

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

CRIMINAL APPEAL NO.776 OF 2011

**WITH
CRIMINAL APPLICATION NO.1292 OF 2017
IN
CRIMINAL APPEAL NO.776 OF 2011**

Anil Yallappa Putage
Age : 27 years, Occu : Plumber,
R/o Marketyard, Dias Plot, Gultekdi,
Pune.
(presently in Yerwada Central Jail)

.... Appellant
(Orig. Accused No.2)

versus

The State of Maharashtra
(At the instance of Lonikand Police Station,
vide C.R.No.68 of 2009)

... Respondent

**WITH
CRIMINAL APPEAL NO.775 OF 2011**

Bhimashankar Yallapa Putage
Age : 26 years, Occu : Plumber,
R/o Marketyard, Dias Plot, Gultekdi,
Pune.
(presently in Yerwada Central Jail)

.... Appellant
(Orig. Accused No.1)

versus

The State of Maharashtra
(At the instance of Lonikand Police Station,
vide C.R.No.68 of 2009)

... Respondent

.....

- Mr.P.R. Arjunwadkar with Mr.Sandesh Marathe for the Appellant in Criminal Appeal No.776/2011 (original accused No.2) and for the Appellant in Criminal Appeal No.775/2011 (original accused No.1) and for the Applicant in Criminal Application No.1292 of 2017.
- Mrs.M.H. Mhatre, APP for the Respondent/State in both appeals.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.**
DATE : 27th JULY, 2017

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

1. Both these Appeals are filed by the Original Accused Nos.1 and 2 in Sessions Case No.698/09 on the file of the Additional Sessions Judge, Pune. The Criminal Appeal No.775/11 is preferred by the Original Accused No.1 Bhimashankar Yallappa Putage and the Criminal Appeal No.776/11 is preferred by the Original Accused No.2 Anil Yallappa Putage.

2. The Appellants in these Appeals had faced the trial along with four other accused. At the conclusion of the trial, by the impugned Judgment and Order dated 25/05/2011 the learned Additional Sessions Judge, Pune, in Sessions Case No.698/09, convicted both the Appellants for commission of the offence

punishable u/s 302 r/w 34 of the Indian Penal Code and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.500/- each and in default of payment of fine to suffer further rigorous imprisonment for six months. Both of them were further convicted for the offence punishable u/s 452 r/w 34 of IPC and were sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.500/- each and in default of payment of fine, were sentenced to suffer rigorous imprisonment for six months. The sentences were directed to run concurrently and the Appellants were given benefit of set off u/s 428 of Cr.P.C.

3. The Appellants were acquitted from the charges of commission of offence punishable u/s 120-B, 143, 147, 148 of IPC and 37(1)(3) r/w 135 of Bombay Police Act. The other accused were acquitted from all the charges.

4. Since both these Appeals arise out of the same set of facts and since in both these Appeals, the same Judgment and Order are challenged, both these Appeals are decided by this common Judgment. For the sake of convenience, the Appellants

are hereinafter referred to as the accused as per their status in the Sessions Case.

5. The prosecution case in brief is as follows;

The deceased in this case, one Mukesh Suresh Khandale was having affair with the Appellants' sister Rupa. According to the prosecution case, the Appellants and their family members were opposed to this liason. Therefore Mukesh married one Kalpana and had three children from her. In spite of that, he continued his relationship with Rupa and got married with her. Mukesh and Rupa were residing at Lonikand with Mukesh's mother P.W.1 Ashabai Suresh Khandale. On the date of incident i.e. on 09/04/2009 Mukesh's niece Meghana was also present in their hut. On 09/04/2009 at around 11.00 p.m. in the night, Ashabai heard knocking on their door. From a hole in the door, she could see the accused Nos.1 and 2, their brothers and sister Surekha standing outside. They made forcible entry in the house. One Pramod and Surekha, sister of the accused threw chilly powder in Mukesh's eyes and thereafter accused Nos.1, 2, Ravi,

Dipak and Pramod assaulted Mukesh with sickles. Ashabai was assaulted by Surekha with a brick and stone and thereafter they went away in Tavera car. They took Rupa along with them. Thereafter Ashabai went to Lonikand police station. The police came to her hut and removed Mukesh to Sasoon hospital in their vehicle. Mukesh was declared dead. Ashabai's statement was recorded in Sasoon hospital and was treated as FIR. The FIR was lodged at 02.05 a.m. on 10/04/2009. The accused Nos.1 and 2 were arrested in the early hours on 10/04/2009. The investigation was carried out. Spot Panchanama was conducted. The clothes of the arrested accused were seized. According to the prosecution case, a sickle was recovered at the instance of the accused No.1 from his house and at that time few more blood stained clothes were found in his house. The recovered and seized articles were sent for chemical examination. The statements of various witnesses were recorded and at the conclusion of the investigation, charge-sheet was filed and the case was committed to the Court of Sessions, as it was the case exclusively triable by the Court of Sessions.

6. During trial, the prosecution examined 15 witnesses. Out of them, P.W.1 Ashabai Suresh Khandale, who is the first informant, P.W.2 Meghana Baba Khandale, a child witness and who was niece of the deceased and P.W.4 Dattatraya Nivrutti Sakat, who was a neighbour; are important witnesses. They have deposed about the incident as eyewitnesses. The other witnesses were Panchas for various Panchanamas and the police officers who had conducted the investigation. The prosecution also examined the driver and owner of the Tavera vehicle, which had purportedly carried the accused to the scene of offence.

7. P.W.11 Dr.Ajay Aniruddha Tawre had conducted the post-mortem examination and had found 38 injuries all over the body. Most of the injuries were on the head, hands and legs. There were incised wounds, stab wounds and abrasions. The cause of death was mentioned as “death due to head injury.”

8. P.W.12 Dr.Sunil Pralhad Zope was attached to Sasoon

Hospital and he had examined P.W.1 Ashabai on 25/04/2009 for the injuries suffered by her. It is her case that she had suffered injuries during the incident on 09/04/2009. The evidence of P.W.12 shows that Ashabai had suffered two injuries as follows:

- (1) Left lower first incisor grade 3 mobility.
- (2) Tender left lateral chest with painful respiration.

9. The Medical Officer opined that the age of the injuries was within 20 days and were caused due to hard object. The nature of injury was grievous. In the cross-examination, this witness has opined that if someone falls on a hard and blunt object, these two injuries were possible.

10. As mentioned earlier, the prosecution case heavily depends on the version of the eyewitnesses. P.W.1 Ashabai is the main witness for the prosecution. She deposed that she had two sons Baba and Mukesh. Baba had a son and a daughter. Mukesh had one son and two daughters. According to her, all of them were

residing together at Dias plot, Gultekdi. After a few days she alone started residing at Lonikand and the other members continued residing at Gultekdi. She has deposed that Mukesh was having love affair with one Rupa. She is the sister of the present accused Nos.1 and 2. According to this witness, she tried to settle the marriage between Rupa and Mukesh. But Rupa's family refused on the ground of difference in their caste. Thereafter Mukesh got married with one Kalpana. According to P.W.1, even after Mukesh got married, he continued his affair with Rupa. Rupa even got pregnant on two occasions. But on her sister Surekha's insistence took the step of abortion on both occasions. After that, Mukesh got married with Rupa at Alandi and started residing at Lonikand with this witness. According to her, Baba's daughter Meghana was also residing with them at Lonikand. On 09/04/2009, P.W.1, Rupa, Mukesh and P.W.1's two grandchildren were sleeping in the night after dinner. Around 11 to 12 p.m. there was knocking on the door. P.W.1 looked from the hole in the door and saw that the accused Nos.1 and 2, accused Avya, Ramya, Pramod, Dipak and Surekha along with Surekha's mother had come to assault them.

The accused Nos.1 and 2 broke open the tin of her hut and entered. They dragged Mukesh out of the hut. Accused Pramod and Surekha threw chilly powder in his eyes and all of them assaulted Mukesh on his head with sickles. P.W.1 has deposed that the accused Nos.1 and 2 gave many blows and in all they gave 38 blows. P.W.1 has further deposed that Surekha pushed her by catching her hair and assaulted her with a brick on her ribs and on her teeth. Thereafter all the accused took Rupa with them and went away in a Tavera vehicle. P.W.1 then went to the police station and informed about the incident. The police came to her residence. They took Mukesh to Sasoon Hospital. According to P.W.1 she was also treated in Sasoon Hospital and during that period police recorded her statement in Sasoon Hospital itself. The statement was treated as the FIR, which is produced on record at Ex.53. The FIR shows that the offence was registered vide C.R.No.68/19 at Lonikand Police Station at 02.05 a.m. During her cross-examination P.W.1 deposed that she had mentioned in the FIR that Surekha and Pramod threw Chilly powder in the eyes of Mukesh, but the said fact was not reflected in her FIR. She has also

claimed that she has mentioned that the accused Shivamma Putage, Pramod Loni and Dipak Wanjale had come on the spot, but the said fact was missing from her FIR. On behalf of the accused it was suggested to her that Mukesh was assaulted by unknown persons and the accused were not concerned with the offence. P.W.1 Ashabai denied that suggestion.

11. Prosecution has then examined P.W.2 Meghana Baba Khandale, who was the daughter of P.W.1's other son Baba. According to P.W.1, P.W.2 was residing with them and on the night of the incident had witnessed the incident. P.W.2 was a child witness and at the time of deposition in the Court she was studying in the second standard. She has deposed that when they were sleeping, the accused entered forcibly and threw chilly powder on Mukesh. After that Mukesh was assaulted with weapons. P.W.2 has deposed that she was not aware as to who was Rupa. P.W.2 thereafter pointed towards all the accused and stated that they were the assailants. She deposed that accused No.1 had thrown chilly powder. In her cross-examination P.W.2

specifically admitted that she was not knowing the accused previously and she was not knowing their names. She further admitted that when she was called at the police station, all the accused were shown to her. She further admitted that in the police station when the accused were shown to her, she did not recognize them. P.W.2 has further deposed that her father and grandmother showed the accused to her and told that they had killed her uncle Mukesh. She further categorically admitted that she was deposing in the Court as per say of her father.

12. P.W.4 Dattatraya Nivrutti Sakat was a neighbour residing near P.W.1's house at Lonikand. He has deposed that on 09/04/2009, around midnight he saw that Mukesh was caught by Mukesh's wife's brother. He has deposed that one of the accused rushed towards him and therefore he did not come forward. He has further deposed that the accused took Mukesh to one side. After some time his mother came shouting. This witness then brought water. The assailants had left. P.W.4 has further deposed that Mukesh's mother ran towards police station and he himself

followed her. Police came to the spot and took Mukesh in an Ambulance to the hospital. P.W.4 has further deposed that on the next day, police recorded his statement. He was also a Pancha in whose presence clothes of the deceased were seized. On 11/04/2009 again he was called for another Panchanama and at that time blood stained clothes of the accused No.1 were seized. He further deposed that on that day one girl produced her clothes before the police. The said Panchanama is at Ex.16. It appears that the said Panchanama is in respect of seizure of Rupa's Salwar. That means, this witness was not knowing Rupa. In his cross-examination his attention was invited to the fact that his claim that Mukesh was caught hold by his wife's brother, was not mentioned in his police statement. P.W.4 could not give any explanation as to why this fact was not mentioned in his statement recorded u/s 161 of Cr.P.C. He has deposed that Lonikand Police Station is at a distance of 5 minutes walk from his house. He has further admitted that when he came, he had seen only 3 persons. P.W.4 did not accompany Mukesh to the hospital and stayed at the spot. He has admitted that some police constables were at the spot

during that time and made enquiries with him about the incident. One PSI also came there and the police were making enquiries about the incident. According to him, he had informed the police about the incident, but the police did not take down his statement in writing. His statement was recorded only on the next day.

13. If the evidence of those eyewitnesses is considered, it is quite obvious that the evidence of P.W.2 is totally worthless. P.W.2 has categorically admitted that the accused were shown to her in the police station and she was deposing in the Court on the say of her father. Therefore the evidence of P.W.2 cannot be taken into consideration against any of the accused.

14. Insofar as P.W.4 is concerned, his evidence shows that he was not knowing Rupa. Thus, it is hard to believe that he could recognize one of the assailants as Rupa's brother, who had caught hold of Mukesh at the time of assault. This witness was present at the spot, but police did not record his statement immediately. His statement was recorded only on the next day. He has acted as a Pancha for two of the Panchanamas. P.W.1 has not deposed about

this witness's presence at all. Therefore P.W.4's claim that he had given water to Mukesh is not corroborated. Further more, since P.W.1 has not spoken about his presence, it is extremely doubtful whether he had witnessed the incident and if he was present at the spot at all. Therefore, even the evidence of P.W.4 does not help the prosecution.

15. Thus, the only piece of evidence in the form of direct evidence is the deposition of P.W.1 Ashabai. Even in her evidence there are intrinsic infirmities. She has not offered any explanation as to why she was residing alone at Lonikand and rest of her family members were residing at Gultekdi. It is not her case that she had bad relations with the other family members. She has deposed that during the assault on Mukesh, even she was assaulted by Rupa's sister Surekha on her teeth and ribs. She has deposed that she was given treatment in Sasoon Hospital. However there is no evidence whatsoever to show that P.W.1 was given any treatment in Sasoon Hospital in the night between 09th and 10th of April 2009.

16. The prosecution has examined P.W.12 Dr.Sunil Pralhad Zope attached to Sasoon Hospital to prove the injuries suffered by P.W.1. P.W.12 has deposed that he had examined P.W.1 Ashabai pursuant to the letter issued by the Lonikand Police Station. Ashabai was examined on 25/04/2009 i.e. after more than 15 days of the incident and P.W.12 had found two injuries. The first injury was showing Grade 3 mobility of the lower first incisor and tenderness of left lateral chest with painful respiration. He had mentioned that age of the injury was within 20 days. P.W.1 had given history of assault to him as the assault with sharp weapon. The history was recorded in the MLC Papers. P.W.12 has further opined that these injuries were not possible by sharp weapon and if someone falls on the hard and blunt object, both the injuries were possible. The prosecution has not offered any explanation as to why P.W.1 was not immediately treated after the incident. There is no explanation for the delay of more than 15 days in examining her. Her case before the Medical Officer that she was assaulted with a sharp weapon is falsified by the Medical

Officer himself. All these infirmities throw doubt about her claim that she had witnessed the incident and had suffered injuries during the assault itself. Subsequently she has clearly deposed that police had recorded her statement in Sasoon hospital. Her statement is in contradiction with the evidence of PSI Dipak Bajirao Gondhali, who was examined as P.W.15. This witness had recorded the complaint of P.W.1. P.W.15 has categorically deposed that he recorded the complaint of P.W.1 in one room of Bund Garden police station. Thus, it is extremely hazardous to rely on the evidence of this witness P.W.1 Ashabai. Therefore we find that the direct evidence produced by the prosecution during trial in the form of evidence of P.W.1 and P.W.4 is not reliable at all.

17. Apart from the direct evidence, the prosecution has tried to bring on record circumstantial evidence against the accused. One of the circumstances, the prosecution has relied on is in respect of hiring of the vehicle in which the accused No.1 had gone to the house of Mukesh at Lonikand. For the said purpose, the prosecution has examined P.W.7 Krishna Parmeshwar

Sonkamble and P.W.6 Sumant Dattu Jagtap. P.W.7 Krishna Sonkamble was in the business of supplying vehicles for tourists. He has deposed that on 09/04/2009 at about 09.00 p.m. to 09.30 p.m. he received the phone call from one Putage, who wanted to go to Nigadi from Dias Plot. The said person informed P.W.7 that he wanted a vehicle to carry 5-6 persons. P.W.7 fixed the fare at Rs.1,000/- and called P.W.6 Sumant Jagtap to go to a place near the canal in Dias plot. After that P.W.7 received the call from P.W.6 at around 12.30 a.m. in the night that he had left the passengers and he was going back to his house. On the next day, he was informed by the police that there was a murder in Lonikand and his vehicle was involved in it. P.W.7 resiled from his statement before the police and therefore was declared hostile and was cross-examined by the prosecution. According to the prosecution case, he had stated before the police that accused Surekha who was known to this witness, had made a phone call and had booked a vehicle. However, this witness had denied this suggestion.

18. The prosecution has also examined P.W.10 Mahadeo Kashinath Avhad, in whose presence Tavera vehicle was seized. However, this circumstance is innocuous because nothing incriminating was found in the said vehicle. P.W.6 Sumant Jagtap was the owner of the Tavera vehicle. According to the prosecution case, all the accused travelled to Nigadi in this vehicle. He has deposed that at about 09.30 p.m. he reached near canal in Dias plot and 4-5 young boys travelled in his vehicle to Nigadi and then he came back at around midnight. On the next day police seized his vehicle. P.W.6 also did not support the prosecution case and was declared hostile. He has not identified the accused in the Court. In this connection, the prosecution examined P.W.8 Jagdish Harishchandra Nimbalkar, who had conducted the Test Identification Parade on 29/04/2009. According to the prosecution case, in this parade, P.W.6 identified the accused Nos.1, 2 and other accused. However, since P.W.6 has not supported the prosecution case in Court, this evidence of Test Identification Parade loses its significance and this circumstance does not help the prosecution in any manner.

19. According to the prosecution case, the accused Nos.1 and 2 and the accused Surekha were arrested at 05.45 a.m. on 10/04/2009. According to P.W.4 Dattatray Sakat the clothes of the accused No.1 which were on his person when he was arrested, were seized on 11/04/2009 at 11.15 a.m. According to the prosecution case those clothes showed the presence of blood of 'B' group. However, the prosecution has not explained as to why the clothes on the person of the accused No.1 were seized on the next day and therefore this seizure does not inspire confidence in the prosecution case. Similarly, the prosecution has not explained as to how though accused No.2 was arrested along with accused No.1, his clothes were not immediately seized. Therefore, even the seizure of clothes, which according to the prosecution were stained with the blood of the same group of the deceased, is not proved by the prosecution beyond reasonable doubt. Apart from this circumstance, the spot panchanama was conducted and a sickle was recovered from the spot. However that sickle could not be connected with the accused Nos.1 and 2.

20. The prosecution has examined P.W.5 Mahadeo Ganeshkar, who was a Panch witness in whose presence the accused No.1 allegedly made a statement leading to recovery of a sickle, two shirts, one pant and one blouse from his house. According to the prosecution case those shirts were belonging to the accused No.2 and accused Ravi Putage. The pant was belonging to Ravi and blouse was that of their mother Shivamma. The memorandum statement of the accused No.1, which is produced on record at Ex.82 shows that he had showed willingness to point out the place where he had kept the sickle. After recording the statement, the accused No.1 led police and the Panchas to his house and from a cupboard a sickle was taken out which was seized. The clothes were found near a rack in the same room. Therefore these clothes were not recovered pursuant to any statement given by the accused and though those clothes were belonging to the other accused, there is no evidence to show that those clothes were recovered at the instance of the accused or they were actually the clothes, which the accused had worn at the time

of commission of offence. The C.A. report shows that only one sickle was sent for chemical analysis and it was found on that spot. Therefore this recovery of sickle at the instance of the accused No.1 also cannot be used to connect the accused No.1 or any other accused with the present offence.

21. Apart from this circumstance, the prosecution has not produced any other evidence on record. As discussed above neither the direct evidence nor the circumstantial evidence is proved by the prosecution beyond reasonable doubt against the accused No.1 or accused No.2. With the result the Appeals succeed. Hence, the following order :

ORDER

- 1] Both the Appeals are allowed.
- 2] The judgment and order of conviction and sentence dated 25th May 2011 in Sessions Case No.698 of 2009 passed by the learned Trial Judge is quashed and set aside.

- 3] Appellants are acquitted of the charges charged with.
- 4] Appellants are directed to be set at liberty forthwith, if not required in any other case.
- 5] Since the Appeals are allowed and disposed off, no orders are necessary in Criminal Application taken out therein and the same is also disposed off.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)