

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

CRIMINAL APPEAL NO. 26 OF 2003

The State of Maharashtra, .. Appellant/orig.
through PSO, Adwad Police Station Complainant

versus

1. Sk. Tayar Sk. Rajjak Manyar,
Age 22 years,
2. Sk. Khalil Sk. Isa Manyar,
Age 29 years,
3. Sk. Rais Sk. Musa Manyar,
Age 23 years,
4. Sk. Sharif Sk. Rajjak Manyar
Age 20 years,
5. Sk. Rajjak Sk. Ibrahim
Age 50 years, ..

Respondents/
Orig. Accused

All R/o Adwad, Tq,. Chopda,
Dist. Jalgaon.

(Appeal against respondent no. 5
is dismissed as abated under court's
order dated 16-02-2010)

WITH
CRIMINAL REVISION APPLICATION NO. 282 OF 2002

Mairunisabi w/o Abdul Rajjak, .. Petitioner /
Age : 45 years, Occup: Nil, Original
R/o Adawad, Tq. Chopda, Complainant
Dist. Jalgaon

versus

1. The State of Maharashtra,

2. Sk. Tayar Sk. Rajjak Manyar,
Age 26 years,
3. Sk. Khalil Sk. Isa Manyar,
Age 33 years,
4. Sk. Rais Sk. Musa Manyar,
Age 27 years,
5. Sk. Sharif Sk. Rajjak Manyar
Age 24 years,
6. Sk. Rajjak Sk. Ibrahim
Age 54 years,
All R/o Adawad, Tq,. Chopda,
Dist. Jalgaon. .. Respondents/
(Respondent no.1 orig.
complainant, and
respondents no. 2 to 6
Original accused)

Mr. S. M. Ganachari, Additional Public Prosecutor for appellant and respondent no. 1 in criminal revision

Mr. U. S. Malte, Advocate for respondents no. 1 to 4 in criminal appeal and respondents no. 2 to 5 in criminal revision

Mr. Suresh N. Devmane (Munde), Advocate holding for Mr. G.V. Wani, Advocate for petitioner in criminal revision Application.

CORAM : SUNIL P. DESHMUKH AND
P. R. BORA, JJ.

DATE : 9th February, 2018

JUDGMENT (PER : SUNIL P. DESHMUKH, J.)

1. This criminal appeal by State takes exception to the judgment and order passed by Additional Sessions Judge, Amalner, rendered on 02-09-2002 in Sessions Case No. 52 of 1997 acquitting respondents-original accused of having committed offences under sections 302, 448, 147 148 and 149

of the Indian Penal Code, arising out of crime no. 15 of 1996 registered with police station, Adawad.

2. On 30-08-1997, a statement had been given by informant Mairunisabi (P.W. 3) resident of Manyarwada, Adawad, Taluka Chopda, District Jalgaon, to Assistant Sub Inspector, Police Station, Adawad, alleging that after midnight of 28-08-1997 and in early morning of 30-08-1997 about 1.30 to 2.00 a.m. she had seen her neighbourer Tayar Abdul Rajjak Manyar (accused No.1) in her house as her bed she had been sleeping on had been jolted and waking up shouting she had asked him what is he doing, he went to staircase but fumbled for a while, while climbing up for some time and she had spotted him with a big axe (फरशी कुर्हाड), however, ran away from the staircase. Around that time, her mother-in-law Mariyambi (P.W. 4) and son Asif had come there calling and she had opened the door and on switching on lights, informant noticed her husband had been convulsing and saw that he had received three blows on his head and blood was oozing from injuries and he was not speaking. He, therefore, had been taken to hospital by people, however, doctor declared him dead. She also stated that there is dispute over lane between her and Abdul Rajjak Ibrahim Manyar and court case in that respect had been pending. The statement was recorded as First Information Report (Exh. 62).

Aforesaid is the gist of allegations in the first information report under the statement by informant to the police.

3. In the statement, before the allegations, she had narrated that her husband had been a malaria supervisor and she had been staying with him along with four children and a daughter and her elder daughter having been married had been residing at her in-laws place and that on 29-08-1997 her (complainant's) husband had been doing office work at home till midnight and thereafter he had been sleeping on a cot with two sons, namely, Mohammad Azar and Mohamad Atif. She had also been sleeping on a parallel side bed. The family had been sleeping around midnight, keeping zero light switched on.

4. On 04-09-1997, she gave a further statement to the police, affirming correctness of the first information report recorded on 30-08-1997 and that at that time her mental state had not been proper and had only referred to the name of Tayar Abdul Rajjak. She added that as she had screamed, her mother-in-law had come running to see and she had seen four persons running away from the open window but, she could not identify them and while she had tried to open door from inside, however, since it had been locked from outside, it could not be opened. Therefore, her mother-in-law had opened the door from outside

and then tube light was switched on. She noticed her husband had been convulsing and had three injuries to his head and blood was oozing from the same and when he was taken to hospital, the doctor had declared him dead. Since her mental state was not proper she had not stated earlier about she having seen four persons running away.

5. The informant Mairunnisabi had been examined as prosecution witness no. 3 at Exhibit 61. In her examination in chief, she purports to refer to that she had seen four persons on the terrace and thereafter her mother-in-law had come to the house running with elder son. Rest of her version is in accordance with the statement appearing in the first information report. She, however, refers to that there was a dispute between her on one side and the accused persons on the other.

6. In her cross examination, informant (P.W.3) has stated that on 29-08-1997 her nephew had come to the house and he and her husband had taken meals together around 3.00 p.m. Yet, she does not remember name of the nephew. She further states in the cross examination that she had not stated to the police that she had seen Taher Rajjak standing near her bed or she had asked him what was he doing and why he had come to her house and although she had stated before police that four

persons were standing on the terrace, this fact has not been mentioned in the first information report. She further deposed that although she had stated to police that the door of her house had been locked from outside and she had closed it from inside and her mother-in-law had opened the door from outside and she (informant) had opened it from inside, the same has not been recorded in the first information report. She further states in the cross examination that although she had shouted and neighbourers had come on the scene, the same has also not been mentioned in the first information report. From the cross examination, it has been elicited that there is a road on the eastern side of her house and there are shops and residential houses to the road.

7. Dr. Vishnudas Vitthaldas Baheti has been examined as P.W. no. 12 at Exhibit 81. He was the Medical Officer attached then to the Primary Health Centre, Adawad. He deposed that one Kazi Alimali Joharali had brought dead body of Shaikh Rajjak Shaikh Kadar in government hospital on 30-09-1997 around 3.10 a.m. He had found three injuries caused to deceased and has deposed that those could be caused by heavy cutting object and that the body was sent for post mortem. His evidence shows that the injuries found on dead body could be possible with use of weapon like axe.

8. In the cross examination of P.W. 12 Dr. Baheti, it has been elicited that in all probability, a person would shout while injuries are being inflicted on him of the nature found on the dead body of Shaikh Rajjak Shaikh Kadar and that larynx, bronchae and trachea of the deceased were intact. It has also been elicited that blood may due to injury no. 1 caused to deceased mentioned in the medical certificate could have possibly sprinkled on his two sons who sleeping close to him.

9. Dr. Bhanudas Dattatraya Savale, examined as P.W. 14 at Exhibit 86, was the Medical Officer then attached to Cottage Hospital, Chopda. He deposed that he had conducted post mortem on Abdul Rajjak A. Kadar Maniyar. Along with external injuries as referred to by P.W. 12 Dr. Baheti, he also on examination of dead body had found internal injuries corresponding to the injuries referred to by Dr. Baheti.

10. He was cross examined about age of injuries and had stated that he cannot give definite opinion as to whether injuries were caused within 36 hours or so.

11. Investigating Officer, Assistant Police Inspector Sanjay Jagannath Patil has been examined as P.W. No. 16 at Exhibit 90. In his evidence, he has referred to that on 30-08-1997 around 2.30 a.m. message had been received from Dr. Baheti of Primary

Health Centre that Shaikh Rajjak Shaikh Tahir had been admitted in hospital in injured condition and on examination was found and declared dead. Thereafter he (Investigating Officer) had immediately visited the spot of incident and had made enquiries with the wife of deceased and neighbours and had then recorded statement of the wife of the deceased. He had prepared inquest panchanama in primary health centre, Adawad. Around 7.00 a.m. On 30-08-1997, spot panchanama had been drawn by him in presence of panchas as well as search panchanama had also been prepared and he had seized from the house of accused Shaikh Tayar Shaikh Rajjak, one black coloured pant, blue coloured shirt and two *lungies* under articles 4, 5, 7 and 1 respectively. On the very day, he had also seized clothes of the deceased, namely, *lungi*, *banyan* and a nicker vide articles 2, 3 and 6 respectively under panchanama Exhibit – 69. He had also on the very day recorded statement of Mariyambi Kadar (P.W.4) and had arrested Shaikh Tayar Shaikh Rajjak around 11.15 a.m. on the same day. He further, however, deposes that on 05-09-1997 he had prepared panchanama of seizure of bed in the house of deceased, along with pillow cover, cotton bed sheet stained with blood, cotton towel stained with blood bearing respectively articles no. 8, 9 and 10. On that day, he had also arrested Shaikh Khalil Manyar, Shaikh Isa Maniyar

and Shaikh Rais Manyar. Before that, on 04-09-1997, he had recorded statement of Abdul Rajjak Abdul Nabi as well as Hamid Hussain as narrated by them. He, on 12-09-1997, had arrested accused Shaikh Sharif Shaikh Rajjak and Shaikh Rajjak Ibrahim. Seized muddemal had been sent to the Chemical Analyzer, Aurangabad.

12. Cross examination of Investigating Officer (P.W. 16) shows that the complainant had not stated that she had woken up shouting or for that matter Tayar Rajjak standing near her bed or she having asked him as to why he had come to her house or that four persons were standing on the terrace of her house or about door being locked from outside and she having closed the same from inside or complainant having stated about her mother in law having opened the door from outside and she having opened it from inside or she having shouted and therefore neighbours having gathered on the scene.

13. P. W. 11 Hamid Sk. Hussain at Exhibit 77 in his examination in chief purports to state that around 2.00 to 2.30 a.m. He had seen Tayar Rajjak and Khalil Isa running from the side of mosque and proceeding towards their house from over his house and Sk. Rajjak telling Sk. Tayyar and Khalil Isa

that he did his job and thereafter he heard noise of persons coming from the side of chowk and therefore he had been there and had seen crowd gathering in front of house of Abdul Rajjak Abdul Kadar and had entered his house and seen Abdul Rajjak lying with three injuries on the left side part of head and thereafter Abdul Rajjak had been taken to hospital.

14. In the cross examination, PW -11 purports to state, him having stated to police that he resides in front of house of accused no. 1 Abdul Rajjak, however, the same does not appear in his statement to police and further purports to refer to the statements as given in the examination in chief, stating that all these statements do not appear appear in his police statement. He further purports to reveal in the cross examination that he had stated to police that he had been sleeping on platform in front of his house but the same does not find place in his statement to the police. It has been elicited that deceased Abdul Rajjak Abdul Kadar had been his cousin and purports to ignore about criminal case having been lodged by accused no. 5 against him and his brother. It has further been elicited in his cross examination that his statement had been recorded by police two days after the incident and he also shows ignorance about there being no electricity from 2 to 3 days at Adawada.

15. P. W. 10 Abdul Rajjak Abdul Nabi examined at Exhibit 76 has resiled from the statement made by him to the police, deposing that he had been taking care of his wife at Chopda since she was hospitalized or having made any police statement.

16. At Exhibit 73, P.W. 9 Shaikh Shaikh Khairu Shaikh Buland has been examined as panch witness. He deposed that on 14-09-1997 at about 8.00 p.m., he had been standing at S.T. stand, Adawad when police came and took him to the police station and asked him to sign the panchanama which was being prepared. He purports to depose that he had seen one white shirt and white pant.

17. In his cross examination, P.W. 9 Shaikh Khairu also refers to that he went to the police station when the work of writing panchanama had been in progress.

18. P.W. 8 Dagadu Patil examined at Exhibit 72 is also a panch witness in respect of seized clothes.

19. P.W. 7 Shaikh Majid Shaikh Ismail is a witness examined at Exhibit – 70. He also purports to refer to that he had seen about 4 to 5 persons running from over side of house of Abdul Rajjak. He refers to him having heard accused no. 5 asking accused no.

2 whether murder was committed and accused no. 2 having replied in affirmative. After ten minutes, he heard noise from the house of Abdul Rajjak and, therefore, he went to the house of Abdul Rajjak. He refers to that there are about 100 to 150 tenements in the Manyarwada area. He appears to be resident of Manyarwada.

20. In cross examination, however, the witness resiles from his statement to the police about he having woken up in the night and seen 4 to 5 persons running towards house of Abdul Rajjak or he having heard conversation of accused no. 5 with accused no. 2 or having heard noise and cryings from the house of Abdul Rajjak and also claims to be ignorant about criminal complaint bearing S. C. no. 810 of 1980 against him by accused no. 5 having been filed and he had been a chance witness to panchanama drawn on 05-09-1997 and had signed the same having been asked to do so.

21. P. W. 6 Alimali Jeharali Kazi examined at Exhibit 67 deposes that around 2.00 to 2.30 a.m., one Tayabkha Pathan had been to his house and had told him about Rajjak having been assaulted by some one by an axe and having been taken to the hospital. (Deceased Rajjak was being referred to by this witness as doctor). The witness appears to be with the

deceased to the hospital at Adawad, so also to Chopda for post mortem and upto funeral and while seizure of pant, shirt and two lungies had taken place and also had been a witness to said panchanama, so also to panchanama of seizure of clothes on the person of the deceased.

22. In his cross examination, it has been elicited that he had been elected member of gram panchayat and had contested along with Manjoor Ali and Mariambi and Shaikh Rajjak Shaikh Ibrahim had also contested elections from the same ward and that in the contest, Manjoorali and Mariyambi had been defeated and Shaikh Rajjak's panel had been elected. It had further been elicited that he had been a leader and had cordial relations with the police.

23. P. W. 1 Manjoorali at Exhibit 58 is examined since he had been a witness to the spot panchanama.

24. P. W. 2 Vasant Dhudaku Bhalerao (Exhibit 60) is also a witness for seizure of clothes.

25. P. W. 4 Mariyambi Abdul Kadar Manyar examined at Exhibit 64 is the mother of deceased Shaikh Rajjak and mother in law of the complainant Mairunisabi. In her deposition, she states that she had heard someone jumping on the roof of house of tin

shade around 2.00 a.m. She had woken up and had seen from the window that accused were jumping from the staircase of the house and therefore she went towards the house of daughter-in-law and found the door to have been locked from outside and she had opened the same. She further deposed that door had been opened by daughter in law from inside and found her son having suffered three injuries and blood was oozing from the injuries.

26. In cross examination, she admits that she had not stated before police that she had seen someone jumping, however, she had stated to police that she had seen all the accused jumping on the roof but all these facts have not come in her statement to police dated 30-08-1997.

27. From the evidence with respect to spot panchanama, it emerges that the incident had occurred in room which was of the size of about 7 ft. x 8 ft. and in a locality having close houses. The evidence also shows that deceased Abdul Rajjak had been sleeping with his two sons on a bed which is stated to be 3 ft. x 6 ft. in size and informant wife of deceased had been sleeping in the very room on another bed. In the neighbouring house, it appears, mother-in-law of the informant had been residing. The house does not appear to have access more than

one. House of the deceased/informant appears to have an arrangement of staircase to reach upto the first floor.

28. The case put forward by the informant and her mother-in-law is, they had seen about five persons running away. The informant and her mother in law have stated that the persons were on the terrace and had jumped from there. The evidence also shows that roof had been having tins. Abdul Rajjak had been sleeping on the ground floor with three other persons. Five persons, in the circumstances, are alleged to be on the tin roof shade of the house having no staircase from outside and the roof of the house had been accessed from inside of the informant's house. It is highly improbable that if five persons had gathered on the tin roof without making any noise and secondly, evidence does not disclose as to how and in what way even the roof of the house could be accessed from outside. There is no evidence to show that there had been arrangement to get to the roof in the absence of any ladder, stool or other like objects. The evidence does not show availability of such objects on the spot. No explanation has been coming forth from prosecution as to how five persons at a time could have been on the tin roof top.

29. Over and above this, despite five persons having climbed up the tin rooftop, both the witnesses said that they had seen four accused on the tin rooftop. Evidence does not show as to how the occupants of the house could have seen the persons on the roof top, for, the evidence does not show that there is possibility of viewing the persons because the persons are stated to be on the roof top of the very tenement where the incident is stated to have taken place and the front door of the house, as it seems, opens on road with intervention by platform at the most of about two feet width. Even assuming for the sake of arguments that five persons had gathered on the rooftop yet, it was in the dark of the night and as such, there is a bleak possibility that accused persons could have been clearly seen and raises doubt about the same. The evidence also passingly refers to that there had been power failure in the village from a few days.

30. The other aspect which will have to be considered is, informant had stated to have immediately identified accused no. 1 running away giving jerk to her bed and she had asked him what was he doing and had seen him with an axe ((फरशी कुर्हाड). It is stated by her that she had seen axe perhaps since she has referred to that zero bulb had been lit. However, at that time, despite there being axe in the hand of accused no. 1

and she shouting at accused no. 1, she had not seen husband lying injured. It was only after her mother in law had come and switched tube light on that, complainant had seen husband convulsing with three injuries and there was blood oozing from the injuries. Nothing has come forth as to what the sleeping children were doing. Doctor has opined that after having hit by sharp object, trachea and larynx were intact, possibility of screaming, shouting was possible and despite three incised injuries, it is quite difficult to believe that the deceased had not been shrieking, groaning in pains. Besides, doctor has also opined that blood could have spurted with such injuries inflicted and yet the children or, for that matter, the side bed where the informant had been sleeping or children's clothes were not seized nor it is the prosecution case that blood was found either on their clothes or on their person. The deceased had been removed from the bed along with mattress to the hospital. However, nothing is coming in the evidence about the clothes of children and no explanation has been offered why their clothes were not seized and examined.

31. Evidence further shows that even informant had not seen her husband being actually assaulted by accused no.1. After getting jerk to her bed, the complainant had woken up and had claimed to have seen accused no. 1 with axe running away.

32. None of the other witnesses had seen accused no. 1 inside the house of informant/complainant. They only claim to have seen some persons running away talking about committing murder. Those persons are from the locality and are stated to have seen accused in the night. All the witnesses state that in the night they had identified accused persons. Their depositions show that they were stating that particular accused was talking to other particular accused. The two witnesses Abdul Rajjak Abdul Nabi as well as Hamid Hussain have deposed that they had seen accused in the night, their cross examination shows that there has been some prosecution launched against them at the instance of accused persons. In the night, with light of zero bulb switched on witnesses could recognize accused no. 1 with axe in his hands but she could not recognize complainant's husband and notice his convulsing.

33. Besides aforesaid, it has also emerged on record particularly from the deposition of P. W. 6 Alimali Jeharali Kazi examined at Exhibit 67 that there had been a political contest among persons, namely, accused no. 1 and others on one side and the informant, Manjoorali and others on the other and that panel supporting accused persons had been successful. The panel of accused persons had been elected in elections.

However, this political rivalry, in the circumstances, does not appear to be of any significance as it is highly unlikely that a motive, and a strong enough, can possibly be had to commit murder.

34. The informant has referred to that there had been a dispute over lane between her and accused no. 1. It is said that it had ever been a court matter. However, this too does not appear to give rise to motive strong enough to commit murder. That aspect has not received any corroboration from any other witness. Further the evidence by the witnesses discernibly shows that the houses of the accused and informant where the incident is stated to have occurred, are not immediately neighbouring.

35. Overall, the evidence is not cogent, convincing, strong enough or inspiring confidence to conclusively point out guilt to accused no. 1. The evidence gives rise to lots of doubts and in the circumstances, under criminal jurisprudence accused should receive benefit of doubt and he may not be deprived to have such benefit.

36. Taking into account aforesaid, although Sessions Judge has held the death of Abdul Rajjak to be homicidal, on the basis of evidence as has come on record, it cannot be said with

certainty that accused no. 1 had committed murder of Abdul Rajjak. In the wake of doubtful circumstances, it would not be safe to sustain conviction given under impugned judgment.

37. The appeal is dismissed.

38. With aforesaid observations, criminal revision filed by complainant – informant, challenging judgment by Sessions Judge of acquittal of respondents and seeking remand of the matter for trial afresh, is liable to be dismissed. There is absolute absence of reason that would even lead to sustain accusations against accused. Even otherwise, no incriminating evidence, besides witness claiming to have seen accused in the night, no specific intention or object had been attributed against accused, even by the informant.

39. Criminal revision is, therefore, dismissed.

P. R. BORA,
JUDGE

SUNIL P. DESHMUKH,
JUDGE

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