

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

CRIMINAL APPEAL NO. 454 OF 2015

Khandu S/o Ravan Shinde,
Age: 32 years, Occu: Labour
R/o: Hanuman Lane, Dharur,
Taluka Dharur, Dist. Beed.

... Appellant
(Ori. Accused)

Versus

The State of Maharashtra

...Respondent

...

Mr. Sudarshan J. Salunke, Advocate for Appellant-Accused.
Mrs. D. S. Jape, APP for appellant – State

...

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

RESERVED ON : 26-09-2018.

DELIVERED ON : 23-10-2018.

JUDGMENT :- (Per : Smt. Vibha Kankanwadi, J.)

Present appeal has been filed by the appellant-original accused challenging the Judgment and Order of his conviction in Sessions Case No. 36 of 2013 by the Additional Sessions Judge, Majalgaon, District Beed, dated 29-05-2015, for the offence punishable under Section 302 of the Indian Penal Code, 1860 (for short, "IPC").

2. Brief facts of the prosecution case are as under :-

The informant Akram Khayyum Quadri is the son of deceased Khayyumkhan. He is having three brothers and two sisters. They are resident of Zaregalli, Dharur, Taluka Dharur, District Beed. Deceased Khayyumkhan was serving as a Driver in the Maharashtra State Road Transport Corporation ("MSRTC"). The informant was at home around 10.00 p.m. on 12-01-2013, when he received information that his father is lying on the ground in injured condition near the well in Khanawal Lane. Therefore, he alongwith brothers and others went to said place. He found that his father was lying in unconscious state in injured condition. He had sustained injuries to his head, back, face and on neck. Since father was seriously injured, the informant and others took him to Hospital of Dr. Hazari. After giving preliminary treatment, he was referred to Swami Ramanand Tirth Rural (SRTR) Hospital, Ambajogai. Again he was referred to Ashwini Hospital at Latur. All the while, Khayyumkhan was unconscious, therefore, did not speak with anybody. But, then informant Akram lodged First Information Report (FIR) vide Crime No. 03 of 2013 under Section 307 of the IPC against unknown person.

3. On the basis of said FIR, further investigation was undertaken. The panchnama of spot was carried out, certain articles like simple earth and earth mixed with blood was seized

from the spot. On the same day, statements of witnesses namely Fulchand Eknath Mulay and Balasaheb Fulchand Mulay came to be recorded. From the statement of those two persons who stated to be an eye witnesses, it was revealed that when PW.2 Fulchand and deceased Khayyumkhan were chitchatting in Khanawal Lane, at that time, accused No. 1 came and demanded money for consuming liquor to PW.2 Fulchand. Accused No. 1 was alongwith other two persons at that time. Fulchand refused to give money to accused No. 1. Thereupon, accused No.1 had abused and caught hold him. He had then shouted loudly. After hearing shout, his son namely Balasaheb came from the house, which was at a distance to 100 to 150 Meters from that spot and took P.W. 2 Fulchand to house, after rescuing. Khayyumkhan was still there, and thereafter, it is stated that Khayyumkhan was assaulted by the accused persons by means of stick. As involvement of the accused persons was revealed, further investigation was also undertaken. One ASI Suryawanshi was deputed for recording statement of Khayyumkhan. But, after he went to the Ashiwini Accident and Neuro Care Center, Latur, it was revealed by Doctor that patient was not in a position to make a statement. Similarly, said Hospital had given written communication to the Police Station on 15-01-2013 informing about admission and later-on death of Khayyum at about 9.10 a.m. on 15-01-2013. Said intimation was given to Shivajinagar

Police Station, Latur. On the basis of it, Accidental Death No. 00 of 2013 came to be registered under Section 174 of the Code of Criminal Procedure, 1973 (Cr.P.C.). Again, ASI Suryawanshi was sent to Latur to prepare inquest panchnama and take the dead body of deceased Khayyumkhan for post-mortem. Accordingly, inquest panchnama was prepared in presence of two panch witnesses and dead body of deceased Khayyumkhan was sent to the Civil Hospital, Latur, for post-mortem. Medical papers were collected. Accused persons came to be arrested. The clothes of accused No. 1 and 2 came to be seized under seizure panchnama with the help of two panchas. During the period of police custody, accused No.1 had given memorandum before two panchas and discovered the stick, which he had concealed in his house. Said weapon was seized. Similar statement was given by accused No.2 before two panchas and he has also led discovery of a stick stated to have been used in the commission of crime. The map of the spot of incident got prepared through Revenue Circle Inspector, Dharur. Certain documents were collected. After completion of investigation, charge-sheet came to be filed against original accused No. 1 and 2 as well as one absconding accused.

4. Both accused persons were not released on bail, therefore, they have been produced before the Court from Jail time to time. After they both were produced before the learned trial Court,

charge was framed. The contents of the charge were read and over and explained to the accused in vernacular. They pleaded not guilty and claimed for trial. Trial has been conducted.

5. Prosecution has examined in all *fourteen* (14) witnesses to bring home the guilt of accused. After considering the evidence on record and hearing both sides, learned Additional Sessions Judge, Majalgaon has held accused No.1 guilty of committing offence punishable under Section 302 of the IPC and has been sentenced to suffer Rigorous Imprisonment for life and to pay fine of Rs.2000/- (Rs. Two Thousand) in default of payment of fine to suffer further Simple Imprisonment for *six* (6) months. Accused No.2 has been acquitted of the offence punishable under Section 302 read with Section 34 of the IPC. Hence, the present appeal has been filed by original accused No.1.

6. Heard Shri. S. J. Salunke, learned Advocate for the appellant and Smt. D. S. Jape, learned APP for respondent-State. Perused the record and proceedings.

7. It has been submitted on behalf of the appellant that PW-1 Akram is the son of deceased, who filed FIR. Admittedly, he was not present on the spot at the relevant time. Even report was lodged under Section 307 of the IPC against unknown persons. PW-2 Fulchand is the eye witness to the incident. He has supported the prosecution till quarrel between himself and

accused No.1, for further events he has turned hostile. Learned trial Court has considered his evidence also under the principle of last seen together. PW-3 Balasaheb, who is son of PW-2 Fulchand, has supported his father till quarrel between his father and accused No.1, which was resolved by him. It is to be noted that PW-3 Balasaheb in his testimony has stated that even Khayyumkhan had gone to the house of PW-2 Fulchand, after PW-3 Balasaheb started to take Fulchand with him. Under such circumstances, after Khayyumkhan went from the house of Fulchand, if anybody had attacked him, it cannot be stated that accused No.1 is behind the act. Both these witnesses have not identified accused No.2. Prosecution has also tried to rely on the testimony of PW-7 Mohammad Umar, however, he has been disbelieved by the trial Court. His name is not appearing in the FIR. It is stated that accused No.1 has been falsely implicated and it has a political angle. The wife of deceased was a Councilor of Municipal Council, Dharur, who had won the election as candidate of *Bhartiya Janata Party* (BJP). Dr. Hazari was also having political connection, so also, PW-7 Mohammad Umar's brother is also having political connection. Therefore, PW-7 Mohammad Umar appears to be a planted witness.

8. It has been further submitted on behalf of appellant that Prosecution has thereafter relied on testimony of PW-4 Syed Shaker, who was panch to the memorandum panchnama. He has

supported the prosecution case, but when eye witnesses turned hostile and has not identified the stick to be the weapon used in the commission of offence, discovery cannot be believed. PW-5 Syed Afez is son-in-law of deceased Khayyumkhan. He was not present at the time of incident. PW-6 Sadek is a panch of spot panchnama. PW-8 Dr. Rahul Umbare is the Medical Officer, who has conducted post-mortem. He had noticed *fourteen* (14) injuries and had stated that they were sufficient to cause the death. Here, prosecution was having burden to prove that accused No.1 was the author of crime.

9. It has been further submitted by him that, PW-9 Santosh Khade was in the employment of informant, therefore, he was interested witness. PW-10 Angat Sudke, PW-11 Akhileshkumar Singh, PW-12 Bhagwat Suryawanshi, PW-13 Dinkar Shinde and PW-14 Baburao Rathod are the Police Officers, who have carried out part of the investigation. CA Report produced on record does not show the group of blood stains. It is only stated that blood was of human. As per prosecution, incident had taken place near mess. However, mess owner or public, who would have been visiting mess or people from the locality have not been examined. They would have been in fact best witnesses to identify the assailant. Therefore, appreciation of evidence by learned trial Court is not proper at all. The conclusion arrived at is erroneous and same deserves to be set aside. Lastly, learned

counsel for appellant prayed to allow present appeal and acquit the appellant from charges levelled against him.

10. The learned counsel for the appellant has relied on the following decisions of the Honourable Apex Court :-

Nos.	Name of Parties in the Citations		Reported in
I	<i>Hanumant Govind Nargundkar Versus State of M.P.</i>	..	1953 Cri. L. J. 129
II	<i>Rambraksh alias Jalim Versus State of Chhatisgarh</i>	..	2016 Cri. L. J. 2939
III	<i>Paulmeli and another Versus State of Tamil Nadu Through Inspector of Police</i>	..	AIR 2014 SC (Supp) 1249
IV	<i>Salim Akhtar alias Mota Versus State of U.P.</i>	..	2003 Cri. L. J. 2302

11. Learned APP for respondent has submitted that PW-1 Akram, who is son of deceased, has set law in motion. Though, PW-2 Fulchand and PW-3 Balasaheb turned hostile at later point; they are partially supporting the case of prosecution. Their evidence can not be discarded in entirety. In support of submission, learned APP has relied on Judgment in the cases of – (1) *Devraj Versus State of Chattisgarh* [AIR 2016 SUPREME COURT 3498] and (2) *Khujji alias Surendra Tiwari Versus State of M.P.* [AIR 1991 SUPREME COURT 1853] on the point that such hostile witness can also be believed to the extent he supports

and conviction can be based on the evidence of hostile witness. She has submitted that, PW-2 Fulchand has specifically stated that deceased was with him. Accused No.1 had asked money for consuming liquor to PW-2 Fulchand, but he had refused it. In fact, if at all grudge would have been there it would have been against Fulchand, but since deceased was accompanied Fulchand and after resolving dispute PW-3 Balasaheb took his father PW-2 Fulchand alongwith him; only Khayyum remained at the spot. PW-1 Dr. Rahul has specifically stated that cause of death of Khayyumkhan was head injury. He had noticed *fourteen* (14) injuries with corresponding internal injuries. Therefore, said death was certainly homicidal. Further, circumstantial evidence against accused No.1 is that he had discovered stick. The clothes of accused No.1 was seized having human blood. Unfortunately, Investigation Officer had not sent said stick to the chemical analysis. But, there cannot be said to be fatal point. Learned APP supported the reasoning given by learned Additional Sessions Judge for convicting accused No.1.

12. The prosecution case is based on direct as well as circumstantial evidence. PW-1 Akram is the son of deceased, who reached to the spot after he received information about injuries caused to his father. That means, he was not present, when the incident took place. He came to know about the story from one Nizamali. Thereafter, he filed FIR (Exhibit-27).

13. In the cross-examination of this witness, it has been tried to bring on record, the alleged political connection between Nizamali and Dr. Hazari. But, except suggestion, there is nothing on record. Further part of the cross-examination has been conceived extracting his activity after deceased was admitted to the Hospital till lodging of report, that means, it is tried to be brought on record that there is delay in lodging the FIR. However, it has come on record that since beginning, after the date of incident till his death, the deceased was unconscious and he has been shifted from one Hospital to another and taking into consideration his health, lodging of the report regarding incident on the next date, cannot be said to be inordinate delay. One more fact tried to be brought on record is that the spot of incident which is in Khanawal lane remains busy with people and traffic around 10.00 p.m. thereby possibility has been created that the incident would have been witnessed by people.

14. Prosecution has relied mainly on the testimony of PW-2 Fulchand. He has deposed that he returned from Ambejogai around 10.00 p.m. He met deceased Khayyumkhan near Pan Shop of Lokhandi on his way to home. He purchased pan and nuts and then alongwith Khayyumkhan proceeded to Khanawal lane. Thereafter, they were chitchatting with each other, where accused No.1 came and demanded money to him for consuming liquor. Two more persons were alongwith him. Due to darkness,

he could not identify them. But, he was certain that person, who was demanding money to him, was accused No.1. When this witness refused to give money to accused No.1, he abused and caught-hold this witness (PW-2 Fulchand). This witness shouted loudly. After hearing shouts, his son PW-3 Balasaheb came from the house, which was at the distance of 100 to 150 Meters from the spot. According to PW-2 Fulchand, he was rescued from the clutches of accused No.1 by his son as well as deceased Khayyumkhan. Deceased Khayyumkhan asked the son of witness (PW-2) that to take witness to house. Accordingly, his son and witness started to proceed to their house.

15. In his testimony, this witness has stated that when he and his son proceeded towards the house, they heard noise of abusing by the accused. But, thereafter, he turned hostile and has stated that at about 10.30 p.m., when they were taking dinner, they were informed that Khayyumkhan was beaten in Khanawal lane. Surprising to note that, in the cross-examination conducted on behalf of accused No.1, he reiterated the fact that after his son had rescued him from clutches of the accused and when they proceeded towards house, at that time, they had heard accused No.1 was abusing. Learned APP has taken permission to put questions in the nature of cross-examination to this witness. But, he has denied the portion mark 'A' from his statement under Section 161 of Cr.P.C. recorded by police during

the course of investigation. He could not assign any reason as to why this portion mark 'A' is appearing in his statement. Even if, we take his testimony till the fact that he was being taken by son towards house after rescuing from clutches of the accused No.1, the fact remain that he stats that accused No.1 was abusing. Naturally only person, who remained there was Khayyumkhan.

16. At this stage, itself testimony of PW-3 Balasaheb is also required to be considered. He has also deposed like his father (PW-2 Fulchand) and supports the prosecution story till they proceeded towards their house. He has also in clear terms stated that when he and his father had proceeded towards their house, he heard noise of beating. In fact, question is, when he heard noise of beating, then natural course would have been so look towards the happening. He could have then noticed that who was beating whom. For the best reason known to him, he has not supported the prosecution story further. Again to the surprise, when cross-examination of this witness has been conducted by accused No.1, it has come on record that due to dark, at that time except Khandu, he could not see any other person, therefore, he had stated before police that when he and his father was going to their house, he heard noise of beating. It appears that said statement is omission. He could not assign any reason as to why specific statement is not appearing in his statement before police. In fact, it is the prosecution story that

PW-2 Fulchand as well as PW-3 Balasaheb had witnessed beating by the accused and other two persons to deceased. Therefore, alleged omission cannot said to be the omission going to the root of the case disbelieving the matter in entirety.

17. As regards to evidenciary value of the hostile witness is concerned, in the decision in the case of ***Devraj*** (cited *supra*) relied by learned APP, it has been held that, *"the evidence of a witness who has been declared hostile can be relied if there are some other material on the basis of which said evidence can be corroborated. Moreso, that part of evidence of a witness as contained in examination-in-chief, which remains unshaken even after cross-examination, is fully reliable even though the witness has been declared hostile"*. Therefore, testimony of both these witnesses (PW-2 and 3) is reliable till they have stated that when they proceeded towards their house. Further inference can be safely drawn that, at that time, they heard noise of abuses and beating to deceased by accused No.1.

18. Learned Advocate for the appellant has submitted that other independent witnesses, who were having shops around the said place in Khanawal lane have not been examined. It can be countered that when PW-2 Fulchand and PW-3 Balasaheb had no relation with deceased and they were supporting to the prosecution case, to substantial extent they were examined.

Non-examination of other witnesses, who might be present at the relevant time, cannot be said to be fatal to the prosecution case. There is absolutely no suggestion to these eye witnesses in the cross-examination by accused No.1 that there was any kind of enmity between these two persons and accused No.1 or between accused No.1 and deceased.

19. PW-2 Fulchand was consistent in saying that in fact accused No.1 had asked him to lend amount for consuming liquor and then he had refused. The conduct of accused No.1 is also required to be considered when PW-2 Fulchand refused to give him amount, he had abused and then had caught-hold him. Fulchand could be rescued at that time because of his shout. But, unfortunately, it can be seen that nobody came forward to rescue deceased Khayyumkhan. Under such circumstances, testimony of these two witnesses cannot be discarded in its entirety. PW-7 Mohammad Umar has been examined by the prosecution as eye witness, but he has been disbelieved by trial Court. Under such circumstances, it will not be safe to consider his testimony in appeal.

20. Next piece of evidence on which the prosecution has relied is memorandum and discovery under Section 27 of the Indian Evidence Act, 1872 ('Evidence Act', for short). In order to prove the same, prosecution has examined PW-4 Syed Shaker. He has

stated that he was called by Police on 18-01-2013, accused Khandu was produced before him. Another panch was along with him. Accused Khandu gave memorandum that he is ready to discover the wooden stick, and accordingly, his statement is reduced in to writing, which was signed by him as well as another panch. Thereafter, accused had led the discovery of stick from his house in presence of panchas and police. PW-4 has proved panchnama (Exhibit-32). In the cross-examination, there is absolutely no suggestion to this witness (PW-4) that there is any kind of enmity between deceased and accused No.1. He has tried to give answer to many questions. For some questions, he has stated that he is unable to tell. As regards what he was not able to tell was concerned, those questions were whether place/house under which stick was allegedly concealed was made of tin or wood, who was owner of the house and what was the colour of house, etc. Memorandum was taken down on 18-01-2013 and his statement before Court came to be recorded on 28-11-2014. Under such circumstances, possibility of not remembering these minute details cannot render his testimony unbelievable. He was consistent enough in saying that accused had given that memorandum statement before him and then led discovery of the stick as per panchnama (Exhibit-32). As accused No.1 was knowing the place where stick was concealed, he has discovered it. Therefore, seizure panchnama (Exhibit-32) is

proved and said fact is relevant fact under Section 27 of Evidence Act.

21. Now, it has been argued that though in the panchnama (Exhibit-32), it has been stated that the stick had bloodstains, yet said stick has not been sent for analysis. The fact is sufficient to note that stick was containing blood stains. It will not be out of place to mention here that CA Report of the blood samples of accused No.1, 2 and deceased Khayyumkhan has been placed on record (Exhibit-70 and Exhibit-71). It shows that blood group of accused No.1, 2 and deceased Khayyumkhan was of 'B' Group. Therefore, even if stick would have been sent for CA, it would have given blood group as 'B'. Therefore, not sending said stick for CA has not caused any prejudice to the accused.

22. PW-5 Syed Afez is son-in-law of deceased Khayyumkhan. Admittedly, he was also not present at the time of incident.

23. PW-6 Sadeq is panch to the spot panchnama. He has specifically stated that from the spot police had seized simple earth as well as earth mixed blood. Testimony of this witness is only relevant to the extent that there was blood on the spot. In the cross-examination he has stated that spot is surrounded by shops. At the cost of repetition, it can be seen here that non-examination of these shop owners is not at all fatal to the prosecution case.

24. PW-8 Dr. Rahul is the Medical Officer, who had conducted post mortem of deceased. He had noticed fourteen (14) injuries at the time of external examination. No doubt, some appears to be post operative marks. But, we can see that multiple injuries were suffered by deceased. He has also given the fact that examination of skull showed Sutural fracture present at coronal suture, Fissured fracture present on left fronto-temporal-parietal bone, Fissured fracture present on left fronto-parieto-occipital region. He has categorically stated that injuries to skull and injuries to brain were sufficient to cause death. He has also given opinion that if any person is beaten by means of sticks, such as, Articles No. 11 and 6, then injuries noted by him in post mortem report are possible. Searching cross-examination has been taken place. But, said cross-examination is not sufficient to discard his opinion regarding probable cause of death i.e. head injury. Thus, it can be said that taking into consideration the injuries on the body, injuries sites chosen and the weapon used; only intention could be gathered is that to commit murder and the death was definitely homicidal in nature.

25. PW-9 Santosh Khade is the Depot Manager in MSRTC, Dharur, who has stated about the employment of deceased Khayyumkhan in MSRTC.

26. PW-10 P.I. Angad Sudke is the Investigation Officer. He has given account of investigation carried out by him. There are no glaring defects in his investigation. PW-11 Akhileshkumar Singh is Superintendent of Police Dhule (the then Assistant Superintendent of Police and Sub-Divisional Police Officer at Kaij) who had carried out part of investigation and given direction to PW-10 P.I. Sudke to make further investigation. So also, PW-12 ASI Suryawanshi and PW-14 Baburao Rathod (then PSI), who had carried out part of investigation and recorded statements of PW-2 Fulchand and PW-3 Balasaheb. PW-13 Dy.S.P. Shinde, was also Investigating Officer, who had forwarded seized articles to the CA.

27. Thus, from the above discussion, it can be concluded that the testimony of PW-2 Fulchand and PW-3 Balasaheb can be believed to the extent that they were supporting to the prosecution case. Further, inference can be arrived at from their testimony itself as well as it can be connected to the discovery panchnama under Section 27 Evidence Act. If evidence of such witness is allowed to be discarded then, it would be easy for the accused to win over witness or witnesses. Learned trial Court has appreciated the evidence properly and had taken a possible view. It can be concluded that prosecution has proved the guilt of the accused No. 1 beyond reasonable doubt. Under such circumstances, absolutely there is no merit in the present appeal,

and hence, it deserves to be dismissed. In the result, we proceed to pass the following order :-

ORDER

The appeal is hereby dismissed.

(SMT. VIBHA KANKANWADI)
JUDGE

(T.V. NALAWADE)
JUDGE

MTK.
