

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

**CRIMINAL APPLICATION NO. 7073 OF 2016
IN
CRIMINAL APPEAL NO. 783 OF 2014**

Sanjay S/o Bansi Pawar
Age: 29 Years, Occ.: Agri,
R/o Waghadi Wadi, Taluka - Partur,
District – Jalna.

**... Applicant
(Informant/ Victim)**

Versus

1] The State of Maharashtra,
Through Police Inspector,
Police Station Partur,
Taluka – Partur, Dist.- Jalna.

2] Ashok S/o Bhimrao Rathod,
Age: 32 Years, Occ.: Agri

3] Vitthal S/o Seva Rathod,
Age: 56 Years, Occ.: Agri

4] Bhimrao S/o Megha Rathod,
Age: 52 Years, Occ.: Agri

5] Bansi S/o Megha Rathod,
Age: 64 Years, Occ.: Agri
(As per order dated 04.05.2017
application stands abated against
Respondent No.5)

6] Baban S/o Vitthal Rathod,
Age: 31 Years, Occ.: Agri

7] Krishna S/o Bansirathod,
Age: 27 Years, Occ.: Agri

8] Santosh S/o Bansurathod,
Age: 27 Years, Occ.: Agri

9] Shankar S/o Vitthal Rathod,
Age: 32 Years, Occ.: Agri

10] Ram S/o Bhimrao Rathod
Age: 37 Years, Occ.: Agricultural
Sr. No. 2 to 10 R/o Waghadiwadi,
Tanda, Taluka- Partur, District-Jalna.

... Respondents
(Respondent Nos. 2 to 10
are Original Accused Nos.
1 to 9)

Mr. V. A. Bagal, Advocate for the Appellant.

Mr. K.M. Nagarkar, Advocate for respondent nos. 2 to 4 and 6 to 10.

Mrs. P. V. Diggikar, APP for respondent-state.

**CORAM : S.S. SHINDE &
MANGESH S. PATIL, JJ.**

**RESERVED ON : 14.11.2017
PRONOUNCED ON : 13.02.2018**

...

JUDGMENT: *(Per Mangesh S. Patil, J.)*

. This is an application seeking leave to appeal as required by Section 378 (3) r/w proviso to Section 372 of the Code of Criminal Procedure by the informant, being aggrieved and dissatisfied by the judgment and order

passed by the learned Additional Sessions Judge, Jalna on 05.11.2014 in Sessions Case No. 14 of 2012 acquitting the respondent Nos. 2 to 10 of the offences punishable under Sections 307, 335, 452, 143, 147, 148 read with Section 149 of the Indian Penal Code and of the offence punishable under Section 135 of the Bombay Police Act.

2] In fact the Criminal Appeal was preferred straightway in the purported exercise of the right vested in the informant injured by virtue of proviso to Section 327 of Criminal Procedure Code. However, as per the directions of this Court by the order dated 22.11.2016 he was directed to seek leave to appeal under Section 378 (3) of the Code of Criminal Procedure in view of the law settled by the Supreme Court in the case of **Satya Pal Singh Vs. The State of Madhya Pradesh and Others; 2015 Cr. L.J. 4929**. The application has been filed pursuant to such direction.

3] Stated in brief the prosecution case is to the effect that informant/appellant Sanjay (PW-8) was married to Sindhubai (PW-10). She is the daughter of Gokul (PW-4). However, the couple was not cohabiting. After she deserted, he solemnised second marriage with one Radha. However, Radha also deserted him and later on Sindhubai (PW-10) again

started cohabiting with him. A case was going on between Sanjay (PW-8) and accused Vitthal since about two years prior to the date of incident and the matter was pending in the Court at Partur.

4] It is then alleged that on the ground of such previous dispute, on 23.02.2011 at about 08.00 p.m. when Sanjay (PW-8) was present in the house of Gokul (PW-4) all the accused nos. 1 to 9 entered into the house carrying weapons like axe and sickle. They then assaulted Sanjay (PW-8) with these weapons on head, neck, palm and thigh. When an alarm was raised Sanjay's mother-in-law Sushilabai (PW-7) tried to intervene but even she was assaulted. It is alleged that Sindhubai (PW-10), Vimal (PW-12), one Rajaram, Vijay, Nandkumar and Bharat (PW-5) arrived there and rescued Sanjay (PW-8). The accused then left the spot. Sanjay (PW-8) was immediately taken to the police station from there he was taken for medical treatment and thereafter at about 11.00 p.m. on the same day his statement was recorded while he was being treated in the hospital and it was received as the F.I.R. and the crime was registered.

5] P.S.I. Vyawahare (PW-13) took over the investigation. The panchnama of the scene of the offence was conducted in presence of panchas

including panch Gokul (PW-4). The accused were arrested. It is alleged that while being in the custody the accused Santosh, Shankar and Ashok gave the disclosure statement in presence of panch Namdev (PW-1) and discovered a sickle which was seized under the panchnama. The accused Vitthal, Bhimrao, Bansi also willingly gave statements and produced the axe used in commission of the offence. Their statements were recorded in the presence of panch Rasu (PW-2) and accordingly they discovered the axe which was seized. Thereafter, the Investigating Officer seized the clothes which were on the person of the informant Sanjay (PW-8) and also seized the clothes of the accused persons under the panchnama in presence of panch Bhaurao (PW-3). The seized Muddemal was sent for Chemical Analysis. Injury certificates were collected and in due course of time the charge-sheet was filed. After committal of the case the learned Additional Sessions Judge framed the charge, recorded the plea and concluded the trial. By the impugned judgment and order he acquitted the accused respondent Nos. 2 to 10. It is necessary to mention here that the respondent No. 5 is reported to have died during pendency of the application and hence it stands abated against him.

6] We have heard the learned Advocate for the applicant the learned

Advocate for the respondent nos. 2 to 10 (except respondent No.5) and also the learned A.P.P. The learned Advocate for the applicant vehemently submitted that there is ample, cogent and reliable evidence which is sufficient to bring home the charge. There are eye witnesses who have supported the prosecution. There are no inconsistencies in their testimonies. There was motive for the assault in the form of previous dispute which was pending in the Court at Partur. The parties were knowing each other and therefore there was no question of any dispute as to identification of the respondent nos. 2 to 10. The learned Additional Sessions Judge has not correctly appreciated all these facts and has without any reason disbelieved the testimonies of the eye witnesses as well as the injured/applicant.

7] The learned Advocate for the applicant further submitted that apart from the direct evidence in the form of testimonies of the eye witnesses, there are other clinching circumstances which have been successfully brought on record by the prosecution but the learned Additional Sessions Judge has over looked them on flimsy grounds. Some of respondents have voluntarily discovered the weapons used in the crime i.e. an axe and a sickle. Chemical Report has also been received. The blood stains on the weapons and the

clothes of the respondents matched with the blood group of Sanjay (PW-8) which is 'AB' and therefore this circumstance could have been properly weighed by the learned Additional Sessions Judge but he has refused to rely upon it without any cogent reason.

8] The fact that Sanjay (PW-8) has sustained injuries has been duly substantiated and proved by Dr. Kulkarni (PW-11) and the fact that the injuries were sufficient in the ordinary course to cause death has been unnecessarily ignored by the learned Additional Sessions Judge. The learned Additional Sessions Judge has taken hyper technical view of the entire matter. The appreciation of the evidence is faulty and the judgment and order suffers from perversity and arbitrariness and is capricious. There are good grounds for the applicant/informant Sanjay (PW-8) to succeed in the appeal and therefore leave may be granted as prayed for.

9] The learned A.P.P. submitted that the State has not preferred any appeal and the application may be decided on its own merits.

10] The learned Advocate for the respondent Nos. 2 to 10 vehemently opposed the application. He submitted that the learned Additional Sessions

Judge has appreciated the direct and circumstantial evidence in the proper perspective. He has assigned cogent and sufficient reasons justifying his conclusions. He has also considered the probabilities. He has pointly noted the grave inconsistencies in the testimonies of the eye witnesses *inter se*. He has also correctly appreciated the fact that the alleged discovery of weapons sought to be relied upon by the prosecution by resorting to Section 227 of the Evidence Act is also faulty in as much as such discoveries are in fact joint discoveries. Two or more accused whose joint statements have been recorded and they have alleged to have discovered the weapons jointly which is not reliable. The learned Advocate for the respondents further pointed out that Sushilabai (PW-7) who in fact is the mother-in-law of informant Sanjay (PW-8) has not at all supported the prosecution and has flatly denied about the respondents having assaulted the informant Sanjay (PW-8) at her home with the weapons like an axe and a sickle. She also denied about having been assaulted when she tried to intervene. There was no reason for her to turn hostile to the prosecution when her son-in-law was assaulted in her home. Even the other witness who were stated to have drawn at the scene of the offence and who allegedly rescued Sanjay (PW-8) by name Bharat (PW-5) has also failed to support the prosecution and has stated to have come to know

about the incident only on the next day. He also flatly denied about having seen the incident and Sanjay (PW-8) being assaulted by the respondent Ashok and Santosh. The learned Advocate also pointed out that though the incident is alleged to have taken place in the house of Gokul (PW-4) who happens to be the father-in-law of Sanjay (PW-8), he has not stated about the incident having taken place in his presence and he has only acted as one of the panchas on the spot panchnama. More importantly, inconsistent with the prosecution version, he has denied that blood was also noticed/found on the spot. The learned Advocate also pointed out that the prime witnesses Sanjay (PW-8), Sindubhai (PW-10) and Vimalbai (PW-12)-who stays in the neighboring house where the incident has taken place are also not consistent in material particulars. There are several inconsistencies going to the root of their veracity. The learned Additional Sessions Judge has carefully scanned their testimonies and has rightly refused to rely upon them.

11] The learned Advocate for the respondents further submitted that even the medical evidence in the form of testimony of Dr. Kulkarni (PW-11) is not compatible and consistent with the ocular version of the prime witnesses. Though, weapons having sharp edge like a sickle and an axe is stated to have

been used by the respondents, Dr. Kulkarni (PW-11) has not noticed any cut injury or incise wound over head and back of Sanjay (PW-8). Dr. Kulkarni (PW-11) only noticed that there was an incised wound on the right side of the neck and right hand base of index / middle finger. He also noticed only an abrasion over back lumber region. This medical evidence is clearly inconsistent with version of the prime prosecution witnesses. Thus all in all, the learned Additional Sessions Judge has rightly appreciated all these facts and circumstances and has come to a right conclusion while acquitting the accused. The impugned judgment and order cannot be said to be either arbitrary, perverse or capricious. Thus, being an application seeking leave to appeal against the acquittal, the principles to be taken into account while interfering in judgment and order of acquittal are far too well settled. The conclusion arrived at by the learned Additional Sessions Judge is plausible and is not liable for any interference.

12] We have carefully gone through the record and proceedings and the evidence led before the learned Additional Sessions Judge as also the impugned judgment and order. Suffice for the purpose to observe, as has been rightly submitted by the learned Advocate for the respondent Nos. 2 to

10 that the scope for interference in the acquittal is far too well settled. The appellate Court is not expected to appreciate all the facts and circumstances independently and is not expected to substitute its own finding in place of the order of acquittal, only because it comes to a different conclusion. It is necessary to ascertain if there is any perversity or arbitrariness while appreciating the evidence by the lower Court. If on the correct appreciation of evidence the lower Court has reached the conclusion which is a plausible one, the appellate Court is expected to hold its hands. The appellate Court should not interfere and substitute its own finding. This being trite, we proceeded to appreciate the rival submissions of the parties.

13] Before scanning the testimonies of the eye witnesses and scrutinising the evidence in respect of the other circumstances, it is apposite to note the relations between the parties, the informant Sanjay (PW-8) and the other prosecution witnesses *inter se* as well as the relations between the accused *inter se* as also the common bond between the two. The accused nos. 2, 3, and 4 are real brothers, accused nos. 5 and 8 are the sons of accused No.2, accused nos. 1 and 9 are sons of accused no.3, accused nos. 6 and 7 are sons of accused no.4. As regards the informant Sanjay (PW-8), Sindhubai

(PW-10) is his wife and Gokul (PW-4) and Sushilabai (PW-7) are her parents. Sanjay (PW-8) has also admitted that the daughter of the accused No.4 is the wife of his brother. Vimalbai (PW-12) is the maternal aunt of Sindhubaim (PW-10) i.e. sister of Sushilabai (PW-7). This is all about the relations.

14] As regards the previous litigation in cross-examination she has also stated that Sanjay (PW-8) is her real brother. Sanjay (PW-8) admitted that there was a dispute 2 to 3 years ago between him and the accused No.2 Vitthal. In that matter accused No.4 Bansi had lodged a report and the matter was pending in the Court at Partur. He also admitted that the daughter of the accused No.4 Bansi who was married to his brother had lodged a complaint against his brother and the family members for the offence punishable under Section 498-A of the Indian Penal Code. He then admitted that because of such disputes the two sides were not on talking terms. It is true that such previous animosity arising out of couple of disputes will on the one hand, feed the aspect of motive for the alleged assault. However, at the same time these facts will have to be borne in mind while scrutinising the testimonies of the prosecution witnesses. Since it is human tendency to come out with falsehood and improvisation for the obvious reasons to somehow teach a lesson to the

offending parties. Therefore, it is utmost necessary to scrutinise their testimonies with circumstantial though not with cynicism or skepticism. The learned Additional Sessions Judge in our considered view has rightly referred to these aspects by way of precaution.

15] Now taking up the testimonies of the injured and the eye witnesses, one will have to recapitulate what the F.I.R. reads since it has been lodged within few hours of the occurrence. It reads that Sanjay (PW-8) on 23.02.2011 at about 08.00 p.m. had gone to the house of his father-in-law Gokul (PW-4) for dinner. All the accused arrived there with axes. They asked him as to why he was abusing them and all of a sudden attacked him with a sickle and an axe on the head, on the frontal part, on the back of head, right side of the neck, right palm, back and thigh. During the assault Vitthal-accused no.2 was instigating the other accused by saying that he (Sanjay PW-8) should be killed. His mother-in-law which he has referred to as Shashikalabai, when her name is Sushilabai (PW-7) arrived there and tried to rescue him but even she was assaulted on the right hand, wherein, one of the fingers of the right hand was cut. It is then alleged that Vimalbai (PW-12), one Rajaram, Vijay his wife Sindhubai (PW-10), Nandkumar and Bhausahab,

Sampat, Bharat (PW-5) and Uttam (PW-6) arrived there and rescued him. It is pertinent to note that this F.I.R. has been recorded while he was admitted in the hospital.

16] This takes us to the testimonies. Informant Sanjay (PW-8) has stated about all the accused having arrived and assaulted him on the neck, hand and back with a stick and an axe. It is thus apparent that unlike in the F.I.R. he has not stated about having been assaulted on the head and thigh. More importantly, he has not specifically attributed the assault to any specific accused. Use of the collective noun 'all the accused' is inconspicuous. It has not been made clear by him as to why and how he is not being able to even vaguely attribute specific overt act to any of the accused particularly when they are his distant relatives and was knowing their full names which he could reproduce while lodging the F.I.R. He has then stated about his mother-in-law Sushilabai (PW-7) having tried to intervene but even she was assaulted. But she herself has turned hostile to the prosecution. She has flatly denied any incident to have taken place in her house much less about any assault on Sanjay (PW-8) or she having sustained any injury. Bearing in mind the fact that she is the mother-in-law of Sanjay (PW-8) and though earlier there was a

matrimonial dispute between him and his wife Sindhubai (PW-10) there was a compromise and the couple had resumed cohabitation and in fact he had gone to the house of in laws for a dinner. No plausible explanation was sought to be given and can be found as to why this prime witness Sushilabai (PW-7) has turned hostile. This indeed is a very strong circumstance having a heavy backing on the testimony of Sanjay (PW-8), his wife Sindhubai (PW-10) and his sister Vimalbai (PW-12).

17] Though, the F.I.R. reads that Bharat (PW-5) had arrived on the spot and rescued Sanjay (PW-8), he has also turned hostile to the prosecution and has stated about having learnt about the incident on the next day. Therefore, his testimony is of no avail to the prosecution.

18] Sindhubai (PW-10) is the wife of Sanjay (PW-8). She has stated about accused no.1 Ashok and accused no.7 Santosh having assaulted Sanjay (PW-8) with sickle on his neck, back and ear. The other accused were present there and Vimalbai (PW-12), Nandu and Bhausahab having intervened. However, conspicuously Sanjay (PW-8) himself has not stated that she was present at the time of incident, much less about having come to his rescue. Besides, though in his testimony he has stated about his mother-in-law

Sushilabai having at the first instance arrived to rescue him, Sindhubai (PW-10) has stated that it was Nandu who had arrived there first in point of time. When he has stated that he was assaulted inside the house she has stated that he was in the courtyard. Apart from such material inconsistencies even independently if we scrutinise her testimony, she has not specifically stated as to whether accused no.1 Ashok and accused no. 7 Santosh both were carrying sickles or only one of them was having a sickle. Her statement that both of them having assaulted Sanjay (PW-7) with a sickle is certainly a vague one. More importantly, like Sanjay (PW-8) even she has not stated about he having been assaulted on the head.

19] Now turning to the testimony of Vimalbai (PW-12) she has stated to have reached the spot and rescued Sanjay (PW-8). Her house is adjacent to the house of the accused persons and after hearing shouts she went to the spot, accused Ashok and Santosh assaulted Sanjay (PW-8) with a sickle over his head, neck and back. She has further stated that when Sushilabai (PW-7) (she has stated her name as Sushabai) tried to intervene even Santosh gave a blow of sickle on her finger. She has then specifically stated that Bhausahab, and Nandu had already reached the spot before her arrival which version is

also inconsistent with the version of Sanjay (PW-8) and that of Sindhubai (PW-10). She is also equally vague in stating that accused Ashok and Santosh have assaulted Sanjay (PW-10) with a sickle without specifying whether both of them were carrying different sickles or if one sickle was used in the assault. It must be borne in mind the fact that Sanjay (PW-8) has stated that the incident was going on for couple of minutes and the person who had intervened had arrived after two to three minutes which makes it quite clear that the so called eye witnesses and particularly Vimalbai (PW-12) in all probability must have arrived after the incident was over and may not have actually witnessed the assault.

20] Considering the fact that Sanjay (PW-8) is a highly interested witness, the testimonies of Sindhubai (PW-10) who is his wife and Vimalbai (PW-12) who is his sister are ridden with several inconsistencies on material aspects. Being highly interested witnesses who must be having grudge against the accused persons, such inconsistencies in our considered view go to the root of their veracity. Simultaneously, one cannot forget the fact that independent witnesses who are stated to have arrived on the spot like Bhausahab and Nandu have also not been examined. Bharat (PW-5) though

he is an independent person has turned hostile to the prosecution. To repeat, even the mother-in-law of Sanjay (PW-8) - Sushilabai (PW-7) has turned hostile and flatly denied any incident to have taken place much less having sustained any injury while rescuing Sanjay (PW-8). All these aspects have been borne in mind by the learned Additional Sessions Judge while refusing to rely upon the prime witnesses. In our considered view, his such approach is unassailable.

21] According to the prosecution accused Santosh and Shankar have voluntarily given statement and discovered sickle from the house of Shankar. However, such discovery statement and subsequent recovery though stated to have been effected in presence of panch Rasu (PW-2) this panch has denied about any sickle having been recovered by Santosh pursuant to any statement. Panch Namdev (PW-1) has also turned hostile and has denied about accused Vitthal, Bhimrao and Bansi having given any statements and having accused Vitthal discovered any axe. In this regard it is also apparent to note that this disclosure statement is also peculiar in as much as it is stated to be a joint discloser statement of three accused. We have a serious doubt as to admissibility of such joint disclosure statement. The disclosure as

contemplated under Section 27 of the Indian Evidence Act is relevant since the person making the discovery can be said to have an exclusive knowledge of the fact to be discovered. In our considered view, the law does not contemplate any such joint discovery which can be made relevant under that provision.

22] Even Gokul (PW-4) who happens to be the father-in-law of Sanjay (PW-8) has denied presence of blood on the spot and has flatly denied any panchnama of the scene of the offence having been conducted in his presence. Panch Uttam (PW-6) has also turned hostile and has denied that clothes of Sanjay were seized in his presence and they were stained with blood.

23] It also needs to be noted that the other panchs and particularly independent persons like Nandkumar, Rajaram and Bhausahab whose names appear in the F.I.R. were not supporting the prosecution and the learned prosecutor had sought to be discharge them by submitting the pursis (Exhibit-58). Thus, it is only on the basis of the testimonies of the Investigating Officer Vyawahare (PW-13) at the most these circumstance regarding discoveries of weapons which is admissible under Section 27 of the Indian Evidence Act has been attempted to be proved. The learned Additional Sessions Judge has

rightly refused to rely upon the testimonies of the Investigating Officer Vyawahare (PW-13) has refuted this circumstances. In our considered view, the approach cannot be faulted with. Being an Investigating Officer, he obviously must be having an interest and it would indeed be too risky to hold such discoveries under Section 27 of the Indian Evidence Act as proved particularly when the oral account of the incident as discussed herein-above, is not trustworthy and reliable.

24] Now turning to the medical evidence in the form of testimony of Dr. Kulkarni (PW-11), he has stated to have examined Sanjay (PW-8). He noticed that there was Incise wound on the right side of neck, CLW over occipital region of scalp, Incise wound on base of right index finger, CLW over fronto parital region of the scalp and couple of abrasions over the back. He has stated that all the injuries were simple. The incise wound and the abrasion on the lateral region of the back were possible by sharp object and other injuries were possibly by hard and blunt object. He has stated that the age of the injuries was within six hours. He has also stated about having noticed the traumatic amputation over right middle finger with fracture of metacarpel bone of Sushilabai (PW-7) and even it was caused within six

hours. However, as is mentioned herein-above Sanjay (PW-8) himself has not stated about having sustained any injury over his head and even Sushilabai (PW-7) has turned hostile and has denied any incident to have taken place much less she having sustained any injury. Though, the weapons like axe and sickle is stated to have been used no cut injury is noticed. Thus, even the medical evidence is not compatible and consistent with the testimonies of the witnesses Sanjay (PW-8) and Sushilabai (PW-7). The learned Additional Sessions Judge has therefore taken a plausible view in appreciating this aspect of the matter.

25] Taking an overall view of the matter, the evidence led by the prosecution has been correctly appreciated by the learned Additional Sessions Judge and he has taken a plausible view which in our considered view cannot be faulted with or substituted by a different view. Therefore, there are no sufficient and cogent reasons to grant leave to prefer an appeal.

26] The application is rejected.

The Criminal Appeal No. 783 of 2014 is disposed of.

[MANGESH S. PATIL, J.]

KAKADE

[S. S. SHINDE, J.]