

Vidya Amin.

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

CRIMINAL APPEAL No. 769 OF 2012

Gulab Bajirao Zombade & Ors. ... Appellants

VS.

The State of Maharashtra ... Respondent

Mr. Daulat G. Khamkar, Advocate for the appellant.

Mr. J.P. Yagnik, APP for the respondent/State.

**CORAM : Mr.S.S. SHINDE &
Mrs.MRIDULA BHATKAR, JJ..**
RESERVED ON : AUGUST 29, 2018
PRONOUNCED ON : SEPTEMBER 12, 2018

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

1. This Appeal is directed against the judgment and order dated 18th April, 2012 passed by the Additional Sessions Judge, Pune, wherein the appellants/accused are convicted for the offences punishable under section 302 r/w. 34 of Indian Penal Code and are sentenced to suffer imprisonment for life and also fine. They are also convicted under sections 143, 147, 148 and are sentenced under each head for three months, 6 months and 1 year respectively with fine.

2. The incident of murder of Balu alias Vijay Gorakh took place on 25th August, 2008 at around 9 p.m. near Krishna Panshop, Vidyanagar, Chinchwad, Pune. As per the case of the

prosecution, Late Khandu Hake, maternal uncle of the deceased was running cable business. After his death, it was taken over by appellant/accused no. 1 and deceased wanted partnership in the said business, for which appellant/accused no. 1 was not ready. So, there was dispute between appellant/accused no. 1 and deceased Balu Gorakh. At around 9 p.m. when the deceased was chit-chatting with his friends PW-1 Nilesh Vinayak Bhigwankar, PW-9 Vinod Annappa Shirshetti and Vishal Kamble near his residence, all the appellants-accused along with Yogesh Mankar and absconding accused Pintya alias Hanumant Chavan armed with weapons arrived there and assaulted Balu with sickle, sword and iron rod. Balu sustained multiple injuries. He was shifted to the hospital by his sister and one witness. He succumbed to the injuries when he was taken to the hospital. Thereafter at the instance of PW-2 Banudas Hake, the offence was registered at C.R. No. 430 of 2008 with Pimpri Police Station under sections 302, 143, 147, 148, 149 r/w. 37(1) r/w. 135 of Bombay Police Act and under sections 4, 25 of the Arms Act. After registration of the offence, Investigation officer PW-10 Nandkumar Jaywant Pinjan apprehended accused nos. 1 and 2 in the early morning of 26th August, 2008. He conducted discovery, inquest panchnama and

spot panchnama on the same day. He seized the weapons and clothes from the accused. He recorded the statements of witnesses. Thereafter he arrested accused nos. 3 Umesh Zombade and accused no. 4 Sachin Mahadeo Chavan on 7th September, 2008. On 8th September, 2008 he arrested Yogesh Mankar. However, accused no. 6 Pintya remained absconding and could not be arrested. The Investigating officer sent muddemal articles to Chemical Analyzer for analysis. He obtained promulgated ordinance under the Arms Act. After completion of investigation, he filed charge sheet against the six accused. The case against accused Pintya, as he was absconding, was separated by the trial Court and the trial proceeded against the five accused. Thereafter the learned Magistrate committed the case to the Sessions Court. The prosecution examined in all 10 witnesses including the Investigating officer. After considering the evidence of the prosecution witnesses and the defence taken by the accused, the learned Additional Sessions Judge, Pune convicted the appellants/accused as mentioned above and acquitted Yogesh Mankar.

3. The learned counsel Mr. Khamkar has submitted that the

case against the appellants/accused is false and the conviction given by the trial Judge is based on unreliable, inadequate evidence of the prosecution. He submitted that, though there are three alleged eye witnesses, they all are interested persons. The prosecution could not produce any independent witness though they were available. He submitted that the incident took place at 9 p.m. on the road near the panshop and as per the admissions given by PW-1 Nilesh Bhigwankar, PW-2 Bhanudas Bhima Hake and PW-4 Balu Vishvanath Humbre that the road was crowded, thus, many persons must have witnessed the incident and independent witnesses were available. He submitted that as per the evidence of PW-1 Nilesh Bhigwankar and PW-2 Bhanudas Hake, the sister of the deceased had seen the incident, however, though her statement was recorded, she was not examined by the prosecution. No documentary evidence is produced in respect of running of cable business by Khandu Hake, maternal uncle of deceased. Hence, the prosecution could not establish the motive of a cable war between the parties. There are many infirmities in the investigation conducted by PW-10. In the inquest panchnama, there is no mention of C.R. No. 430 of 2008. He has admitted that the information of the incident was given to Pimpri Police Station

by Lokmanya Hospital at 11.25 p.m. Thus, there was nearly delay of one hour in registering/lodging the FIR in the police station. In the history, in Exhibit 114/1, i.e., OPD registration form, the names of the assailants were not given by Sunder or alleged eye witness PW-1 Nilesh Bhigwankar, though assailants were known to them. He submitted that if the incident was seen by PW-1, PW-2 and Sunder and if the assailants were known to the eye-witness, then the names of those persons ought to have been stated to the police and the doctor, when the medico legal case was registered. However, it is doubtful that the offence might not have committed in a manner, the prosecution has put up before the Court. The learned counsel argued that seizure of clothes and weapons is faulty so also the learned Judge did not question about the blood group of the deceased to the accused while putting questions under section 313 of Cr. P.C.

4. The learned counsel Mr. Khamkar relied on the following judgments:

- (i) On the point of delay in FIR and non-examination of material witnesses, he relied on judgment of Hon'ble Supreme Court in the case of

Meharaj Singh vs. State of U.P. reported in 1994 SCC (Cri) 1390.

(ii) On the point of incriminating circumstances, he relied on the judgment of Supreme Court in the case of ***Shaikh Maqsood vs. State of Maharashtra, reported in (2009) 6 SCC 583.***

(iii) On the point of delay in recording statements of the witnesses, he relied on the judgment of Supreme Court in the case of ***Ganesh Bhavan Patel & Anr. vs. State of Maharashtra, reported in 1979 Cri L.J. 51.***

(iv) On the point of failure of seizure of clothes of the witnesses, he relied on judgment of Supreme Court in the case of ***Khima Vikamshi & Ors. vs. State of Gujarat, reported in (2003) 9 SCC 420.***

5. Learned APP has supported the judgment of conviction passed by the learned trial Judge. He submitted that the prosecution has tendered sufficient, reliable, credit-worthy evidence of the eye-witnesses and the circumstances establishing offence against the applicant-accused. He submitted that in the cross-examination, the witnesses remain unshattered and have

specifically stated that the applicant-accused arrived there armed with weapons and have assaulted deceased Balu alias Vijay. He submitted that before the incident of murder, there was quarrel between Balu and Gulab due to cable business which led to this well-planned assault of the deceased. He relied on the post-mortem report and submitted that in all there were 24 injuries. The deceased was brutally assaulted with intention to commit his murder. He has further submitted that Investigating officer has seized the clothes of the deceased, accused and have also seized the weapons. The blood group of deceased Balu was "A" and human blood of "A" group was found in almost all the articles. However, learned APP fairly admitted that the learned Judge did not put specific question about Chemical Analyzer report and blood group of the deceased and its existence on the clothes of the accused. He submitted that the over all evidence tendered by the prosecution establishes the guilt of the accused persons. Learned APP relied on the following judgments:

- (i) Judgment of Division Bench of this Court, Nagpur Bench in the case of ***Virendrasingh Rampurkar Khairwar & Ors. vs. State of Maharashtra, reported in 2017(4) Bom. C.R. (Cri) 771.***

(ii) Judgment of Hon'ble Supreme Court in the case of ***Kattukulangara Madhavan (Dead) through LRs vs. Majeed & Ors., reported in 2017(2) Bom. C.R. (Cri) 455.***

(iii) Judgment of Hon'ble Supreme Court in the case of ***Masalti & Ors. Vs. State of Uttar Pradesh, reported in AIR 1965 SC 202*** on the point of appreciation of evidence against the accused who are prosecuted for the offence of member of unlawful assembly.

6. In the present case, the prosecution has examined 12 witnesses out of which PW1 Nilesh Bhigwankar, PW2 Bhanudas Hake and PW9 Vinod Shirshetti are the eye witnesses. PW3 Dr.Prakash Rokde is the medical officer, who performed the post-mortem. He has opined that the death is due to traumatic haemorrhagic shock due to injury to head, neck and face. Thus, undoubtedly, the death of Balu @ Vijay Gorakh Kokare is culpable homicide amounting to murder.

7. Thus, the incident of murder has taken place on 25.8.2008 at

around 9pm near Krishna Pan stall, Vidya Nagar, Chinchwad, Pune. The spot panchanama (exh.79) is proved through PW5 Siddharth Mhaske. Panchanama of the clothes of the deceased was drawn at exhibit 80. There are two recovery panchanamas and two panchanamas of seizure of clothes. PW10 Nandkumar Pinjan, the Investigating Officer, in his evidence has deposed about drawing inquest panchanama exh.102 and has deposed that he arrested accused Nos.1 and 2 on the next day i.e., 26.8.2008 in the morning and has conducted discovery panchanama of two sickles (exh. 86). Accused Nos.3 and 4 were arrested. PW4 Balu Humbre was examined as panch witness on the point of recovery panchanama (exh. 77) at the instance of accused No.5 Yogesh wherein iron bars and clothes of accused Nos.3 and 4 were recovered. PW5 Siddharth Mhaske has examined and deposed on the point of spot panchanama (exh.79). PW6 Anand Danane is a panch, who deposed about seizure of clothes of pintya, who is the absconding accused where the panchanama is drawn at exh. 82 and PW7 Datta Kamble is the panch on recovery panchanama (exh. 86). PW8 is examined and has deposed about the seizure of clothes of accused Nos.1 and 2 under panchanama (exh. 88). PW10 Nandkumar Pinjan has deposed about the C.A. report (exh.

111 to 113).

8. We have gone through the evidence of PW1 Nilesh Bhigwankar and PW 2 Bhanudas Hake and PW9 Vinod Shirshetti. Both PW1 and PW2 have stated that one late Khandu Hake was running business of cable and after his death, the accused No.1 took it over in which the deceased Balu @ Vijay Gorakh Kokare wanted partnership for which accused No.1 was not ready. Whether Khandu Hake was running the business or not, is not required to be proved by any documentary evidence but the evidence of both the witnesses is sufficient to establish the motive. Both the witnesses have stated that the incident has taken place on 25.8.2008 in the morning near Vidyanagar bus stop, Chinchwad, pune. PW1 alongwith the deceased Balu, PW9 Vinod Shirshetti and PW2 Bhanudas was chitchatting near the bus stop. At that time, accused Nos.1 and 2, who were holding sickle, accused No.3 and the absconding accused Pintya holding swords, arrived at the bus stop. Accused No.1 mentioned about the running of the cable business and assaulted Balu with sickle on his face so also all the other accused Nos.1 to 4 attacked Balu with arms and assaulted on his head, face, eye, legs. PW2 Bhanudas

Hake and PW9 Vinod Shirshetti have corroborated and have stated that they were present alongwith the deceased and PW1 near Vidyanagar bus stop and at that time, accused Nos.1 and 2 holding sickle, accused Nos.3 and 4 and the absconding accused Pintya holding swords, arrived there and the accused questioned the deceased Balu about running of cable business and started assaulting him with sickles. All other accused persons participated in the assault and as they all started shouting, the accused fled away. Thus, there is a complete corroboration with the evidence of PW1 by PW2 and PW9. The contention raised by the learned Counsel Mr.Khamkar that these witnesses are not independent witnesses but PW2 was his cousin and PW1 and PW9 are the friends of the deceased and thus, they are interested witnesses and therefore, their testimony is unreliable, are not acceptable as we find all these witnesses creditworthy. Their evidence is not shaken in the cross-examination. Their presence on the spot appears very natural. It is to be noted that as per the evidence of these three witnesses, Balu was immediately shifted to the hospital at around 10 o'clock. The FIR was given by PW1 Nilesh at around 11.25pm at Pimpri police station and the offence was registered at C.R. No.430 of 2008 against all the accused. All the

details about the names of the accused and the acts done by them are found in the FIR which was given immediately, which rules out possibility of false implication.

9. When Balu was taken to the hospital, he was declared dead. The learned Counsel has pointed out exh. 114 i.e., OPD registration form of Lokmanya hospital, where the case was registered as medico-legal case. In the case history, it showed that the concerned medical officer has mentioned that the details of assault are not available. The learned Counsel has on the basis of this, has submitted that though there were eye witnesses, and they claimed that the assailants were known to them, the non-mentioning of the assailants creates doubt about the presence of the eye witnesses at the time of actual assault. The learned counsel on the point of medical history relied on the judgment of Division Bench of this Court in the case of **Vishwajeet Ganpati Sarkar vs. The State of Maharashtra in Criminal Appeal No. 418 of 2010 decided on 8th june, 2018.**

10. In the case of **Vishwajeet Ganpati Sarkar** (*supra*), though the names of the assailants were known to the witnesses who took

deceased to the hospital, the history was written as “assault on the deceased by an unknown person”. We are unable to appreciate these submissions and the ratio in the said case is not applicable to the present set of facts. At the time of attending the patient in OPD, for a Doctor, the patient is important and there is emergency. Under such circumstances, history of assault is written. In the present case, it is not mentioned that the names of assailants are not known but it is stated that details of the assault are not available. Thus, Sundar, the sister of the deceased, has taken the injured Balu to the hospital and her name is appearing in the history. However, she might not have disclosed the names of the assailants as she might be under the shock of death of her brother.

11. PW3 Dr.Prakash Rokde, the medical officer of YCM hospital, Pimpri has conducted the post-mortem on the body at around 6am on 26.8.2008. In the post-mortem notes, the Doctor has noted down 24 injuries, out of which most of the injuries were all incise wounds and on the vital part of the body i.e., face, head, neck, ear, etc. He has opined that the injuries would have been caused within 24 hours. The medical evidence corroborates ocular

evidence of the 3 eye witnesses. Thus, when the presence of the witness is natural and is corroborated with the evidence of the other eye witness, which is further supported by the medical evidence, then, though the witness is relative or friend, his evidence has to be considered independently and minutely, and it cannot be discarded by labelling it as evidence of interested witnesses.

12. Non-examination of Sunder did not amount to suppression of material evidence, because other two eye witnesses are examined by the prosecution. Moreover, nothing specific is pointed out which could have helped the defence materially due to non-examination of Sunder.

13. In the case of **Ganesh Bhavan Patel** (*supra*), the Hon'ble Supreme Court had held that, delay in recording of the statement of the material witnesses will cast a cloud of suspicion on the credibility of the entire warp and woof of the prosecution story. However, this is not applicable in the present case, as the statements of witnesses are recorded immediately.

14. The fact of immediate steps taken and speedy investigation

has strikingly appealed us. The incident took place around 9 pm on 25.8.2008; thereafter the deceased was shifted to the Lokmanya hospital at around 9.40pm as per exh. 114/1. Thereafter, the FIR was recorded at 11.25pm. As per the evidence of the Investigating Officer (PW10), he apprehended the accused Nos.1 and 2 early morning at 4.45am on 26.8.2008. Thereafter, at 11am on the same day, accused No.1 made a statement to the police pursuant to which memorandum (exh. 86) u/s 27 of the Evidence Act was recorded and two sickles were discovered from the house. Thereafter, he recorded statements of PW9 Vinod Shirshetti and others. PSI Kamble prepared spot panchanama (exh.79) on the same day i.e., 26.8.2008. Under the panchanama, one sword, Nokia cellphone, blood samples were seized. The clothes of the deceased were seized. The post-mortem was conducted on the same day. On 27.8.2008, the statements of the witnesses were recorded and the clothes of accused Nos.1 and 2 were seized under Panchanama (exh. 88). On 29.8.2008, he recorded statements of 7 witnesses. The clothes of the absconding accused Pintya Chavan were seized on 31.8.2008 and on 7.9.2008, accused Nos.3 and 4 were arrested. Thereafter, accused No.3 Umesh made voluntary statement and produced two

swords and the said memorandum was recorded at exh. 105. Then, on 8.9.2002, he arrested accused No.5. Pursuant to his voluntary statement, panchanama of blood stained clothes of accused Nos.3 and 4 was drawn which is marked at exhibits 76 and 77. All the articles were blood stained clothes, blood stained weapons which were sent to the C.A. on 12.9.2008 by the Investigating Officer alongwith the letter (exh. 107). The C.A. report was received thereafter and marked at exhibits 111, 112 and 113. He also filed ordinance issued by the Additional Commissioner of Police restraining people to carry lethal weapons in the city (exh. 110). Thus, it shows that within 3 days, the police has completed the major part of investigation. Accused Nos.3 and 4 were arrested within 2 weeks. The manner in which the investigation was carried out, does not leave any room for doubts of false implication of the accused persons.

15. The ratio laid down in the case of **Virendrasingh Rampurkar Khairwar** (*supra*), is helpful to the prosecution. In the case of **Kattukulangara Madhavan**, 5 accused were convicted for the offence of murder under sections 302, 324, 326 and 149 in the year 2017. The Supreme Court has considered that the offence

had taken place in the year 1993 and deceased was attacked with sticks on non-vital parts, therefore, they reduced the conviction from 302 to 326, 149 of Indian Penal Code. It was also held further that while holding the accused a member of lawful assembly, the Court needs the evidence that the accused have knowledge of unlawful assembly or whether he attempted to prevent the assembly or he disassociated himself from the assembly, then the conviction under section 149 is justified.

16. In the case of ***Khima Vikamshi*** (*supra*), the Hon'ble Supreme Court took note of certain glaring suspicious circumstances in respect of actual presence of PW-4 in that case. The Supreme Court held that non-recovery of her blood stained clothes belies her presence. However, PW-4 was the pardanashin lady and she alone went with her father-in-law to a doctor for her health problem when her husband and mother-in-law both were available. Considering the peculiar facts of that case, the Supreme Court held that recovery of blood stained clothes of PW-4 would have established her presence at the spot. The facts of the present case are altogether different.

17. In the case of **Meharaj Singh**(*supra*), the eye-witnesses were found unreliable and the widow of the deceased claimed that she was present with her husband at the time of occurrence, however, no blood stains were found on the body though the deceased was shot and stabbed by the assailants. Therefore, the Hon'ble Supreme Court held that inference to be drawn that she was not present at the time of occurrence. This authority of **Meharaj Singh** was cited on the point of absence of blood stains on the clothes of Sunder who carried deceased Balu to the hospital. However, Sunder is not examined and moreover, evidence of all the three eye witnesses were found reliable.

18. The learned Counsel Mr.Khamkar has raised legal objection in respect of the recovery of clothes of accused Nos.3 and 4, which was made at the instance of accused No.5 Yogesh. The said memo panchanama (exh. 76) and the seizure discovery (exh. 77) are proved through PW4 Balu Humbre. However, the clothes of blood stained clothes of accused Nos.3 and 4 are recovered at the instance of the co-accused. The learned Counsel has submitted that the discovery of these clothes at the instance of the

co-accused, is not admissible u/s 27 of the Evidence Act. We do agree with the submissions of the learned defence Counsel to a certain extent on the point of such discovery. The fact of discovery at the instance of the co-accused is a very weak evidence and unless it is corroborated with other material evidence, no more weightage can be given to it for holding the accused guilty. The said evidence in the absence of other corroborating facts, could not have been taken into account. However, the fact discovered and admissible is only to the extent of the discovery of blood stained clothes. Whether they belong to the co-accused is inculpatory statement against the accused Nos.3 and 4 and, therefore, that portion not admissible and cannot be read in the evidence.

19. On this point, the CA reports are to be looked into. Exhibit 111 shows that the blood group of Balu is inconclusive. Exhibit 113, the report, shows that on all the articles, i.e., on a sword, sickles, all the clothes, human blood of 'A' group was found.

20. Mr.Khamkar has argued that question regarding evidence of C.A. finding of blood group 'A', were not put to the accused in the

statement u/s 313 of Cr.P.C.. He objected that therefore that evidence cannot be taken into account as prejudice is caused to the accused. The learned Prosecutor has fairly conceded that such specific question is not put to the accused. However, he pointed out question No.58 about taking out blood stained clothes in the discovery by accused No.2; in question no. 63, seizure of the clothes under panchanama; blood stained clothes of the deceased were seized, was asked. Question no. 66 was put about the seizure of the blood stained pant worn by the absconding accused Pintya under exh.82. He also pointed out that question no. 72 was asked about the recovery of blood stained two sickles at the instance of accused No.1. The seizure of blood stained clothes of accused No.1 and accused no. 2 was asked. The question regarding incriminating evidence given by PW-10 that covers of the swords were blood stained and on muddemal articles of the C.A. were put to him in Question no. 122.

21. In the case of **Shaikh Maqsood** (*supra*) , the Hon'ble Supreme Court held that non-putting of appropriate questions in the examination of accused under section 313 of Cr. P.C. will adversely affect conviction.

22. It is mandatory for the Court to put all the incriminating evidence adduced by the prosecution to the accused in the questions u/s 313 of the Code of Criminal Procedure to enable the accused to explain the circumstance. The learned Judge should have put a question to the accused on exhibit 113 that the C.A. report discloses that the blood group found on all the articles is of A group. However, the said question is not put. So, we do not consider that particular evidence. However, as pointed out by the learned Prosecutor, the questions asked to the accused persons were in respect of finding of blood stains on the clothes and so also on the weapons. To all these questions, the accused persons have answered unanimously "I do not know". Thus, though the opinion of the C.A. that the blood group of the blood found on all these articles and the clothes of accused Nos.1 and 2 were of one and the same group, is not read in the evidence as this fact is not asked under section 313 of the Code of Criminal Procedure, yet, the prosecution has established that all the clothes of accused Nos.1 and 2 and also the weapons which were found pursuant to the memorandum drawn u/s 27 of the Evidence Act, were all blood stained. To find blood stains on the clothes or on the weapon is not a normal circumstance. It is sufficiently incriminating

circumstance if no explanation is offered by the accused. It is true that the accused has right to keep silence but the Court cannot ignore such incriminating circumstance of finding blood stains on the weapons and also on the clothes.

23. All these circumstances support the evidence of the three eye witnesses. Thus, we are of the view that the prosecution has proved beyond reasonable doubt that the appellants / accused 1 to 4 have committed murder of Balu @ Vijay Gorakh Kokare on 25.8.2008 at 9pm and hence, the impugned judgment and order of conviction dated 18th April, 2012 passed by the Additional Sessions Judge, Pune is hereby confirmed.

24. Appeal is dismissed.

(MRIDULA BHATKAR, J.)

(S.S. SHINDE, J.)

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