

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

CRIMINAL APPEAL NO.636 OF 2012

1] Mr. Gulam Ali Mohd. Yunus Shaha @ Zinga

Aged: 22 years, Occ: Rikshaw Driver,
Residing at : Lane No.14, Krantinagar,
2nd Rabodi, Thane (W) 400601.
(Presently in Judicial Custody at
Kolhapur Central Prison, Kolhapur)

2] Mr. Niyaz Ahmed Kamruddin Shaikh @ Babu Kalya

Aged: 22 years, Occ: Rikshaw Driver,
Residing at : Lane No.14, Krantinagar,
2nd Rabodi, Thane (W) 400 601.
(Presently in Judicial Custody at
Kolhapur Central Prison, Kolhapur)

..Appellants
(Org. Accused Nos.3 & 5)

Versus

The State of Maharashtra
Through Rabodi Police Station

..Respondent
(Org. Complainant)

**ALONGWITH
CRIMINAL APPLICATION NO.19 OF 2018
IN
CRIMINAL APPEAL NO.636 OF 2012**

Mr. Niyaz Ahmed Kamruddin Shaikh @ Babu Kalya

Aged: 22 years, Occ: Rikshaw Driver,
Residing at : Lane No.14, Krantinagar,
2nd Rabodi, Thane (W) 400601.
(Presently in Judicial Custody at
Kolhapur Central Prison, Kolhapur)

..Applicant
(Org. Accused No.5)

Versus

The State of Maharashtra
Through Rabodi Police Station

..Respondent
(Org. Complainant)

ALONGWITH
CRIMINAL APPLICATION NO.196 OF 2018
AND
CRIMINAL APPLICATION NO.34 OF 2018
AND
CRIMINAL APPLICATION NO.921 OF 2017
IN
CRIMINAL APPEAL NO.636 OF 2012

Mr. Gulam Ali Mohd. Yunus Shaha @ Zinga
Aged: 22 years, Occ: Rikshaw Driver,
Residing at : Lane No.14, Krantinagar,
2nd Rabodi, Thane (W) 400601.
(Presently in Judicial Custody at
Kolhapur Central Prison, Kolhapur)

..Appellants
(Org. Accused No.3)

Versus

The State of Maharashtra
Through Rabodi Police Station

..Respondent
(Org. Complainant)

ALONGWITH
CRIMINAL APPEAL NO.151 OF 2013

The State of Maharashtra

..Appellant

Versus

1] Mohd. Ibrahim Mohd. Ismail Menon & Ors.
Age about 28 years, Occ: Labour.

2] Irfan Ali Ahesan Ali Saiyed @ Jangli
Age about 31 years, Occ: Painter.

3] Navab Rahematulla Shaikh

Age about 26 years, Occ: Carpenter.

4] Nasir Rahimuddin Shaikh @ Teda Babu

Age about 22 years, Occ: Painter.

5] Laloo Kamruddin Shaikh

Age about 21 years, Occ: Tempo driver.

6] Shakil Allauddin Kazi

Age about 42 years, Occ: Fruit Seller,

All R/a: Krantinagar, Rabodi, Thane,
Dist: Thane.

..Respondents
(Org. Accused Nos.1,
2, 4, 6, 8 & 9 in
Sessions Case No.437
of 2009)

And

7] Jafar Aziz Qureshi @ Jafar Mendha

Age about 36 years, Occ: Business,

R/at: Krantinagar, Lane No.6,

Near Sharif Mistri,

2nd Rabodi, Thane (W).

..Respondent
(Org. Accused in
Sessions Case No.215
of 2011)

ALONGWITH
CRIMINAL APPEAL NO.664 OF 2012

Mr. Shahanavaz Yakub Shaikh

Aged: 23 years, Occ: Painter,

Residing at : Lane No.14, Krantinagar,

2nd Rabodi, Thane (W) 400601

(Presently in Judicial Custody at
Kolhapur Central Prison, Kolhapur)

..Appellant
(Org. Accused No.7)

Versus

The State of Maharashtra
Through Rabodi Police Station.

..Respondent
(Org. Complainant)

Mr. S. V. Marwadi a/w Trupti Khamkar and Tahera Qureshi, Advocate for the Appellant No.2 in Appeal No.636 of 2012 and for the Appellant in Appeal No.664 of 2012 and for Respondent Nos.2, 6, 8, 9 and 10 in Appeal No.151 of 2013.

Mr. Abhaykumar Apte, Advocate for the Appellant No.1 in Appeal No.636 of 2012 (Org. Accused No.3).

Mr. V. V. Gangurde, APP for Respondents in Appeal No.636 of 2012 and Appeal No.664 of 2012 and for Appellant in Appeal No.151 of 2013.

Mr. Sachin R. Pawar, Advocate for Respondent No.3 in Appeal No.151 of 2013.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 18th JULY, 2018**

ORAL JUDGMENT (Per B. R. Gavai, J)

1] Criminal Appeal No.636 of 2012 is filed by original Accused Nos.3 and 5 and Criminal Appeal No.664 of 2012 is filed by original Accused No.7, being aggrieved by the judgment and order dated 29th February 2012 passed by the learned Ad-hoc Additional Sessions Judge-3, Thane in Sessions Case No.437 of 2009, thereby convicting them for the offence punishable under Section 147, 148,

BGP.

302 r/w 149 of the Indian Penal Code (“IPC” for short) and sentencing them to suffer life imprisonment and to pay fine of Rs.5000/- each and in default of payment to suffer further rigorous imprisonment for six months.

The said Accused Nos.3, 5 and 7 have also been convicted for the offence punishable under Section 148 of IPC and sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.2000/- and in default of payment of fine to suffer further rigorous imprisonment for three months.

By Criminal Appeal No.151 of 2013 the State has also challenged the order of acquittal of Accused Nos.2, 4, 6, 8, 9 and 10.

Since the Accused No.1 has died during pendency of the Appeal, Appeal against him stands abated.

2] The prosecution story in brief as could be gathered from the material placed on record is thus :-

The deceased Salim Shaikh was residing with his family

in Lane No.14, Rabodi-2, Thane. He was having inimical terms with Accused No.10 – Jafar Qureshi @ Jafar Mendha. It is the prosecution case that prior to the incident in question, Accused No.7 – Shahnawaz Shaikh had come to the wife of deceased Salim Shaikh and had told her that Accused No.10 – Jafar Qureshi @ Jafar Mendha had directed him to ask her to convince her husband otherwise they would kill him. It is further the prosecution case that on 29th May 2009, it was Friday. At round 12:00 p.m., Accused No.5 – Niyaz Ahmed @ Babu Kalya was near his horse cart (Tanga) parked in the lane. However, the deceased Salim Shaikh had asked the Accused No.5 – Niyaz Ahmed @ Babu Kalya to remove Tanga from the lane, since it was obstructing people proceeding in the lane. On this point, there was quarrel between deceased Salim Shaikh on one hand and the Accused No.5 – Niyaz Ahmed @ Babu Kalya, Accused No.8 – Laloo Shaikh, Accused No.3 – Gulam Ali, Accused No.7 – Shahnawaz Shaikh, Accused No.6 – Nasir, Accused No.2 – Irfan and Accused No.4 – Nawab. Accused No.5 – Niyaz Ahmed @ Babu Kalya had uttered that the deceased would be killed by evening.

3] It is further the prosecution case that in the evening hours the deceased was about to go to mosque to offer prayers. Their daughter namely Sana came from outside and informed that the Accused No.5 – Niyaz Ahmed @ Babu Kalya alongwith his friends were at Kranti Nagar and told PW-1 – Mumtaz not to send deceased through Kranti Nagar Lane. It is further the prosecution case that therefore PW-1 – Mumtaz told the deceased not to go through Kranti Nagar Lane and thereafter he went through Akashganga road. When the deceased reached at Hajimulla Chawl, all the accused came there. PW-1 – Mumtaz was following her husband. She saw that all the accused were chasing her husband and in Hajimulla Chawl, near Fatima School, all the accused assaulted her husband. Accused No.5 – Niyaz Ahmed @ Babu Kalya assaulted with sword on the chest of the deceased, Accused No.3 – Gulam Ali assaulted with sickle on the back of the deceased, Accused No.4 assaulted with iron bar on the head of deceased and Accused No.7 – Shahnawaz Shaikh dealt blow of Sura above the left side of ear of the deceased. Accused No.5 – Niyaz Ahmed @ Babu

Kalya again dealt blow of sword on the right side of face of the deceased, due to which, his right ear was cut and rest of the accused assaulted the deceased with Suris and Koytas. When she tried to catch her husband, his cut off ear came in her hand and he fell down. Thereafter within five minutes her son-in-law Rais and her daughter Sana came on the spot. Thereafter Police also came on the spot. PW-1 – Mumtaz, her son-in-law PW-2 – Rais and her daughter PW-3 – Sana lifted her husband and carried him in the hospital in police jeep. Doctor declared him to be dead.

4] As such, on the basis of oral report of PW-1 – Mumtaz an offence came to be registered vide Crime No.97 of 2009. Upon completion of investigation, a charge-sheet came to be filed in the Court of learned JMFC. Since the case was exclusively triable by the learned Sessions Judge, the same came to be committed to the learned Sessions Judge.

5] The learned Trial Judge framed charges against Accused Nos.1 to 9 in Sessions Case No.437 of 2009 below Exh.31. All the accused pleaded not guilty and claimed to be tried. For the same case, a separate trial case was registered against Accused – Jafar BGP.

Qureshi (hereinafter referred to as “Accused No.10”) being Sessions Case No.215 of 2011. In the said case, charge came to be framed below Exh.9. The said accused also denied the charges and claimed to be tried. It was the defence of the Accused No.10 – Jafar Qureshi that he was under trial prisoner lodged in the Thane Central Jail. He was released on bail from the jail at about 8.00 p.m. on 29.5.2009. Thereafter he had been to his house late in the night. The learned Trial Judge at the conclusion of the trial, passed an order of conviction and sentence as aforesaid and rest of the accused were acquitted of the charges, charged with.

6] Mr. Marwadi and Mr. Apte learned counsels for the Appellants/Accused submit that the conviction is based only on the evidence of PW-1 – Mumtaz, PW-2 – Rais the alleged eye witnesses. It is submitted that insofar as the evidence of PW-28 – Salma is concerned, the same has been rightly disbelieved by the learned Trial Judge. It is submitted that both the witnesses are interested witnesses. The conviction on the basis of such interested witnesses would not be sustainable. It is submitted that though even according to the prosecution the incident had taken place in crowded locality,

not a single independent witness has been examined.

7] In so far as the Appeal against acquittal is concerned, learned counsel Ms. Tahera Qureshi appearing on behalf of acquitted accused submits that there is no merit in the Appeal filed by the State.

8] Mr. Gangurde, learned APP appearing on behalf of State submits that merely because the witnesses are interested witnesses, cannot be a ground for discarding their testimony. He submits that in view of evidence of both the witnesses PW-1 – Mumtaz and PW-2 - Rais, which is consistent as such no interference is warranted in the finding of the conviction. He submits that however in so far as the acquittal of the accused is concerned, the learned Trial Judge has erred in acquitting the accused on the basis of the same evidence, on which he has convicted the accused. It is therefore submitted that the Appeal against acquittal deserves to be allowed and the order of acquittal be set aside.

9] With the assistance of the learned APP and the learned counsels for the Appellants, we have scrutinized the evidence on

record. Since the death of the deceased being homicidal is not disputed by the Appellants, it is not necessary to scrutinize the medical evidence.

10] Undisputedly, the prosecution has examined PW-1 – Mumtaz, PW-2 – Rais and PW-28 – Salma. The prosecution has also relied on the evidence of PW-3 – Sana, daughter of PW-1 – Mumtaz and the deceased. Insofar as the evidence of PW-28 – Salma is concerned, the learned Trial Judge has disbelieved her testimony. Perusal of material placed on record would reveal that the statement of the said witness was recorded on 14th June 2009 i.e. about 15 days from the date of incident. The learned Trial Judge has further found that the version given by her was totally in conflict with the version given by PW-1 – Mumtaz and PW-2 – Rais. In that view of the matter, we find that the learned Trial Judge has rightly disbelieved her testimony.

11] That leaves us with the testimony of PW-1 – Mumtaz and PW-2 – Rais. From the perusal of the evidence, it would reveal that PW-2 – Rais as well as PW-3 – Sana came on the spot after the incident was over. The testimony of PW-2 – Rais would reveal that

after his father-in-law left house to observe Namaz, his mother-in-law also went behind the back of his father-in-law. Thereafter after an hour one small boy came and informed that quarrel was going on with his father-in-law near Fatima High School. Thereafter he went on the spot to the Rabodi Lane and he found there was crowd. There he saw all the accused were assaulting the deceased. The perusal of paragraph 12 of the evidence of PW-1 – Mumtaz would reveal that walkable distance between her house and Jumma Masjid is five minutes. It could be seen that according to PW-1 – Mumtaz, the incident has taken place when the deceased was going to mosque from his house. If the distance between her house and Jumma Masjid is five minutes and the incident has taken place prior to reaching mosque, then the incident must have occurred within five minutes, after the deceased left the house. However, according to PW-2 – Rais after an hour when he rushed to the spot, the incident was still going on. Therefore, it is difficult to believe that PW-2 – Rais has really witnessed the incident. In that view of the matter, we find that the learned Trial Judge has rightly observed that his testimony cannot be used to corroborate testimony of PW-1 – Mumtaz.

12] As such that leaves us only with the testimony of PW-1 Mumtaz. The case would thus be a case based on testimony of solitary eye witness. No doubt that the conviction can also be based on the testimony of solitary eyewitness. However, it is required that the evidence of such a witness is found to be trustworthy, reliable and cogent. It is further to be noted that PW-1 – Mumtaz is an interested witness and as such, testimony of such witness will have to be scrutinized with greater caution and circumspection. The Hon'ble Apex Court in the case of Vadivelu Thevar Vs. State of Madras reported in AIR 1957 SC 614 has observed thus :-

“Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

- (1) Wholly reliable.
- (2) Wholly unreliable.
- (3) Neither wholly reliable nor wholly unreliable.

[12] In the first category of proof, the court should

have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral

testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution.”

The Hon'ble Supreme Court has held that if the witness is found wholly trustworthy, there is no difficulty, in as much as, conviction can be based on the basis of such evidence. Even in case of a witness which has been found to be totally unreliable, there is no difficulty, in as much as, such evidence has to be discarded. The difficulty arises only in case of 3rd type of evidence when the witness is neither wholly reliable nor wholly unreliable.

13] It appears that the learned Trial Judge has found evidence of PW-1 – Mumtaz to be falling in the 3rd category. On the basis of the said evidence, the learned Trial Judge has convicted three accused and acquitted seven. We will have to scrutinize the

evidence of PW-1 – Mumtaz with greater caution and circumspection so as to find out, whether it is reliable, trustworthy and as to whether such evidence inspires confidence in the mind of the Court. PW-1 – Mumtaz has stated in her evidence with regard to the quarrel that had taken place in the afternoon between Accused No.5 – Niyaz Ahmed @ Babu Kalya and others on one hand and the deceased on the other hand with regard to deceased asking Accused No.5 – Niyaz Ahmed @ Babu Kalya to take away his horse cart (Tanga) and clear the way to the public. She states that the Accused No.5 – Niyaz Ahmed @ Babu Kalya told all the other accused that till night he will finish her husband. She further states that on hearing noise, she had gone on the spot and tried to convince her husband and asked him to leave the spot. She has further stated that prior to two days she was following her husband as Accused No.7 – Shahnawaz had told her that Jafarbai had asked him to convince to her husband otherwise he would finish him after his release from jail. She has further stated that Jafar was suspecting that her husband has told his name to the police and he had stated that after release from jail he will finish her husband. She has further stated that Jafar had quarreled with her husband in jail.

14] However, in her cross-examination she admits that though she had lodged various complaints against the accused persons, she had not lodged any complaint in respect of quarrel which took place in the afternoon. She states that she did not think it proper to lodge complaint in respect of such petty quarrel.

15] In paragraph 10 of her cross-examination, she admits that on the date of incident her husband had observed Namaz four times. She states that when her husband went to observe Namaz at 5:00 p.m. she did not go alongwith him or did not follow him. She further states that even when he went to offer Namaz at 7:30 p.m., she did not go alongwith her husband or followed him. The reason as to why PW-1 – Mumtaz followed her husband, when he went to offer Namaz at around 8:30 p.m. appears to be that when her daughter brought milk in the house, she told her that Babu Kalya and his friends were at Krantinagar and told her not to send the deceased through Krantinagar. However, perusal of paragraph 22 of her cross-examination would reveal that this is an omission in her statement before the Police and this has been stated by her for the first time in the Court. It is further to be noted that her version in

examination-in-chief that Jafar was suspecting that her husband has told his name to the police and he had stated that after release from jail he will finish her husband and that he had also quarreled with her husband in jail, is also an omission in Police statement and has been stated for the first time in the Court. Her version in the examination-in-chief that prior to two days of the incident, Shahnawz had told her that Jafarbai had asked him to convince to her husband otherwise he would finish him after his release from jail, is also an omission in the Police statement and stated for the first time in the Court. It could thus be seen that the evidence of PW-1 – Mumtaz is full of omissions and contradictions. She has substantially improved her version before the Court. It is further to be noted that the learned Trial Judge has himself found her evidence not to be trustworthy in so far as seven accused are concerned and has relied on her evidence only with regard to the three convicted accused. No doubt that the principle of *falsus in uno falsus in omnibus* is not applicable in Indian Criminal Jurisprudence. However, when the conviction is based on solitary testimony and that too of an interested witnesses, we find that it would not be safe to sustain an order of conviction without there being corroboration.

16] Insofar as the recoveries on the basis of memorandum under Section 27 of the Indian Evidence Act are concerned, they are made from a place in open nallah, accessible to one and all, as such no credence could be given to such recoveries.

17] It is further to be noted that in the present case, the prosecution has not examined a single independent witness. PW-1 – Mumtaz, in her cross-examination has admitted that towards eastern side of her house, there is Jamati Masjid at walkable distance of one minute. She has further admitted that while going to Krantinagar, there is a road through Lane Nos.13 and 14. There are three small milk shops in Lane Nos.12 and 13. She has further admitted that from Lane No.12, Akashganga road is at the distance of 500 ft. and that area is heavily crowded by both sides of road. It could thus be seen that the spot where the incident has taken place was densely populated. No doubt that non-examination of independent witness is not fatal to the prosecution case in every case. However, in the present case, we find that non-examination of independent witness would create doubt in the truthfulness of the prosecution case.

18] In the result, we find that it would not be safe to rest on solitary testimony of PW-1 – Mumtaz. Accused are entitled to the benefit of doubt.

ORDER

(i) Criminal Appeal No. 636 of 2012 and Criminal Appeal No.664 of 2012 are allowed.

(ii) The Judgment and Order of conviction dated 29/02/2012 passed by the Additional Sessions Judge, Thane in Sessions Case Nos. 437/2009 with Sessions Case No.215 of 2011 is quashed and set aside.

(iii) Accused are acquitted of the charges, charged with.

(iv) Accused are directed to be set at liberty forthwith, if not required in any other case.

(v) Criminal Appeal No.151 of 2013 is dismissed.

(vi) Since Criminal Appeals are disposed of, Criminal Applications taken out in Criminal Appeal No.636 of 2012, do not survive and the same are also disposed of.

Balaji
Govindrao
Panchal

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Govindrao
Panchal
Date: 2018.07.30
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[SARANG V. KOTWAL, J.]

[B. R. GAVAI, J.]