused no.3 Vijay s/o Dharma Rathod, accused no.4 Sudam s/o Dharma Rathod, accused no.5 Kisan s/o Somla Rathod and accused no.7 Gajanan s/o Pandu Rathod, the learned Judge of the trial court has rightly convicted them under Section 326 r/w 149 of IPC and sentenced them to suffer rigorous imprisonment for four years and to pay fine of Rs.500/- each, in default to suffer further rigorous imprisonment of three months. We find no fault in the conviction order and sentence passed by the trial court against the accused persons in respect of the other offences as detailed in the order of conviction. The ratio laid down in the case law cited by the learned counsel for the appellants/accused cannot be made applicable to the facts and circumstances of the present case.

20. In view of the above discussion, we find no substance in criminal appeal no.396 of 2013 preferred by the appellants/accused and the same is hereby dismissed.

21. So far as accused nos. 3 to 5 and 7 (i.e. accused no.3 Vijay s/o Dharma Rathod, accused no.4 Sudam s/o Dharma Rathod,

accused no.5 Kisan s/o Somla Rathod and accused no.7 Gajanan s/o Pandu Rathod), the learned judge of the trial court has rightly considered the community of object up to certain point amongst the accused persons and accordingly distinguished the case of accused nos. 3 to 5 and 7 and convicted them for the offence punishable under Section 326 r/w 149 of IPC. Accused no.1 Madhukar s/o Dharma Rathod, accused no.2 Kailash s/o Kishan Rathod and accused no.6 Dharma s/o Somla Rathod had assaulted deceased Kailas Surose with the common object of causing his death, whereas the other accused persons share different community of object and as a consequence of the same, the effect of Section 149 of IPC may be different on different members of the same unlawful assembly. In view of the same, we find no substance in both the appeals preferred by the State. Hence, both the appeals i.e. criminal appeal no. 170 of 2014 and criminal appeal no. 441 of 2015 are hereby dismissed.

(V. K. JADHAV, J.)

(S. S. SHINDE, J.)

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