

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 270 OF 1999

The State of Maharashtra
(Through the Police Sub-Inspector,
Phaltan Police Station, Dist. Satara)

... Appellant
(Orig. Complainant)

V/s.

- 1 Shivaji Maruti Yetakale,
Age : 23 yrs.,
- 2 Narayan Maruti Yetakale,
Age : 25 yrs.
Both r/o. Asu, Tal. Phaltan, Dist. Satara.

... Respondents
(Orig. Accused)

Mr. S.V. Sonawane, A.P.P. for the Appellant.
Mr. Abhaykumar Apte, appointed Advocate for Respondent Nos.1 and 2.

**CORAM : INDRAJIT MAHANTY AND
V.K. JADHAV, JJ.**

Judgment reserved on : 6th DECEMBER, 2018.
Judgment pronounced on : 21st DECEMBER, 2018.

JUDGMENT (Per V.K. Jadhav, J.):

1 The State has preferred this Appeal against the judgment and order of acquittal passed by the 5th Additional Sessions Judge, Satara on 20.02.1999 in Sessions Case No.161 of 1996. The learned 5th Additional Sessions Judge, Satara, has acquitted the Respondent-Original Accused Nos.1 and 2 for the offences punishable under Sections 148, 302, 325, 323, 504, 506 and 149 of I.P.C.

2 Brief facts of the prosecution case are as follows :-

Deceased Baburao Katkar was residing at Village Asu, Taluka Phaltan, alongwith his wife Gangubai and his two sons Shivaji and Baban, daughter-in-law Shakuntala and children. One Maruti Rama was residing with his family members adjacent to house of deceased Baburao. There is a dispute between these two families on account of open space in front of the house of deceased Baburao. Therefore, Maruti Yetkale had instituted a suit before the Court of Civil Judge, Junior Division, Phaltan, in respect of the said open space. The Respondents herein Original accused Nos.1 and 2 are the sons of said Maruti Yetkale. Incident had taken place on 11.04.1994, it was a festival of Gudhi Padva. At about 5.00 to 5.30 p.m. PW Gangubai was sweeping the courtyard in front of her house and the Respondent-Accused No.1 Shivaji and his mother Kankabai had objected for the same on the ground that the said courtyard is belonging to them. However, PW Gangubai told them that the said open place was belonging to her and she would continue to sweep. Further reveals from the prosecution story that Respondent-Accused No.1 Shivaji and Kankabai shook PW4 Gangubai and pushed her down and thereupon she raised the shouts. On hearing the said shouts, deceased Baburao Katkar, PW5 Shivaji Katkar and PW2 Baban came out. They have noticed the presence

of Maruti Yetkale, Udhav Yetkale, Appa Yetkale and Sarajabai including Respondent-Original Accused Nos.1 and 2. On seeing them, Respondent-Accused No.1 Shivaji rushed towards his house and brought an axe and shouted that he would kill one by one. By saying so, he gave a blow with sharp edge of axe on the head of deceased Baburao. Deceased Baburao has sustained bleeding injury and fallen down on the ground. The Respondent-Accused No.2 Narayan and co-accused Udhav gave a blow with stick on the head and back of PW5 Shivaji Katkar. Maruti and Appa gave blows with stick on the back and hand and PW2 Baban while co-accused Sarajabai and Kantabai beat PW4 Gangubai. The villagers intervened in the matter and the assailants went away. Deceased Baburao was immediately shifted to Municipal Dispensary at Phaltan. However, he died during the treatment.

3 On the basis of the report lodged in Police Station by PW2 Baban Katkar Exh.35 Crime No.49 of 1994 came to be registered with Phaltan Police Station for the offences punishable under Sections 302, 149 of the I.P.C. The present-Original Accused Nos.1 and 2 were absconding since the date of incident and after their arrest, the concerned Police Station has submitted the supplementary charge sheet against them. The remaining five accused were tried by the Court vide Sessions

Case No.120 of 1994 and they were acquitted by the Additional Sessions Judge, Satara, on 10.05.1996. The learned Judge of the trial Court has framed charges against both the accused for the offences punishable under Sections 148, 302, 325, 323, 504, 506 r/w 149 of I.P.C. Both of them pleaded not guilty of the charge and claimed to be tried. The prosecution has examined in all nine witnesses in order to substantiate the charges levelled against the accused. The statement of the accused came to be recorded under Section 313 of I.P.C. and after hearing both the sides, the learned 5th Additional Sessions Judge, Satara, has acquitted the Respondents-Original Accused Nos.1 and 2 for the charges levelled against them.

4 The learned A.P.P. submits that PW2 Baban, PW4 Gangubai, PW5 Shivaji are the injured eye witnesses, PW6 Sarubai is also eye witness and PW3 Bashir Shaikh is an independent eye witness to the incident. The evidence of eye witnesses is consistent, reliable and trustworthy. All the eye witnesses have narrated the incident in detail by ascribing the role to each and every accused. Though it has come positively in the evidence of eye witness that Respondent No.2 Shivaji has inflicted the blow of an axe on the head of deceased Baburao which was ultimately resulted into death of deceased Baburao, learned Judge of the

trial Court has ignored the said evidence and erroneously acquitted Respondent-Accused Nos.1 and 2. The ocular evidence is fully corroborated by the medical evidence on record. There is a prompt lodging of FIR Exh.35. Learned A.P.P. submits that the impugned judgment and order of acquittal is thus, liable to be quashed and set aside and Respondent-Original Accused No.1 and 2 are liable to be convicted for the charges levelled against them.

5 The learned Counsel for the Respondent-Original Accused Nos.1 and 2 submits that the evidence of so called Eye witnesses is not consistent, reliable and trustworthy. They have contradicted each other on material aspect and all of them put forth the different version in respect of the incident. Their evidence do not inspire any confidence. PW3 Bashir Shaikh is not an independent eye witness and he is interested witness. He has altogether given a different story about the incident. PW4 Gangubai has exaggerated the prosecution story. FIR Exh.35 cannot be treated as FIR for the reason that the same would be hit by the provision under Section 161 of Cr.P.C. PW2 Baban has deposed that before lodging FIR Exh.35 his complaint was recorded by the police and further one another person viz. Shivaji Mane had given a telephonic message from Village Asu prior to FIR Exh.35. Learned Judge of the trial

Court has rightly observed PW2 Baban PW5 Shivaji are not eye witnesses to the incident. PW4 Gangubai had no occasion to witness the actual incident. PW6 Sarubai went to the spot after the incident was over. PW3 Bashir Shaikh has stated altogether different story. The learned Judge of the trial Court has, therefore, rightly given benefit of doubt to the accused and acquitted them accordingly, there is no substance in the Appeal and the Appeal is liable to be dismissed.

6 On careful perusal of the prosecution evidence we find that though PW2 Baban, PW3 Bashir Shaikh, PW4 Gangubai, PW5 Shivaji, PW6 Sarubai claimed to be eye witnesses to the incident, none had an opportunity to witness the actual incident. They have contradicted each other on material aspect and some of them exaggerated the prosecution story. All of them are the interested witnesses and even on scrutinizing their evidence carefully it appears that their evidence is not free from doubt. Moreover, PW2 Baban has lodged the complaint initially however, the same has been suppressed. Consequently, the complaint Exh.35 cannot be read evidence and the same would be hit by the provision of Section 161 of Cr.P.C.

7 There is a dispute between the two families in respect of the

courtyard since four years prior to the incident and even the accused had instituted the suit against the complainant's family in respect of the same. The incident had taken place since PW4 Gangubai started sweeping the courtyard, the ownership of the same was in dispute. At that day at about 1.00 p.m. (prior to the main incident) there was a quarrel between two families thus, PW2 Baban had decided to inform about the same to his brother Shivaji therefore, he went to the farm and brought his brother PW5 Shivaji to home. Thereafter, alongwith brother Shivaji, PW2 Baban had been to the house of Sarpanch, however, he was not found and, therefore, they returned to the house. Both of them entered in their home. In para 5 of the cross-examination, PW2 Baban has stated that after some time he heard shouts of his mother and, therefore, went outside and noticed that the mother (PW4 Gangubai) was lying on the ground. He had also noticed his father was also lying. According to him, his father lying in unconscious condition having sustained bleeding injury. According to him, his brother PW5 Shivaji went outside first and he had followed him. His brother Shivaji was assaulted and after sustaining the injury, his brother Shivaji had fallen on the ground. PW2 Baban was also beaten and according to him, he was the last person assaulted by the accused. PW5 Shivaji in para 3 of his cross-examination has stated that

after hearing noise of quarrel, he went out and saw the co-accused Kankabai and Sarjabai were beating his mother. Thereafter, first blow of stick was given by Udhav on his head and he has received only one blow on his head. He has contradicted his own evidence recorded by the Court in the trial against the other accused persons in which those accused persons came to be acquitted. He was confronted with his previous evidence. According to him, he went to courtyard along with his father and PW2 Baban. He had narrated the incident as if he was present right from the beginning and witnessed the blow of an axe given on the head of his father by accused Shivaji. However, PW2 Baban has not deposed like that.

8 PW4 Gangubai has exaggerated the story by deposing that accused Shivaji gave the second blow with axe on the head of her husband. According to her, she was the person from family who was firstly beaten by the accused. She was pushed by co-accused Kankabai and Sarjabai and, thereafter, extended beaten to her with kicks and fist blows. Even accused Kankabai sat on her chest. She was lifted by persons gathered there and put Gangubai in the jeep. She has deposed that on hearing her noise, her husband deceased Baburao and her sons Shivaji and Baban came out, however, this is not the prosecution story. Deceased

Baban had been to the spot firstly and after some time PW5 Shivaji and PW2 Baban went to spot.

9 PW3 Bashir Shaikh, to whom the prosecution claims an independent witness, has denied the suggestion in his cross-examination that he is cultivating the land in partnership with deceased Baburao. However, PW2 Baban has admitted the partnership with PW3 Bashir Shaikh. PW3 Bashir Shaikh went towards the spot and noticed that Shivaji Katkar lying on the ground and deceased Baban was also lying on the ground. Obviously he had no occasion to see the main incident. Similarly, PW6 Sarubai had also no occasion to witness the actual incident. On noticing her brother deceased Baburao and others lying, she went to the brother's home for bringing the water. Even then PW Sarubai had tried to narrate the incident as if she had witnessed the actual incident.

10 PW2 Baban in para 3 of his cross-examination, when the reference was given to his earlier deposition stated that after the incident, the jeep was taken to police station and then they were taken to hospital and the police man were accompanied them. He had further admitted that at that time police had recorded the information given by him and his signature was obtained and then they were taken to dispensary.

According to him, the police man were present in the dispensary till his father died and brother Shivaji was sent to hospital at Satara. Till 10.30 p.m. he remained in the dispensary. Thereafter, he went to the police station and his information Exh.35 was recorded. It is thus, pertinent that if at all the information was reduced into writing before PW2 Baban and the other injured persons were taken to the dispensary, the said information has not come on record. Thus, the so called complaint Exh.35 is not admissible and the learned Judge of the trial Court has rightly treated Exh.35 as afterthought complaint. Furthermore, the Investigating Officer has recorded the statement of the eye witnesses belatedly for which no explanation has been tendered. Even the statement of PW4 Gangubai has been recorded belatedly. Furthermore, it cannot be ignored that the other co-accused came to be acquitted in Sessions Case No.120 of 1995. PW4 Gangubai has not narrated the incident to the police in the dispensary. She was discharged at about 10.00 to 11.00 a.m. from the dispensary at Phaltan and then along with Shivaji and Baban went to Civil Hospital, Satara. According to them she was admitted for about 7-8 days. It is not clear as to how the Investigating Officer has recorded her statement on the next day at evening. The alleged FIR Exh.35 was recorded at 10.15 p.m. on 11th and

surprisingly the statement of PW4 Gangubai was not recorded on the night of 11th or in the morning of 12th when she was available in the dispensary.

11 It is well settled that the interference with the judgment and order of acquittal passed by the trial Court is limited only to some exceptional cases i.e. i) if the judgment and order of acquittal suffers from glaring illegalities or has caused miscarriage of justice, ii) whether the trial Court has illegally shut the evidence which ought to have been considered, iii) where the admissible evidence is wrongly brush aside as in admissible.

Though powers of the High Court in acquittal appeal are not circumscribed, the broad principle is that the presumption of innocence is strengthened if an accused is acquitted by the trial Court and a reversal of the trial Courts' judgment should be made in a cases where the view taken was not possible on the evidence or perverse with the broad understanding that if two views were possible, the one taken by trial Court in favour of the accused should be retained. When two views are possible from record, then adoption of one view by trial Court cannot be interfered in an appeal.

12 In the instant case the reasons adduced by the trial Court for discarding the testimony of the eye witnesses are sound and the evaluation of the evidence made by the trial Court is proper and correct. The trial Court had advantage of watching the demeanor of the witnesses. The learned Judge of the trial Court has recorded the convincing and substantial reasons. The evidence of the prosecution witness is replete with inconsistency, infirmities and no implicit reliance can be placed on testimony of complainant and his witnesses. We find no perversity in finding of the trial Court. Accordingly we proceed to pass the following order :-

ORDER

Criminal Appeal is hereby dismissed and accordingly disposed of.

(V.K. JADHAV, J.)

(INDRAJIT MAHANTY, J.)