

Vidya Amin

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

CRIMINAL APPEAL NO. 226 OF 2014

Subhash Bapu Patil & Ors.	...	Appellants
VS.		
State of Maharashtra	...	Respondent

**WITH
CRIMINAL APPEAL NO. 320 OF 2014**

Mrs. Archana Babasaheb Patil	...	Appellant
VS.		
State of Maharashtra & Ors.	...	Respondents

Mr. Priyal G. Sarda, Advocate for the appellant in Appeal/226/2014 and for respondent nos. 2 to 4 in Appeal/320/2014.

Mr. M.S. Mohite i/b. J.J. Bardeskar, Advocate for the appellant in Appeal/320/2014.

Mr. V.B. Konde-Deshmukh, APP for the respondent-State.

CORAM	:	Mr.S.S. SHINDE & Mrs.MRIDULA BHATKAR, JJ..
RESERVED ON	:	3rd October, 2018
PRONOUNCED ON	:	30th October, 2018

JUDGMENT : (PER MRS. MRIDULA BHATKAR, J.)

1. Criminal Appeal No. 226 of 2014 is filed by original accused nos. 2 and 5 against conviction and Criminal Appeal No. 320 of 2014 is filed by wife of the deceased under section 372 of Cr. P.C. against the judgment and order dated 31st January, 2014 passed by the learned Additional Sessions Judge, Islampur in Sessions Case No. 4 of 2009 acquitting the respondents, who are

original accused nos. 1, 3 and 4.

2. In Sessions Case No. 4 of 2009, five persons were prosecuted and charged for the offence punishable under section 302 r/w. 120B of the Indian Penal Code and under section 3 r/w. 25 and Section 7 r/w. 27 of the Arms Act. The incident of assault has taken place on 24th November, 2008. Deceased Babasaheb Bhimrao Chavan and accused no. 1 Subhash Babu Patil had quarrel on 23rd November, 2008 in respect of hiring of JCB machine. At that time, deceased Babasaheb Patil had assaulted accused no. 1 Subhash Patil and, therefore, accused Subhash Patil and other co-accused conspired to eliminate Babasaheb. Accused no. 3 Rajesh handed over his country-made revolver and cartridges to accused no. 5 Popat Mahadev Shinde. Accused no. 2 Satish alias Pratap Vasant Chavan carried loaded country-made revolver and accused no. 3 Rajesh rode Pulsar motorcycle on which accused no. 2-Satish and accused no. 5-Popat Shinde were pillion riders. They went to the market. Accused no. 3 Rajesh kept the ignition of the motorcycle on and waited near Siddheshwar Bazar. Accused nos. 2 and 5 went in the shop, namely, Siddheshwar Bazar, owned by the deceased and both of them

fired their firearms at point blank range on the left side chest of Babasaheb. Accused nos. 2 and 5 immediately came out and went towards the motorcycle and all the three fled away.

3. On 24th November, 2008 when PW-19 Pratap Patil was proceeding towards Siddheshwar Bazar at around 3.15 p.m. he heard two firing shots and so he rushed towards Siddheshwar Bazar. On his way, he saw two persons coming out of the Siddheshwar Bazar hurriedly. He identified that one of them was accused no. 2 Satish Chavan. He also noticed PW-18 Krishna Patil and Sanjay Patil rushing towards Siddheshwar Bazar. One person in blue colour Pulsar motorcycle took accused nos. 1 and 5 away from the spot. He saw Babasaheb in a pool of blood. With the help of other staff, witness Krishna Patil took Babasaheb to hospital in a car. He informed about the incident to the police and gave FIR at Exhibit 108. The police registered offence at C.R. No. 46 of 2008 at Shirala Police Station for the offences punishable under sections 302 r/w. 34, 120B of Indian Penal Code and under section 3, 25 and section 7 r/w. 27 of the Arms Act. PW-27 Investigating officer Bhimanand Narayan Nalawade conducted spot panchnama. He recorded the statements of the witnesses.

After receiving the information regarding whereabouts of accused nos. 2 and 5, they were apprehended in a temple at village Gotkhindi on 3rd December, 2008. On personal search of accused no. 2, a country made revolver with live and empty cartridges was recovered and during the personal search of accused no. 5 Popat, one country made revolver with two live cartridges and empty cartridges was found. The seizure panchnama was prepared and marked at Exhibit 74. On 5th December, 2008, Investigating officer seized pulsar motorcycle which was used by accused nos. 2 and 5 at the time of commission of offence pursuant to the information given by accused no. 2. The said panchnama was prepared and marked at Exhibits 75 and 76. On 9th December, 2008 another motorcycle used by accused no. 3 Rajesh at the time of commission of crime was seized under seizure memo (Exhibit 79). The property was sent to Chemical Analyser and to the office of ballistic expert. CA report was received and marked at Exhibits 157 to 165. After completion of the investigation, he prepared police report filed in the Court of Judicial Magistrate First Class. Thereafter the case was committed to the Sessions Court. Learned Sessions Judge framed charges against five accused for the offences punishable under section 302 r/w. 120B of Indian

Penal Code and Section 3 r/w. 25 and Section 7 r/w. 27 of the Arms Act. The accused adopted defence of denial. The learned Judge after considering the case of the prosecution and the defence of the accused convicted accused nos. 1 and 5 for the offence of murder punishable under section 302 r/w. 34 of Indian Penal Code and imprisonment for life. The accused were also convicted under section 7 r/w. 27 of Arms Act and sentenced them to suffer R.I. for three years and fine. However, accused nos. 1, 3 and 4 were acquitted for the offence under section 302 r/w. 120B and 34 of Indian Penal Code. Being aggrieved by the said judgment and order, the convicted accused nos. 2 and 5 filed Criminal Appeal No. 226 of 2014 and the wife of the deceased filed Appeal against acquittal of accused nos. 1, 3 and 4.

4. The learned counsel Mr. Sarda appearing for the appellants/accused has submitted that the judgment and order of conviction dated 21st January, 2014 is wrong and illegal. He submitted that so called eye witnesses PW-18 Pratap Patil, PW-19 Krishna Patil and PW-20 Dilip Shinde are relatives of deceased. PW-21 Rahul was the employee of the first informant. They all are the interested witnesses and they have not to be believed.

Moreover, they have not seen weapons in the hands of the accused. There is delay in recording statement of PW-18. The clothes of these witnesses, who claim that they lifted the deceased and took him to hospital, should have been blood stained, as the deceased was assaulted and had firearm injury in the chest and shoulder. This creates doubt about the presence of these witnesses on the spot. He submitted that one empty and one live cartridges were found on the spot. One bullet was found in the chest, thus three shots were fired. However, witnesses deposed that they heard only two bullet shots. When as per the physical evidence, three cartridges/bullets were found, it falsifies ocular evidence. This ambiguity is not explained by the prosecution. This makes the presence of the witnesses doubtful on the spot. He submitted that PW-22 Dr. Ramesh, who conducted postmortem, has deposed that the cartridge was found in the body, however, PW-15 panch, who had recovered the clothes of the deceased, has deposed that the medical officer gave cartridge to him and the said plastic was sent to CA. The learned counsel submitted that the bullet which was recovered from the body was never sent to Forensic Laboratory. The report of CA is thus defective and cannot be relied. He submitted that the accused nos. 2 and 5

were found with the blood stained clothes and it is highly impossible for any person moving with blood stained clothes after 10 days. The overall evidence is not creditworthy and not sufficient to hold the conviction. Hence, the judgment of the trial Court is to be set aside.

5. Learned APP has submitted that the prosecution has tendered adequate and reliable evidence on the point of motive and how the incident has taken place. He argued that there was a dispute between the father of the deceased and accused no. 1 on account of hiring of JCB machine. The incident of previous quarrel has taken place on 23rd November, 2008 and the assault took place on the next date, i.e., 24th November, 2008.

6. The learned counsel Mr. Mohite appearing for the complainant, i.e., wife of the deceased, while adopting the submissions of learned APP on the point of motive and eye witnesses, has relied on evidence of PW-11 Ajay Jadhav, owner of the JCB machine. Learned APP and learned counsel for the complainant both have relied on the relevant portion of the depositions of PW-18, PW-19 and PW-20 and FIR Exhibit 108.

They submitted that all these witnesses corroborate each other and they were present at the spot when the incident of firing took place. They argued that PW-20 Dilip has identified all the three accused persons by name, so also PW-17 Sambhaji Galugade, though he is hostile witness, he has said that two unknown persons entered and he heard gun shots. On 3rd December, 2008 all absconding accused were arrested. Their clothes were also seized. They relied on the CA report which is marked at Exhibit 157 to 165 especially report of ballistic expert at Exhibit 160 which is positive about the firing of bullet cartridge from the firearm seized from the accused persons.

7. The learned counsel Mr. Mohite has submitted that the decision of the learned Judge of acquitting accused nos. 1, 3 and 4 is illegal. Accused nos. 1,3 and 4 also have conspired. Accused no. 3 drove pulsar motorcycle upto the shop and hence he has participated in the crime and is equally responsible for the murder of Babasaheb. He submitted that accused also to be convicted for the offence of murder.

8. The prosecution has examined total 27 witnesses. Out of

PW-24 Amar, who claimed to be an eye witness and PW-25 Ashok, who recorded FIR Exhibit 108A did not support the case of the prosecution and the trial Court has discarded their evidence. The case of the prosecution mainly stand on the evidence of motive and of the eye witnesses. PW-19 Pratap Patil has stated that Bhimrao, father of deceased Babasaheb was his maternal uncle. On 23rd November, 2008 at around 7 p.m. when he was standing outside Siddheshwar Bazar, his uncle informed him telephonically that accused no. 1 and one Adhik Patil came to him on motorcycle in the afternoon and they have abused and threatened him on account of hiring of JCB machine. On the same day, he again received phone call from Bhimrao who told him that accused Subhash and Adhik Patil abused him. At that time, deceased Babasaheb arrived and he along with Babasaheb went to accused Subhash and Adhik Patil and he asked Subhash why he abused and threatened his maternal uncle twice on that day. The altercations took place between the deceased and accused Subhash Patil and deceased Babasaheb slapped accused no. 1. PW-11 Ajay Jadhav, owner of JCB machine is examined by the prosecution. He confirmed that on 13th November, 2008 Bhimrao Patil, father of the deceased Babasaheb, has hired JCB machine

and accused Subhash also wanted the said machine. PW-9 Jayant Gaikwad has stated that on 23rd November, 2008 at around 8.15 p.m. when he was near Subhash and Adhik Patil, at that time, suddenly deceased Babasaheb and Pratap Patil came running from Siddeshwas Bazar and Babasaheb questioned accused no. 1 that why he gave abuses to his father and then slapped Subhash Patil. Thus, on the point of motive, the prosecution has established the case that accused no. 1 was holding animus against the deceased.

9. On the point of incident, PW-18 Krishna Patil has stated that on 24th November, 2008 at around 3.15 p.m. when he along with his cousin brother Sanjay Patil reached near Siddheshwar Bazar, he parked his car in front of Siddheshwar Bazar and started proceeding further. On the way, they heard firing of gun and at that time, he noticed two persons coming out of the Siddheshwar Bazar. Out of two persons, he knew one person Satish Chavan. The two persons sat on pulsar motorcycle of blue colour and one person who was waiting on motorcycle, drove them away. He saw the words "Satyajit anna" written on the rear side of number plate. At that time, PW-19 Pratap Patil arrived on the spot. He along with

Sanjay Patil and Pratap Patil went inside and they found Babasaheb in injured condition in the chair at counter.. Other witnesses PW-20 Dilip Shinde, Shahaji Gaikwad arrived there and they all took Babasaheb in a car to hospital. He was declared dead in the hospital. On the next day, he and Sanjay Patil was called at Shirala Police Station and their statements were recorded. PW-19 Pratap Patil has stated that on 24th November, 2008 at around 3.15 p.m. He arrived near Siddheshwar Bazar and while starting the motorcycle, he heard two gun shots from Siddheshwar Bazar, so he rushed to the spot . At that time, he saw two persons coming out of the shop hurriedly, out of which one was Satish Chavan (accused no. 2). Sanjay Patil also rushed to Siddeshwar Bazar. One person was waiting on blue colour motorcycle who had kept the engine on. Satish Chavan and his companion sat on the motorcycle and fled away. He stated that when he went inside, he saw Babasaheb injured on the left side chest and to the shoulder, they all shifted him to the hospital, where he was declared dead. PW-20 Dilip Shinde when he was chitchatting near Siddheshwar Bazar, he saw accused Rajesh, accused no. 2 Satish and accused no. 5 Popat. Babasaheb was relative of Dilip Shinde. Accused no. 3 Rajesh was driving the

motorcycle and accused no. 5 Popat and accused no. 2 Satish was sitting on the back seat. Accused nos. 2 and 5 went towards Siddheshwar Bazar and within a minute he heard sound of two gun shots , so he along with Shahaji Gaikwad rushed towards Siddheshwar Bazar, at that time, he noticed accused no. 2 and accused no. 5 came out of Siddheshwar Bazar, sat on the motorcycle and went away. Babasaheb injured with gun shots. He was shifted to the hospital in the car of witness Krishna Patil. After going through the cross of these witness, we are of the view that the evidence of these witnesses remained unshaken on the point of incident. It is pertinent to note that all the eye witnesses knew accused no. 2 and they have mentioned his name. Accused no. 20 knew accused no. 5 by name and thus the identification of these accused persons by them cannot be disputed. The evidence of all these witnesses corroborate each other on all material particulars and thus, there is no scope to disbelieve these witnesses. Thus, the prosecution has proved that accused no. 2- Satish and accused no. 5 Popat have arrived along with accused no. 3 Rajesh, who waited outside on the motorcycle and kept the ignition of the motorcycle on and accused nos. 2 and 5 went inside. Thereafter Babasaheb was found dead due to bullet

injuries and immediately accused nos. 2 and 5 came outside the shop, sat on the motorcycle and went away. The identity of accused no. 3 Rajesh is also fixed by one of the eye witnesses. It is true that none of these witnesses have actually seen the accused persons firing at Babasaheb, however, immediate movement of these two accused of entering the shop, then hearing the sound of gun shots and coming out of the shop and fleeing away are thus clinching circumstances to establish their guilt . Thus, the presence of accused persons at the spot is established by the prosecution.

10. PW-19 Pratap Patil gave first information to the police. The offence was registered on the basis of said FIR which is marked at Exhibit 108. It is true that Test Identification Parade of Popat and Rajesh was not conducted by the prosecution and therefore, identification by the witnesses of the accused persons to whom they did not know cannot be accepted, however, all these eye witnesses knew accused no. 2 and some of them knew accused no. 3. Thus, taking into account circumstances cumulatively, the prosecution is successful in proving the accused no. 2 and accused no. 5 are the perpetrators. The information was

given to the police on the same day, i.e., 24th November, 2008 at 3.55 p.m. and the incident has taken place at 3.15 p.m. In the FIR, the witness has given the details about the quarrel taken place between deceased and accused no. 1 on the earlier date and in the FIR, he has disclosed the name of Satish alias Pratap Chavan, accused no. 2. He has mentioned that there was other unknown persons and one person was riding blue colour pulsar motorcycle and the ignition of the said motorcycle was on. Thereafter he went inside and saw Babasaheb in a pool of blood. Thus, the name of accused no. 2 was disclosed immediately , i.e., within 45 minutes by the informant to the police. The FIR Exhibit 108 corroborates the evidence of the informant and other witnesses.

11. We have considered the ballistic reports received from the Directorate of Forensic Science Laboratories. It shows that by letter, i.e., Exhibit 159, it was reported that analysis started on 15th June, 2009 and it was completed on 31st August, 2009. Exhibit 1A was shown twenty nine deformed lead pellets. Exhibit 1B is one deformed plastic wad. It was opined that

“The weight and diameter of deformed lead pellets in Exhibit 1A corresponds to shot size No. 'B' generally used in shotgun

cartridges.

Exhibit 1B contains the fired 12 bore plastic wad, generally used in shotgun cartridges.”

Exhibit 160 gave a detailed results of analysis disclosing analysis started on 11th June, 2009 and it was going on till 4th September, 2009. Exhibit 1 is one single barrel breech loading country made handgun. Exhibit 4 is also one single barrel breech loading country made handgun. Exhibit 1 is capable of chambering and firing 12 bore shotgun cartridges whereas Exhibit 4 is capable of chambering and firing 8MM rifle cartridge . Exhibit 9A and 9B are fired from 12 bore shotgun cartridge cases but Exhibit 9A and 9B have been fired from one single weapon other than handgun in Exhibit 1. Exhibit 1 and Exhibit 4 shows results that these handguns were used for firing prior to their receipt in the laboratory. Exhibit 7 deformed copper jacketed softnose bullet is fired from 8 mm rifle bullet and has been fired from the countrymade hand gun in Exhibit 4. Unnecessarily confusion is created by the learned defence counsel questioning whether three shots or two shots were fired. As per the evidence of all the witnesses, one shot each was fired from two firearms. Accordingly, the CA report is consistent with this ocular evidence.

The remnants of pellets and powder of the bullet are found in the chest of the deceased. Thus, they are the part of the bullet when the bullet is fired and deformed after hitting the chest. Therefore, analysis made by the learned counsel for the defence that one live cartridge, empty cartridge and one bullet and its particles were found in the chest, is not correct. So, we don't give much importance to this submission in view of ballistic expert's evidence and consistent ocular evidence of the witnesses who are found creditworthy.

12. As per the evidence of PW-27 Police Inspector Nalawade, he has seized two countrymade revolver from accused no. 2 Satish Chavan and accused no. 5 Popat Shinde. He has also given evidence that as per the disclosure by accused no. 2- Satish Chavan, memorandum Exhibit 75 was prepared and bajaj pulsar motorcycle bearing No. MH-09 AH 7938 was seized (Exhibit 76). During the personal search of the accused Satish Chavan, police found one country made revolver and during the search of accused Popat Shinde, they found one country made revolver, two live cartridges and one empty cartridge. They seized these articles. PW-23 Sudam D. Sawant has deposed about the seizure

of two country made revolver. He has proved the arrest of accused no. 2 Satish and accused no. 5 Popat at Jaybhavani Temple, Taluka Indapur, District Pune on 3rd December, 2008. Thus, this arrest and seizure of the revolver corroborates with the evidence of the witnesses and so also with C.A. report.

13. Thus, there is sufficient evidence against accused nos. 2 and 5 to hold them guilty against the evidence of murder. The appellant Archana Balasaheb Patil, wife of the deceased, has filed Appeal No. 320 of 2014 against the acquittal of original accused nos. 1, 3 and 4. After due consideration of the evidence against the appellants/accused, we are of the view that the prosecution could not bring evidence against original accused nos. 1 and 4 at all. PW-20 Dilip Shinde has identified that accused no. 3 Rajesh was driving the motorcycle and accused nos. 2 and 5 were sitting on the back seat. PW-18 Krishna Patil and PW-19 Pratap Patil both have stated that they have seen pulsar motorcycle of blue colour and the ignition of the motorcycle was kept on when the accused nos. 2 and 5 entered Siddeshwar Bazar. After firing at deceased when these two persons came out, they immediately sat on the said motorcycle and rider of the motorcycle took them away.

It is true that the name of accused Rajesh is specifically mentioned and his identity is also disclosed by one of the witness, however, though his presence is established, it was outside the shop and thus, his role in the actual killing of Balasaheb cannot be said to be proved beyond reasonable doubt. When a case of the accused is within the range of “may” or “may not” about participation in the commission of crime, then he is entitled to benefit of doubt. The prosecution did not bring evidence of conspiracy against accused no. 3 and therefore, we do not want to interfere with the verdict of acquittal of accused nos. 1, 3 and 4.

14. Thus, the Appeal of conviction filed by the accused is dismissed and the Appeal against acquittal filed by the wife of the deceased is also dismissed. The conviction of the accused persons by the learned Additional Sessions Judge, Islampur is hereby maintained.

(MRIDULA BHATKAR, J.)

(S.S. SHINDE, J.)