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

CRIMINAL APPEAL NO.581 OF 2011

Dhirendra alias Balu Subhash Vadval)
Age 24 years, Occ : Nil)
R/o: Ingavale Chawl, behind Hill Top)
Society, Tekdi Bungalow, Naupada,)
Thane.)
(At present in Kolhapur Central Prison,)
Kalamba, District Kolhapur.) Appellant.
(Orig. Accused No.5)

Versus

The State of Maharashtra)Respondent

**ALONGWITH
CRIMINAL APPEAL NO.589 OF 2011**

1] Ganesh Narayan Shirke,)
Aged about 39 years,)
Residing at Tekdi Bunglow,)
Near Ganesh Darshan Building,)
Naupada, Thane.)

2] Bhau Sadashiv Charvat,)
Aged about 27 years,)
Residing at Dhondur Kadam Chawl,)
Behind Ganesh Darshan Building,)
Tekdi Bunglow, Naupada, Thane.)

3] Jagdish @ Kalyabhau Krusha,)

Aged about 32 years,)
 Residing at Ingavale Chawl,)
 Behind Hill Top Society, Tekdi)
 Bungalow, Naupada, Thane.)
)
 At present undergoing the sentence)
 imposed upon him at Kolhapur Central)
 Prison, Kolhapur) Appellants.
 (original Accused Nos. 1, 2
 and 4)

V/s

The State of Maharashtra)
 (at the instance of Social Service)
 Branch, Naupada Police Station,)
 Thane vide C.R. No.I-224 of 2009) Respondents.

Ms. Farhana Shah, Advocate for the Appellant in Criminal Appeal No.581 of 2011.

Mr. Anil S. Navale, Advocate for the Appellant No.1. in Criminal Appeal No. 589 of 2011.

Ms. Rohini Dandekar, Advocate appointed by Legal Aid Committee for Appellant No.1 in Criminal Appeal No.589 of 2011.

Mr. P.R. Arjunwadkar, Advocate for Appellant No.2 in Appeal No.589 of 2011

Mrs Ashvini A. Takalkar, APP for the Respondent/State in both the above criminal appeals.

**CORAM: B. R. GAVAI &
 BHARATI H. DANGRE, JJ.**

DATE: 13th JANUARY, 2018

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

1] The present appeals take exception to the Judgment and Order

passed by the learned Sessions Judge, Thane in Sessions Case No.310 of 2009, thereby convicting the Appellants for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life.

2] Prosecution case, in brief, is thus :-

3] P.W. 1 – Gangubai Pawar is a distant relative of the deceased Eknath. When the deceased and other persons were playing cricket, there was quarrel between the deceased and his friends on the one hand and the accused persons and their friends on the other hand. However, there was compromise between accused and the deceased. This is said to have happened around 6.00 P.M. It is further the case of prosecution that, at 8.30 P.M., Eknath was sitting outside the house of the complainant on the motorcycle and when the complainant was sitting in front of her house, the accused persons came there with weapons like chopper, sword, knife and attacked Eknath. He fell on the ground and was taken to the hospital by his friends in rickshaw. The complainant and her daughter followed them in another rickshaw. On reaching the hospital, the first informant came to know that the

deceased was no more. Therefore, she went to Naupada Police Station and lodged the oral report. On the basis of oral report, C.R. No.I-224/2009 came to be registered by the Police Station. During investigation, postmortem was conducted. It is also the prosecution case that, during investigation, certain incriminating material came to be seized at the instance of the accused. After investigation, charge-sheet came to be filed in the Court of learned JMFC, Thane. Since the case was triable by the Sessions Court, it was committed to the learned Sessions Judge, Thane.

4] The charges came to be framed against the five accused for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and also for the offence punishable under Sections 37, 39 and 40 read with Section 135 of the Bombay Police Act. Accused – Dheeraj alias Bhau Appa died during the course of trial and as such, the trial abated against him. At the conclusion of trial, learned Trial Judge passed an order of conviction and sentence, as aforesaid. He, however, acquitted the accused of rest of the charges. Being aggrieved thereby, these two appeals.

5] Learned Counsel for the Appellants submitted that, though it is the prosecution case that there are five eye witnesses, perusal of their testimony reveals that, the evidence of not a single eye witness is trustworthy. It is submitted that, all the eye witnesses are got up witnesses. It is further submitted that, the versions given by eye witnesses are also inconsistent and as such, the conclusion based on the evidence of these eye witnesses would not be sustainable. It is further submitted that, the so-called recoveries made under memorandum under section 27 of the Indian Evidence Act are all farcical. Learned Counsel further submitted that, it is the case of most of the eye witnesses that they lifted the body of the deceased while taking it to the hospital. It is submitted that, the absence of blood stains on the clothes of such of the witnesses falsifies their versions. Learned Counsel for the Appellants therefore submitted that the Appeals deserve to be allowed and the Appellants acquitted of the charges charged with.

6] Learned Public Prosecutor, on the contrary, submitted that merely because there are minor contradictions in the evidence of eye witnesses, that cannot be a ground for discarding their testimony. She

submitted that, insofar as the main incident of attack on the deceased by the Appellants is concerned, there is no inconsistency and the evidence of all the eye witnesses is consistent. It is therefore submitted that the Appeals deserve to be dismissed.

7] With the assistance of learned APP and learned Counsel appearing on behalf of the Appellants, we have scrutinized the evidence on record. Since death of the deceased being homicidal is not challenged, it will not be necessary to refer to the medical evidence.

8] The prosecution case mainly relies on the evidence of P.W.1 – Gangubai Pawar, the first informant, P.W. 4 – Rupesh Dalvi, the neighbour, P.W. 9 – Rukmini Bhoir, who is also related to the deceased, P.W. 10 – Kiran Shinde, the neighbour and P.W. 12 – Mukund Pawar, the another neighbour.

9] P.W. - 1 Gangubai is the first informant. She states in her evidence that, the deceased was residing with his family members at Raigad. On 21/05/2009, he had come to her from Raigad and was

residing with her thereafter. Accused and their friends and deceased Eknath and his friends were playing cricket at around 6.00 P.M. in Aji Aajoba Garden and there was quarrel between the accused and the deceased on account of the game. She further states that, there was compromise between accused and the deceased Ekanth and they left for their houses. She further states that, around 8.00 P.M., Eknath went outside her house and sat on motorcycle, which was in front of her house. She was sitting outside the house. The accused persons and Dheeraj Pawar came to the spot with weapons like chopper, big knife and swords. They assaulted Eknath and left that place. She and her daughter took the deceased to civil hospital by rickshaw. Doctor of the civil hospital told her that, Eknath was no more. Thereafter, she went to the Police Station and lodged the oral report. She admitted in her cross-examination that, she has not stated to the police that she was sitting outside her house. She has further admitted that, she was sitting near the shop which was near Ganesh Darshan Building. She has further admitted that, her house and the Board of Mourya Sports Club are at different places than Ganesh Darshan Building. She has further admitted that, the deceased Eknath was sitting on motorcycle which was in front of Ganesh Darshan Building. The sketch map of

the spot is at Exhibit-30. From the perusal of map, it is doubtful as to whether P.W.1 – Gangubai could have noticed the spot of the incident and the person sitting in front of the shop near Ganesh Darshan Building. She has further stated in her examination in chief that she and her daughter had taken the deceased to the hospital in rickshaw, whereas in her cross-examination she has admitted that some of the friends of the deceased had taken him to hospital. She has further stated in her cross-examination that she had not touched the body of the deceased.

10] P.W. 4 – Rupesh is the neighbour. He talks about the quarrel that took place, when the deceased, Appellants and others including the said witness were playing cricket. He states that, during quarrel, the deceased had slapped Dharendra. He states that, he intervened in the matter. The accused threatened Eknath to see him and thereafter they left for the house. He further states that, at around 8.30 P.M., he was sitting on a motorcycle with his niece and Eknath was sitting on another motor-cycle. He states that, his niece was of six months. He states that, at that time, deceased accused No.3 came there alone with knife to beat Eknath. He left the place with his niece. When he came

back, Eknath was taken to civil hospital. However, his cross-examination reveals that, there are material contradictions in his evidence. Though he has stated before police that, there was scuffle between Eknath and Dheeraj, he has denied making such statement in the cross-examination. Though, in his statement under section 164, he states that the deceased accused Dheeraj had also sustained injury during scuffle, in cross-examination he denies making of such statement. Again, this witness states that, he took the deceased to civil hospital in rickshaw with the help of other persons.

11] P.W. 9 – Rukmini is also related to deceased Ekanth. She states that Eknath was residing at Roha. Sometimes, he used to come to Thane. On 24/05/2009, at about 7.45 P.M., she was at the shop of tailor. Eknath was sitting on motorcycle. P.W. 4 – Rupesh was with him. Deceased accused Dheeraj came there with Sura. He beat Eknath on his back. Appellants followed him. They also beat Eknath by weapons. She has admitted in her cross-examination that there were various cases on deceased Eknath. She has also admitted that, Eknath was convicted in one murder case and after undergoing the sentence, he had gone to his village. She further states that, after the

incident, she and Milind handled the deceased and gave water to him. She has further admitted that, tailor shop is in Ganesh Darshan Building. She states that, Gangubai was sitting near her house at Pawar Chawl. She further admits that, Pawar Chawl is between Ganesh Darshan Building and Mourya Club Board. Perusal of the map – Exhibit-30 would again create a doubt as to whether this witness and P.W. 1 – Gangubai have witnessed the incident or not. Insofar as involvement of the present Appellants is concerned, it is by way of improvement. There is no mention with regard to the role played by the present Appellants in her police statement. It is further to be noted that P.W. 4 – Rupesh states that, after seeing the assailants, he ran away. This witness (P.W. 9) states that it was not correct to say that Rupesh Dalvi ran away. She states that Rupesh Dalvi was present and sitting on a motorcycle.

12] P.W. 10 – Kiran Shinde is a grandson of P.W.1 - Gangubai. He states that, when he was playing with Dhanesh near Ganesh Darshan Building, Ekanth was sitting on motorcycle . Rupesh was also with him. Dheeraj came there. He beat Eknath by knife. Remaining accused followed him. He shouted with Dhanesh. Thereafter,

assailants ran away. Again, there are contradictions in his evidence. He has denied that, there was scuffle between accused and the deceased. In his statement before police, he has stated that, there was scuffle between the deceased and Dheeraj. He has stated that, though he shouted on the spot, nobody came there to intervene the matter. When he reached at the scene of offence, nobody was there. He has stated in his evidence that, no blood stains were found on his person and his friend Dhanesh. He also contradicts P.W. 4 – Rupesh and says that, he did not see Rupesh Dalvi while running away. He states that, he did not see Rupesh Dalvi at the scene of offence and Dhanesh was the only person who made an attempt to give water to Eknath. He has further admitted that, the Board of Mourya Club where incident had taken place is at the backside of his grandmother's house. He states that, the house of P.W. 9 - Rukmini is half a kilometer away from the house of P.W. 1 – Gangubai.

13] P.W. 12 – Mukund is another witness. He states that, at around 7.00 to 7.30 P.M., he heard shouts. Eknath and Rupesh were sitting on two different motorcycles. Accused came there. They beat the deceased Eknath on his head, chest. Eknath fell down. All the

accused left the place. He went to the deceased and saw him. He and other person took him to the hospital. They were informed in the hospital that he was dead.

14] The statement of this witness (P.W.12) is recorded on 27/05/2009. He states that, on 24/05/2009, though he had met policemen, he did not tell anything about the incident till recording of his statement. He admitted that on 25th and 26th of May, 2009 also, he had been to the Police Station with his grandmother and cousins. He has also admitted that, there were no blood stains on the clothes of anybody including himself, whereas other witnesses have denied that there was scuffle between the deceased Eknath and the deceased accused Dheeraj. This witness (P.W.12) states that, there was scuffle in which Dheeraj also sustained injury.

15] It could thus be seen that all these witnesses are either relatives of the deceased Eknath or his close friends. No doubt that, merely because witnesses are interested witnesses either being relative or friends, that cannot be a ground for discarding their testimony. However, evidence of such witnesses has to be scrutinized with greater

caution and only if their evidence is found to be reliable and cogent, the conviction based on the evidence of such witnesses can be maintained.

16] It is to be noted that P.W. 1 – Gangubai, P.W. 9 – Rukmini and P.W. 10 – Kiran are relatives of the deceased. We have already discussed hereinabove that, from the map, which is at Exhibit-30, it is doubtful as to whether Gangubai could have witnessed the incident. The map would show that the house of P.W.1 – Gangubai in which the deceased Eknath was residing with her is near Ganesh Darshan Building. Even P.W-10 – Kiran has admitted that the board of Mourya Sports Club is on the backside of the house of P.W. 1 – Gangubai. Gangubai states that, at the time of the incident, she was sitting in a shop near Ganesh Darshan Building. Perusal of the map would reveal that, it is difficult to witness the incident from any of the shops near Ganesh Darshan Building. Perusal of evidence of P.W.10 – Kiran and P.W. 11 – Suryakant Jadhav would show that house of P.W. 9 – Rukmini is at a distance of half a kilometer away from the house of P.W. 1 – Gangubai. However, P.W. 9 – Rukmini also, incidentally, happens to come at the same time at the same place near the spot of

incident, which is half a kilometer away from her residence. Even according to her, tailor shop is in Ganesh Darshan Building. She states that, the spot of incident is five feet away from Ganesh Darshan Building. However, it is falsified by the map itself. P.W. 10 – Kiran, who is another relative of the deceased, also happens to be at the spot. However, though he accompanies his grandmother to the Police Station on 25th and 26th May, 2009, he finds it necessary to inform the police about his witnessing the incident only on 27th May, 2009. Insofar as P.W. 4 – Rupesh is concerned, according to him, he was there along with the deceased Eknath on another motorcycle. However, after seeing the accused, he ran away in order to save his niece. However, P.W. 9 – Rukmini states that when the incident was going on, Rupesh was present there and sitting on motorcycle. P.W. 10 – Kiran denies presence of Rupesh.

17] That leaves us with only one witness i.e. P.W. 12 – Mukund. Again, his statement is recorded on 27th May, 2009. He is also cousin of P.W. 10 – Kiran. Like P.W. 10 – Kiran, he also accompanies his grandmother to Police Station on 25th and 26th May, 2009 and finds it necessary to inform the police about witnessing the incident only on

27th May 2009.

18] However, the most important facet of their evidence is that, most of these witnesses say that they had lifted the body of the deceased and taken it to the hospital and all of them say that there were no blood stains on their clothes. In this respect, it will be appropriate to refer to the following observations of Division Bench of Gauhati High Court in the case of *Rajat Ali vs. The State of Assam*¹:-

“8..... P.W. 5 is not an eye-witness to the occurrence. According to the evidence of P.W.4, it was P.W.3, P.W.4 and P.W.5, who carried the dead body of Jogen to his home. It is also in evidence that at the time Jogen was profusely bleeding and that the clothes of these persons were besmeared with blood. But curiously enough for reasons known to them, the police did not seize the blood stained clothes of any of these witnesses. Defence challenged the presence of these persons, and being eye witness to the occurrence. Had their blood stained clothes been seized, they would have clearly proved their presence. This leads to an inference that presumably these witnesses were not present at the time of the occurrence and that they were not the persons who carried the dead body of deceased Jogen.”

1 1977 CRI.L.J. 508

Reliance in this respect can also be placed on the judgment of the Their Lordships of the Apex Court in the case of *State of Punjab and Gurmej Singh vs. Jit Singh and others, etc.*¹

19] We find that aforesaid observations aptly apply to the present case. Though, all the witnesses say that they have taken the deceased to the hospital, in the next breath they say that their clothes were not stained with blood. However, Investigating Agency did not find it necessary to seize the clothes of the said witnesses. In that view of the matter, we are of the view that conviction on the basis of evidence of the so-called eye witnesses would not be sustainable.

20] That leaves us with other circumstance of the alleged recovery stated in the memorandum of the accused under Section 27 of the Indian Evidence Act. Insofar as the recovery of weapons, the witnesses alleged to have been used in the crime is concerned, the same is attributed to the original accused No. 5 – Dharendra. The memorandum shows that, accused Dharendra makes a statement that after all the accused have done the deceased to death, other accused

¹ 1994 CRI.L.J. 1116

handed over weapons while running away to this accused and he has concealed them at a place which he would show along with the weapons. The recovery is from the place behind D.P. Box which is situated within two buildings viz. Durwankur and Jaswandi. It is a settled principle of law that, only such of the recovery which is from the place exclusively within the knowledge of maker of a statement would be admissible under section 27. Undisputedly, the place from which the alleged recovery is made was open and accessible to one and all. Insofar as recovery of the clothes alleged to have been used by the accused at the time of incident is concerned, the same is said to have been made on the basis of memorandum of accused No.2 – Bhau Charvat. Here again, the prosecution case is that, all the clothes of all the accused were concealed at the same place. The place from which the clothes are said to have been recovered is below Chenna Bridge in creek. The clothes are recovered from the water. Curiously enough even after the clothes being submerged in water for 4 to 5 days, they have blood stains. It could thus be clearly seen that the investigation has not been done in fair manner and an attempt has been made to implicate the accused. The recovery, to say the least, is farcical in nature.

21] In that view of the matter, we find that the Appellants are required to be acquitted of the offence punishable under Section 302 read with section 149 of the Indian Penal Code and both these Appeals deserve to be allowed.

22] In the result, we pass the following order:-

O R D E R

(i) Appeals are allowed. The Order of conviction and sentence in so far as present Appellants are concerned, is quashed and set aside. Appellants are directed to be set at liberty forthwith, if not required in any other case.

(ii) Fees of Ms. Rohini Dandekar, Advocate appointed by Legal Aid Committee for Appellant No.1 in Criminal Appeal No.589 of 2011 is quantified at Rs 5,000/-.

(BHARATI H. DANGRE, J.)

(B. R. GAVAI, J.)