

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

CRIMINAL APPEAL NO.406 OF 2011

1. Deepak Baban Walilkar
Aged 31 years
2. Kishor Jagan Walilkar
Aged 22 years
3. Sanjay Baban Walilkar
Aged 29 years
4. Baban Bedkya Walilkar
Aged 59 years
5. Jagan Bedkya Walilkar
Aged 50 years

All residents of Dahisar Mori,
Post – Dahisar, District Thane.

(All accused at present at
Thane Central Prison)

.... Appellants
(Original Accused Nos.1 to 5)

versus

The State of Maharashtra
(At the instance of Mumbra Police Station)

... Respondent

**WITH
CRIMINAL APPEAL NO.775 OF 2018**

1. Kishor Tanaji Patil
Aged 23 years
Residing at Bhoir Chawl,

Room No.3, Behind Santoshi Mata Mandir,
Old Dombivli, District Thane
Original resident of Post Risand,
Taluka and District Washim.

2. A. Vasudeorao Shankarrao
Aged 24 years
Resident of C/o Deepak Walilkar,
Dahisar Mori, Post Dahisar,
District Thane.
Original resident of Khadakpur,
Post-Vimpura, Govalkoli,
Dist-Badlapur, West Bengal

(Both accused at present at
Thane Central Prison)

.... Appellants
(Original Accused Nos.7 and 8)

versus

The State of Maharashtra
(At the instance of Mumbra Police Station) ... Respondent

.....

- Mr.Shirish Gupte, Senior Counsel i/b. Mr.Rahut Arote,
Advocate for the Appellant Nos.1 to 5 in Appeal No.406/11.
- Mr.Yug M. Choudhary a/w Mr.Dashrath Gaikwad, Advocates
for the Appellant Nos.1 and 2 in Appeal No.775/18 (Original
Accused Nos.7 & 8).
- Mr.H.J. Dedhia, APP for the State/Respondent.
- Ms.Megha S. Bajoria h/f Mr.K.S. Patil, Advocate for the
Complainant.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.**
DATE : 21st JUNE, 2018.

JUDGMENT (PER : SARANG V. KOTWAL, J.) :

1. The present Criminal Appeal No.406 of 2011 was preferred by the Original Accused Nos.1 to 5 and Original Accused Nos.7 and 8 in Sessions Case No.431/06 on the file of Additional Sessions Judge, Thane. At the stage of final hearing of the Appeal, the Original Accused Nos.7 and 8 preferred a separate Appeal vide Appeal No.775/18 with the permission of the Court. Since both these Appeals are preferred challenging the same Judgment and Order dated 31/03/2011 passed by the Additional Sessions Judge, Thane, in Sessions Case No.431/06; both these Appeals are disposed of by this common Judgment.
2. The Appellants in these Appeals are hereinafter referred by their original status in the Sessions Case. The Appellant Deepak Baban Walilkar, Kishor Jagan Walilkar, Sanjay Baban Walilkar, Baban Bedkya Walilkar, Jagan Bedkya Walilkar were the original Accused Nos.1 to 5 respectively. The Original Accused No.6 Amit Patil expired during the trial. The Appellants

Kishor Tanaji Patil and A. Vasudeorao Shankarrao were the Original Accused Nos.7 and 8.

3. At the conclusion of the trial, the accused were convicted and sentenced as follows -:

- (i) The accused nos.7 and 8 were convicted for the offence punishable under Section 143 of the IPC and were sentenced to suffer R.I. for three months and to pay fine of Rs.200/- each and in default of payment of fine, to suffer R.I. for 15 days.
- (ii) The accused nos.7 and 8 were further convicted for the offence punishable under Section 147 of the IPC and were sentenced to suffer R.I. for six months and to pay fine of Rs.500/- each and in default of payment of fine, to suffer R.I. for one month.
- (iii) The accused nos.7 and 8 were also convicted for the offence punishable under Section 148 of the IPC and were sentenced to suffer R.I. for eight months and to

pay fine of Rs.700/- each and in default of payment of fine, to suffer R.I. for one month.

- (iv) The accused nos.7 and 8 were also convicted for the offence punishable under Section 149 read with 341 of the IPC and were sentenced to suffer R.I. for fifteen days and to pay fine of Rs.100/- each and in default of payment of fine, to suffer R.I. for eight days.
- (v) The accused nos.7 and 8 were convicted for the offence punishable under Section 149 read with 302 of the IPC and were sentenced to suffer R.I. for life and to pay fine of Rs.5,000/- each and in default of payment of fine, to suffer R.I. for two years.
- (vi) The accused nos.7 and 8 were also convicted for the offence punishable under Section 302 read with 34 of the IPC and were sentenced to suffer R.I. for life and to pay fine of Rs.5,000/- each and in default of payment of fine, to suffer R.I. for two years.
- (vii) The accused nos.7 and 8 were also convicted for the offence punishable under Section 37 (1) read with 135

of the Bombay Police Act and were sentenced to suffer R.I. for four months and to pay fine of Rs.300/- each and in default of payment of fine, to suffer R.I. for one month.

- (viii) The accused nos.1 to 5 were acquitted of the offences punishable under Sections 143, 147, 148, 341 read with 149 of the IPC, under Section 149 read with 302 of the IPC and under Section 302 read with 34 of the IPC.
- (ix) The accused nos.1 to 5 were convicted for the offence punishable under Section 120(B) read with 302 of the IPC and they were sentenced to suffer R.I. for life and to pay fine of Rs.5,000/- each and in default of payment of fine, to suffer R.I. for two years.
- (x) The accused nos.1 to 5 were also convicted for the offence punishable under Section 109 read with 302 of the IPC and they were sentenced to suffer R.I. for life and to pay fine of Rs.5,000/- each and in default of payment of fine, to suffer R.I. for two years.

- (xi) All the sentences against all the above-mentioned accused were directed to run concurrently.
 - (xii) The period of detention already undergone by them was given as set off.
 - (xiii) On realisation of total fine amount, it was directed to be paid to the heirs of the deceased Arjun, after appeal period was over.
4. We have heard Mr.Shirish Gupte, the learned Senior Counsel for the Accused Nos.1 to 5. We have heard Dr.Yug M. Choudhary, the learned Counsel for the Accused Nos.7 and 8 and we have also heard learned APP Mr.H.J. Dedhia for the State of Maharashtra. In the interest of justice, we have heard Ms.Megha S. Bajoria h/f Mr.K.S. Patil, the learned Counsel who represented, the brother of the deceased. With the assistance of the learned Counsel we have gone through the entire evidence and we have perused the record and proceedings.
5. The prosecution case pertains to murder of one Arjun

Walilkar. The murder was committed on 07/09/2006 at around 07.30 a.m. in the village Dahisar. The Accused Nos.4 and 5 were the Uncles of the deceased Arjun. The Accused Nos.1 and 3 are the sons of the Accused Nos.4. Accused No.2 is the son of Accused No.5. Thus the deceased Arjun was a close relative of the Accused Nos.1 to 5. There was dispute between the Accused and the deceased in respect of the ancestral agricultural land bearing Survey No.69 adjoining Mumbai Pune Highway. The deceased Arjun had even instituted a Civil Suit in respect of the said land. On 30/05/2006 a mutation entry was effected in favour of Arjun and his branch of the family. Arjun installed a board of his name in the said land. The Accused Nos.1 to 5 had instituted chapter case under Cr.P.C. Against Arjun. Thus, there was bitterness between Arjun on one hand and the Accused Nos.1 to 5 on the other. It is the prosecution case that Arjun's nephew Nagesh Hiranman Patil was staying with him and was serving under him in the business of STD booth.

6. On 07/09/2006 at about 07.30 a.m. the deceased

Arjun and Nagesh went on a motorcycle to the said plot i.e. survey No.69. While Arjun had gone ahead on the plot, Nagesh was waiting nearby with his motorcycle. At that time six persons came on two motorcycles. Two of them got down and threw chilli powder on Arjun's face. Some chilli powder went in the eyes of Nagesh also. Then two of them attacked Arjun with chopper and Kukri on his chest, abdomen, back etc. One of them threatened to attack Nagesh. Therefore Nagesh ran away for some distance. Thereafter the assailants left the spot in a hurry. Three of the assailants left on their two motorcycles and the remaining three picked up another vehicle i.e. Bajaj M-80 motorcycle which was parked nearby. The said vehicle was belonging to one Nandkumar Sapkal who was in the vicinity. Somebody informed the police. Police came on the spot. The inquest panchanama was conducted. The statement of Nagesh was recorded at the spot and it was treated as the FIR and an offence vide C.R.No.I-349/06 was registered at Mumbra Police Station u/s 302 of the Indian Penal Code (for short IPC) and other sections of IPC. The dead body was removed to Civil

Hospital for post-mortem. The post-mortem was conducted by Dr.Dhananjay Baburao More (P.W.16) which shows that the deceased had suffered 12 incised wounds on his chest, abdomen, left hand and back. The internal examination showed that the lungs and heart were punctured. Liver and kidneys were injured and cause of death was given as “shock and haemorrhage due to multiple incised stab wounds involving vital organs caused by sharp edged tapering weapon or weapons”.

7. The investigation commenced and all the accused were arrested on 11/09/2006. During investigation, allegedly choppers were recovered at the instance of the Accused Nos.7 and 8. Their clothes were seized on 14/09/2006. Some amount in cash was seized at the instance of the Accused Nos.7 and 8 from the house of Accused No.1. It was the prosecution case that, in furtherance of criminal conspiracy, the Accused Nos.1 to 5 hired Accused Nos.7 and 8 and others to commit Arjun's murder. Accordingly, the six assailants committed Arjun's murder. Apart from the Accused Nos.7 and 8, the investigating

agency arrested one Amit Patil who expired during trial. The other three assailants were not found. At the conclusion of the investigation, the charge-sheet was filed and the case was committed to the Court of Sessions. The case was conducted before the Additional Sessions judge, Thane, Vide Sessions Case No.431/06. At the conclusion of the Trial, the learned Trial Judge passed the Judgment and Order of conviction and sentence as mentioned earlier. During trial, the prosecution examined 29 witnesses. These witnesses can be categorized as, the eyewitnesses, various Panchas for various Panchanamas, medical evidence in respect of injuries suffered by the deceased, the relatives of the deceased who gave background of the case and the dispute, employees of hotel in Pune to show conspiracy, bank officers to show the transaction in some of the accused's account, the evidence in respect of the identification parade consisting of the Special Executive Magistrate and the memorandum of identification parade, the CA reports and the investigating officers.

8. Dr.Yug M. Choudhary, the learned Counsel for the Accused Nos.7 and 8 submitted that the evidence of the eyewitness is not believable. The identity of the assailants is not established. He submitted that the conduct of this witness in the background of the evidence given by P.W.11 Nandkumar Sakpal does not inspire confidence. Insofar as the evidentiary value of his deposition is concerned, Dr.Choudhary submitted that the Pancha who was present during the identification parade was a close relative of P.W.3 Nagesh Patil. Therefore the evidence of identification parade was not reliable. P.W.3 Nagesh has not given description of six accused but has given vague description of only two accused in his FIR. The investigating agency has manipulated the record to establish his presence. As per the evidence produced in the Court P.W.3 was taken to the hospital in the night for the treatment of his eyes. In any case, P.W.3 could not have witnessed the incident because admittedly the chilli powder had gone in his eyes and he could not be in a position to witness anything. Dr.Choudhary further submitted that the recoveries at the instance of the accused were a farce.

The recoveries of weapons was not reliable because two weapons were recovered from the same place on consecutive days. The said place was open and accessible to all. Similar was the case for recovery of the currency notes as they were seized from almost the same place on the same date on different occasions. He further submitted that there was no connection between these two accused and the others and therefore the charge of conspiracy was not proved.

9. The learned Senior Counsel Mr. Shirish Gupte for Accused Nos. 1 to 5 submitted that the alleged land dispute could not be the motive for commission of murder. He submitted that the parties had taken recourse to filing proceedings in the courts of law and therefore there was no necessity to take law in their own hands. Mr. Gupte further submitted that there was no evidence to show that there was any nexus between the Accused Nos. 1 to 5 on one hand and the Accused Nos. 7 and 8 on the other. He further submitted that the recovery of cash amount from the house of the Accused No. 1 at the instance of Accused Nos. 7 and 8 was not believable and

could not be a circumstance to show conspiracy between them. On the other hand, the learned APP Mr.Dedhia and Ms.Megha S. Bajoria submitted that the evidence of the eyewitness Nagesh was reliable and cogent. They submitted that there was no reason as to why his evidence should not be accepted by the Court. They submitted that Nagesh was the only eyewitness who was residing with the deceased and who had accompanied the deceased on that day at the spot of incident. They further submitted that Nagesh had given description of the two accused in his FIR who are Accused Nos.7 and 8. They further submitted that there was corroborative piece of evidence in the form of recovery of weapons and seizure of blood stained clothes from the Accused Nos.7 and 8. They further submitted that there was a strong motive for the Accused Nos.1 to 5 to enter into conspiracy by hiring assailants to commit murder of Arjun. They further submitted that the prosecution has established the case against the accused beyond reasonable doubt and therefore there is no necessity for interference with the Judgment and Order passed by the Trial Court.

10. Out of these 29 witnesses, the most important witness is P.W.3 Nagesh Patil who was the eyewitness to the incident. According to him the deceased was his maternal Uncle and had given shelter to him. P.W.3 Nagesh was serving at the STD booth of the deceased Arjun. P.W.3 Nagesh has further deposed about the dispute in respect of the land at Survey No.69 at Dahisar. He further deposed about the Chapter Case initiated by the Accused Nos.1 to 5 against Arjun. P.W.3 Nagesh has further deposed that on 07/09/2006 at about 07.30 a.m. he and Arjun had gone to the said plot on P.W.3 Nagesh's motorcycle. Near the plot, Arjun got down and went towards his plot. P.W.3 was waiting at some distance where he saw one Nandkumar Sakpal (P.W.11). They wished each other and then Nandkumar left. While P.W.3 Nagesh was going towards Arjun on his motorcycle, three persons on one motorcycle came near them. Out of them two persons rushed towards P.W.3 Nagesh and Arjun. In the meantime three persons on another motorcycle came there. Out of them two persons rushed towards P.W.3 and Arjun. Two of

those four persons who had rushed towards the deceased threw chilli powder on Arjun's face. Some chilli powder also went in the eyes of P.W.3 Nagesh. The other two persons out of those four caught Arjun and assaulted him with chopper and Kukri. One of them even threatened P.W.3 Nagesh as he tried to intervene. Therefore P.W.3 ran away for a short distance. After the assault all the assailants ran away from the spot. Three of them went on the two motorcycles brought by them. Remaining three persons went on the vehicle of Nandkumar which was parked nearby. According to him some persons were witnessing the incident and somebody informed the police, who came there. Thereafter inquest Panchanama was conducted and P.W.3 Nagesh's statement was recorded which was treated as the FIR as mentioned earlier. The FIR is produced on record at Ex.P-105. In the FIR P.W.3 Nagesh had given description of two persons. In the Court, he identified the Accused Nos.7 and 8 as the persons who had assaulted the deceased by Chopper and Kukri. He identified the weapons produced in the Court.

11. The crucial aspect of the evidence of P.W.3 Nagesh was the identification of the assailants. According to P.W.3 on 11/10/2006 he was called at Tahasildar's office at Thane and from there he went to the District Central Jail at Thane to attend the identification parade. According to him, in the said parade, he identified Accused Nos.7 and 8 and the deceased accused Amit Patil.

12. Before discussing the effect of the evidence of this witness P.W.3, it is necessary to refer to the evidence of P.W.11 Nandkumar Sakpal. According to him, on 07/09/2006 at about 07.00 a.m., he had gone to Vipul Weigh bridge to cut grass. He had parked his vehicle i.e. Bajaj M-80 motorcycle and proceeded to cut the grass. At that time, he had met P.W.3 Nagesh Patil. They wished each other and then this witness proceeded to cut the grass. While he was doing so, he heard shouts and saw that his motorcycle Bajaj M-80 was taken away by three unknown persons. This witness then shouted and chased them by riding on another vehicle. But he could not see them till City of Taloja.

At Dahisar check post one Auto Rikshaw driver informed him that his M-80 motorcycle was taken by two persons towards Village Wakan. P.W.11 then went to Wakan and found his vehicle.

13. Coming back to the evidence of P.W.3 Nagesh; P.W.11 Nandkumar does not support the version of P.W.3 Nagesh in respect of assault on the deceased. It was quite surprising that though he was working nearby and though assailants had taken away his vehicle from the spot itself, he did not witness the incident. Even P.W.3 has not deposed that after the incident he went to P.W.11 Nandkumar to seek his help. Thus there is some doubt regarding the deposition of P.W.3 Nagesh, in the light of the evidence given by P.W.11 Nandkumar Sakpal.

14. The evidence of P.W.3 Nagesh is required to be scrutinized carefully because he is the sole eyewitness who was a close relative of the deceased. P.W.3 Nagesh was under obligation of the deceased as he was given shelter and

employment by the deceased Arjun. P.W.3 Nagesh himself has deposed that there were other persons who had witnessed the incident, but none of them has been examined by the prosecution. Insofar as his own evidence is concerned, though he says first in his deposition that he had given description of six persons, but on being confronted with his FIR he admitted that he had given description of only two persons in the FIR. His deposition shows that before the incident of assault, two persons threw chilli powder on the face of the deceased. Some part of it went in the eyes of this witness. Therefore the question that arises is as to whether this witness was in a position to witness the actual assault which had taken place after the chilli powder had gone in his eyes. P.W.3 has tried to explain this by deposing that only a particle of chilli powder went in his eye. However, requisition given by the Police for his medical checkup (Ex.P-261) shows that chilli powder was thrown at his face and medical certificate (Ex.P-310) shows that both his eyes had become red. It is extremely doubtful as to whether he was in a position to see the actual assault after chilli powder was thrown

by the assailants. In this context his identification of the Accused Nos.7 and 8 at the identification parade held on 11/10/2006, is of great importance. This witness has admitted that he used to visit the police station to find out the progress of the investigation. The accused were arrested on 11/09/2006. There is no acceptable explanation as to why the identification parade was held only on 11/10/2006 i.e. after a month. P.W.26 Sr.P.I. Suresh Pawar, in his cross-examination has tried to shift the blame on the Special Executive Magistrate who had sought time on two occasions. There is no explanation offered as to why the investigating officer could not approach any other Executive Magistrate. Apart from this, what is more disturbing is the fact that this witness had tried to suppress the material fact from the Special Executive Magistrate who had conducted the identification parade. P.W.3 Nagesh has deposed that on the date of identification parade, he along with his brother-in-law Subhash Mahadu Porgi had gone to Tahasildar's Office. This witness and the said Subhash Porgi had proceeded together for the identification parade as is revealed from his cross-

examination. Even P.W.11 Nandkumar had accompanied them for the purpose of identification. P.W.3 in paragraph No.25 of his cross-examination has admitted that his brother-in-law used to occasionally work for the deceased Arjun. He has admitted that during their travel from the Tahasildar's office to Thane Central Jail, the S.E.M. who conducted the identification parade had made enquiry with him. P.W.3 has clearly admitted that on his own he did not disclose to the S.E.M. that Subhash Porgi was his brother-in-law. Subhash Porgi was one of the Panchas who was present during the identification parade. Thus one of the Panchas was not an independent person. P.W.3 was brought at the place of identification parade by the other Pancha Janardan Laxman Mhatre. After P.W.3 had identified the Accused, Subhash brought Nandkumar at the place of identification parade. The identification parade was conducted in the presence of S.E.M. P.W.22 Dinesh Babulal Paithankar and these two Panchas, as their signatures appear on the identification parade memorandum produced at Ex.P-242. P.W.22 Dinesh Paithankar, S.E.M. who had conducted the identification parade has

admitted in his cross-examination in paragraph No.7 that he had selected the two Pancha witnesses from the persons who were present outside the campus of the Tahasildar's office. As mentioned earlier even P.W.3 was at the Tahasildar's office before all of them proceeded towards Thane Central Jail for identification parade. This witness P.W.22 has further admitted that it was not disclosed to him that the Pancha Subhash Porgi and the witness Nagesh were the relatives of each other. He further categorically admitted that if he was made aware of the said fact, he would not have selected Subhash Porgi as a Pancha for the identification parade. He has even stated that before the identification parade he had even asked Pancha witness as well as the other witnesses as to whether they were acquainted with each other; to which they had replied in the negative. This shows that the P.W.3 Nagesh is not a truthful witness at all. He had suppressed material facts even at the stage of identification parade and had cleverly taken help of his own brother-in-law Subhash Porgi who incidently was under obligation of the deceased Arjun. In this view of the matter, it would be highly

improper to rely on such identification parade where one of the Panchas was in a position to help the main identifying witness; particularly when both of them had suppressed this fact from the S.E.M. who had conducted the identification parade. Therefore we are not inclined to place much reliance on this evidence of identification parade. Moreover, since P.W.3 had an opportunity to see these Accused Nos.7 and 8 on the date of identification parade, his identification of these accused in the Court is meaningless. Once he had fixed his mind about the identity of these accused, it was a mere formality to identify them in the Court. In this context, the identification of the accused in the identification parade is of great importance. But as discussed, this identification by P.W.3 was not only suspicious, but the parade also gave him an opportunity to see the accused. Therefore, we are of the opinion that the prosecution has failed to prove the identity of the accused Nos.7 and 8 as the assailants beyond reasonable doubt.

15. The next piece of evidence against the Accused Nos.7

and 8 is in respect of the recovery of weapons at their instance. In this connection the prosecution has examined P.W.5 Abdul Razak Abdul Latif as the Pancha in whose presence the Accused No.7 had made a voluntary statement u/s 27 of the Indian Evidence Act, showing his willingness to show the place where he had hidden a chopper and a handle of Kukri. According to this witness, Accused No.7 made a statement that these articles were kept in front of a mosque beyond Dahisar in grass in the compound. Accordingly, the memorandum statement (Ex.P-123) was recorded between 12.30 to 12.45 p.m. on 14/09/2006. According to this witness the Accused No.7 thereafter led the police officers and the Panchas to the place in front of a mosque at Dahisar. This witness P.W.5 has further deposed that the Accused No.7 then took out a chopper and the handle of Kukri from the grass near the compound. The recovery Panchanama is at Ex.P-124. As can be seen, the said place is open and accessible to all. We are not inclined to rely on such recovery where the weapons are recovered from an open space which is accessible to all.

16. The prosecution has examined P.W.7 Ratnakar Kanan Palkhi, who was a Pancha in whose presence the chopper was recovered at the instance of the Accused No.8. According to the witness on 15/09/2006, the Accused No.8 made a statement that he concealed the chopper at Dahisar in the compound of a mosque and it was kept concealed in grass. The memorandum Panchanama recorded u/s 27 and produced at Ex.P-137 shows that the statement was recorded between 05.00 - 07.15 on 15/09/2006 and the Panchanama at Ex.P-138 shows that a chopper was recovered from the grass near the compound of the mosque at Dahisar.

17. Thus, it can be seen that on the next day of recovery of weapons at the instance of the Accused No.7, from the same place another chopper was recovered at the instance of the Accused No.8. Thus the recovery by itself is unbelievable. It is difficult to believe that when the police had gone to the said spot for effecting recovery of chopper at the instance of Accused

No.7, they did not find this weapon i.e. another chopper which was recovered at the instance of the Accused No.8 on the next day. As mentioned earlier this place was open and accessible to all and the weapon was merely taken out from below the grass. Therefore we are not inclined to accept such piece of evidence against the Accused Nos.7 and 8.

18. The next circumstance is that of seizure of clothes which were on the person of the Accused Nos.7 and 8 when they were arrested. The accused were arrested on 11/09/2006 and the clothes from their person were seized on 14/09/2006. There is no explanation as to why their clothes were not seized on 11/09/2006 itself. The learned Counsel Dr.Yug Choudhary rightly submitted that the accused were not expected to wear the same clothes from 07/09/2006 to 11/09/2006. Therefore even this piece of evidence is not proved satisfactorily by the prosecution. Since we have disbelieved the recovery of weapons at the instance of the Accused Nos.7 and 8 and the seizure of their clothes, the CA reports in respect of these articles is

inconsequential and in any case, the report shows that the result for finding blood group was inconclusive.

19. The next circumstance which is relied on by the prosecution is the recovery of Rs.8,000/- in cash at the instance of the Accused No.7. In this behalf, the prosecution has examined P.W.6 Nasir Usman Shaikh, who was the Pancha in whose presence such recovery was effected at the instance of the Accused No.7 from the house of the Accused No.1. After recording his statement u/s 27 of the Evidence Act between 01.45 p.m. to 02.00 p.m. on 19/09/2006 the Accused No.7 was taken to the house of the Accused No.1 and according to this witness the Accused No.7 took out Rs.8,000/- from below the mattress on one of the two beds in the house of the Accused No.1. The said statement u/s 27 of the Evidence Act is at Ex.P-129 and Panchanama is at Ex.P-130. On the same day i.e. on 19/09/2006 between 04.15 p.m. to 04.30 p.m. in the presence of the same two Panchas recovery of Rs.7,000/- in cash was effected at the instance of the Accused No.8 from the same

house from below the mattress on another bed. The said statement is at Ex.P-131 and the Panchanama is at Ex.P-132. It is again interesting to see that within a short span of time police along with accused went to the same place and at the first instance found Rs.8,000/- from below a mattress and thereafter after some time found Rs.7,000/- from the adjacent bed. This by itself is doubtful. It is hard to believe that at the first instance the police did not take further search and did not find Rs.8,000/- from under the mattress, which was lying just nearby. In any case, finding of cash amount at the instance of these two accused from the house of Accused No.1 can hardly lead to the inference of any conspiracy between them.

20. The main edifice of the prosecution story including the theory of the conspiracy is based on the foundation of the main incident of assault on Arjun on 07/09/2006 at 07.30 a.m. Once we have reached the conclusion that identity of the Accused Nos.7 and 8 as the assailants of Arjun is not established, the entire foundation of the prosecution is shaken and the theory of

conspiracy between the Accused Nos.1 to 5 on one hand and the Accused Nos.7 and 8 on the other, falls flat. It is the prosecution case that to eliminate Arjun, the Accused Nos.1 to 5 gave contract to the Accused Nos.7 and 8, who executed the plan with four others.

21. One Accused Amit Patil had expired and did not face the trial. Three other persons who were supposed to be present at the time of incident and who had taken part in the assault, were never arrested or brought before the Court. There is no material brought on record to show the connection between the Accused Nos.1 to 5 and the Accused Nos.7 and 8. One attempt was made by the prosecution to show that the money was recovered at the instance of Accused Nos.7 and 8 from the house of Accused No.1. As we have discussed earlier, we are not inclined to rely on such recovery of money. Secondly, the prosecution has not produced any evidence to show that the Accused Nos.7 and 8 were residing in the house of the Accused No.1.

22. The prosecution has examined P.W.15 Nathusingh Kalusingh Rajpurohit, who was a receptionist at Rajdhani Hotel, Pune and P.W.17 Savita Vinod Swaminathan who was also a receptionist at Hotel Rajdhani at Pune. P.W.15 Nathusingh has deposed that as per their register one Amit Patil and Deepak Patil had stayed at their hotel on 08/09/2006 and had left on 09/09/2006. He has deposed that two more persons had come on 09/09/2006 to meet them. But this witness has not identified anybody. P.W.17 Savita has produced the receipt on record, but even her evidence does not take the prosecution case any further.

23. The prosecution has examined P.W.10 Mohammad Naushad Bashir as a Pancha at the time of arrest of the Accused. According to him, the Accused No.1 showed the place i.e. his own residence where the accused had hatched conspiracy. Since no fact was discovered pursuant to the statement dated 18/09/2006 of the Accused No.1, this piece of evidence has no evidentiary value.

24. The prosecution has examined P.W.12 Gopal Shantaram Walilkar who was cousin of the deceased Arjun and P.W.13 Gyandeo Krishna Walilkar, who was the brother of the deceased Arjun. Both have deposed about the dispute between the Accused Nos.1 to 5 and the deceased. P.W.13 Gyandeo in particular has given details of the proceedings between the parties. He has deposed that after Arjun had installed his board in his agricultural land, the Accused Nos.1 to 5 got enraged and instituted criminal case against him resulting in a Chapter Proceeding against Arjun. He has deposed that one month prior to the incident the Accused No.3 Sanjay Walilkar had approached him and had informed him that they had sold the said land for Rs.3 crores and they had kept one crore aside to kill his brother Arjun. P.W.13 Gyandeo has further deposed that he or Arjun did not take cognizance of such threat.

25. This witness was cross-examined at length by the learned Counsel for the accused and he was confronted with

various complaints lodged by him before the Collector Thane and the Deputy Chief Minister and the Home Minister. He had admitted that in his complaint lodged after the murder of his brother Arjun, there was no whisper about the threats mentioned by him in his deposition before the Court. Therefore, threats issued by the accused appear to be included by this witness in his deposition as an afterthought. Thus, the prosecution case does not travel beyond the bitterness between the Accused Nos.1 to 5 and the deceased on the ground of disputed agricultural field bearing survey No.69 at Dahisar. The prosecution has examined P.W.18 Mohammadali Shokatali Shaikh to whom the Accused Nos.1 and 2 had agreed to sell the disputed land for a consideration of Rs.1,80,00,000/-. This was agreed on or about 28/04/2006. However even this piece of evidence does not go beyond the arena of land dispute. Thus, the prosecution case at the highest shows that there was a dispute between the deceased and the Accused Nos.1 to 5. However, this solitary circumstance does not lead to a conclusion that these accused hired the Accused No.7 and 8 to

commit the murder of deceased Arjun and it was committed pursuant to the execution of the criminal conspiracy.

26. The prosecution has examined P.W.19 Madhukar Balu Patil to show that the accused No.2 Sanjay Walilkar was the Head Master at Trimurti Vidyamandir, Dahisar Mori, and that he was not present at 10.30 a.m. in his school. The incident had allegedly occurred at 07.30 a.m. and within a short while, the police were informed. The absence of Accused No.2 in his school from 09.30 a.m. has no relevance to the incident of assault and from that circumstance itself it is not possible to draw an inference that the Accused No.2 was involved in the offence in any manner.

27. The prosecution has examined P.W.27 Vikas Narayan Fulkar, who was a Nodal officer working with the telephone service provider company 'Orange' and P.W.28 Rajesh Sampatrao Gaikwad working with 'Reliance'. P.W.27 has produced CDR in respect of phone No.9833114546 and P.W.28 has produced the CDR in respect of Phone No.9322057884. The

latter number stood in the name of Sangita Patil. There is no evidence that any of the accused was using the said phone number. The phone number 9833114546 stood in the name of Accused No.1 Deepak Walilkar. The accused has challenged the genuineness of this record. These witnesses have not produced certificates of the officers who had taken out this record from their computers. Moreover, the prosecution has failed to establish any connection of these phone numbers with the case to prove their allegations of conspiracy. The conversations inter-se between these numbers without any further details, does not further the prosecution case in any manner.

28. The prosecution has examined P.W.29 Anant Baban Dalvi to show that mobile No.9821676894 belonging to this witness was being used by Amit Balaram Patil and that his phone number was in constant touch with mobile No.9833114546. However, accused Amit Patil had died during the trial and this witness was declared hostile. Therefore, even his evidence is of no consequence.

29. Considering all these factors we are of the firm opinion that the prosecution has failed to prove its case beyond reasonable doubt against any of the accused for commission of the offences they are charged with. While passing the impugned judgment and order, the learned Trial Judge had directed that the fine amount if deposited, be given to the legal heirs of Arjun. The Criminal Appeal No.406/11 is pending before this Court since past about 7 years. The accused Nos.7 and 8 are in custody since 2006 i.e. for almost 12 years. In the interest of justice we have given audience to Ms.Bajoria h/f K.S. Patil representing Gyandeo Krishna Walilkar, the brother of the deceased. In this view of the matter, we direct that the fine amount if deposited in Court shall not be returned to the accused, but shall be given to the legal heirs of the deceased. Thus, there will be no prejudice caused to the legal heirs of the deceased Arjun in respect of the directions given by the Trial Court.

30. Hence following order:

ORDER

1. The Appeals are allowed.
2. The Judgment and Order dated 31/03/2011 of conviction and sentence is set aside.
3. The Appellants are acquitted of the charges charged with.
4. The Appellant Nos.1 to 5 are on bail. Their bail bonds stand discharged. The Appellant Nos.1 and 2 in Appeal No.775/18 (Original Accused Nos.7 and 8) are directed to be set at liberty forthwith, if not required in any other case.
5. Fine amount deposited, if any, shall be paid to the legal heirs of the deceased Arjun.

(SARANG V. KOTWAL, J.)**(B. R. GAVAI, J.)**