

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

CRIMINAL APPEAL NO.754 OF 2010

Mahendra Loknath Waghmare
Age – 41 years, Occupation-Painting,
R/at-Porwal Park, Shantinagar,
Yerwada, Pune
At present R/at – Yerwada Central Prison,
Pune.

... Appellant/
Orig. Accused

versus

The State of Maharashtra
(At the instance of
Vishrantwadi Police Station, Pune) ... Respondent

.....

- Mr.Daulat G. Khamkar, Advocate for the Appellant.
- Mr.Arfa Sait, APP for the State/Respondent.

**CORAM : MRS.MRIDULA BHATKAR &
SARANG V. KOTWAL, JJ.**

DATED : 20th JANUARY, 2018

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

1. The Appellant has preferred this Appeal challenging the Judgment and Order dated 31/08/2010 passed by the Additional Sessions Judge, Pune, in Sessions Case No.748/08.

By the impugned judgment the Appellant was convicted for the

offence punishable u/s 302 of IPC and was sentenced to suffer imprisonment for life and to pay a fine of Rs.2,000/- and in default of payment of fine to suffer rigorous imprisonment for six months. The Appellant was further convicted for the offence punishable u/s 324 of the Indian Penal Code and no separate sentence was passed in view of the sentence passed for the offence punishable u/s 302 of IPC. The Appellant was acquitted from the charges u/s 504 of IPC. The Appellant was granted set off u/s 428 of Cr.P.C. for the period he was in jail since his arrest.

2. We have heard learned counsel Mr.Daulat Khamkar, Advocate for the Appellant and Mr.Arfa Sait, APP for the State.
3. The prosecution case is in respect of the murder of one Yogesh Rahul Kamble. According to the prosecution case, the said Yogesh Kamble was murdered by the present Appellant on 04/07/2008 at about 09.30 p.m. at Shantinagar, Yerawada, Pune. It is alleged that the Appellant assaulted the deceased with knife on a trivial ground that the deceased had criticized

that the Appellant was not paying his contribution for the picnic. It is the prosecution case, that, the first informant Surendra Gajendra Lokhande intervened when the Appellant was assaulting the deceased and in the process, the first informant also suffered incised wounds. Yogesh Kamble was removed to Sethiya Hospital, Mohanwadi and then to Sassoon Hospital, where he was declared dead. The first informant was treated in the hospital by Dr.Ganesh Ashok Mane and thereafter he lodged his FIR with Vishrantwadi Police Station, Pune, vide C.R.No.223/08 at 01.00 a.m. on 05/07/2008. The Appellant was arrested on 05/07/2008 at about 01.00 p.m. His blood stained clothes were seized at the time of his arrest. It is the case of the prosecution that, at the instance of the Appellant, the murder weapon i.e. a knife was recovered on 08/07/2008 from the bushes near bank of a river.

4. After registration of the FIR, the investigation was carried out. Different panchanamas were conducted. The statements of witnesses were recorded. The seized articles

including the clothes of the deceased, the first informant and the Appellant as well as the murder weapons were sent for chemical analysis. After completion of investigation, the charge-sheet was filed and the case was committed to the Court of Sessions at Pune. The charges were framed on 06/03/2009 u/s 302, 324 and 504 of the IPC, to which the Appellant pleaded “not guilty”.

5. During the trial, the prosecution examined 10 witnesses. P.W.1 Surendra Gajendra Lokhande, was the injured eyewitness and the first informant. P.W.5 Ganesh Bhaguji Ubale, the Uncle of the deceased, claimed to be an eyewitness. P.W.2 Dr.Milind Sharad Vable had conducted the post-mortem examination and gave evidence about the injuries suffered by the deceased. P.W.3 Dr.Ganesh Ashok Mane had treated P.W.1 and produced his injury certificate. P.W.4 Rahul Vishwanath Waghmare was examined as a Pancha, in whose presence spot panchanama was conducted. P.W.6 Krishna Ramchandra Landge was the Pancha, in whose presence the Appellant made a statement about his willingness to produce the murder weapon

and in whose presence the said weapon was recovered. P.W.7 PI Anil Piraji Ghuge had conducted the investigation from 06/07/2008. He had arrested the accused, had seized the knife, had sent the articles to CA and had ultimately filed the charge-sheet. P.W.8 PSI Bapurao Vishwanath Mohite had taken down the first information report given by P.W.1 and had registered the C.R.No.223/08 at Vishrantwadi Police Station. He had seized the clothes of the first informant. P.W.9 PI Dilip Laxman Mane was the first Investigating Officer, who had conducted the initial investigation. He had collected the blood stained soil from the spot and he had conducted the spot panchanama. He had seized the Appellant's clothes. P.W.10 Harischand Paladu Nanak was the panch in whose presence clothes of the accused were seized.

6. The Appellant did not examine any witness on his behalf. In his statement u/s 313 of Cr.P.C., he had taken a defence that a false case was filed against him and from the tenor of his answers and the cross-examination, his defence appears to be of total denial. After recording and considering the

evidence and the statement of the Appellant u/s 313 of Cr.P.C. and after hearing the arguments of both the sides, the learned trial Judge was pleased to convict and sentence the Appellant as mentioned above.

7. The prosecution mainly rests on the evidence of P.W.1 Surendra Lokhande and P.W.5 Ganesh Ubale, both of them were examined as the eyewitnesses to the incident. According to P.W.1 Surendra Lokhande, he was knowing the deceased as well as the accused and all of them were residing in the same area. The deceased and this witness were doing labour work and the Appellant was doing the work of painting. On 04/07/2008 in the evening P.W.5 Ganesh Ubale came to him and asked this witness to accompany him to the hospital of Dr.Ganesh Mane as the said Uable had suffered the leg injury. After his treatment, they returned home. It is deposed by the P.W.1 that, after some time at about 09.00 p.m. he left his house for consuming liquor and on the way in front of Ganpati temple, he saw that the Appellant was assaulting Yogesh Kamble with some sharp

weapon. He further deposed that when he intervened, the Appellant assaulted him as well and gave abuses. P.W.1 suffered bleeding injuries on his left hand. He had seen that Yogesh had sustained bleeding injury on his stomach. According to him, he got scared and ran away from the spot. He further deposed that on the way he met P.W.5 Ganesh Ubale and one Arvind Gaikwad, who took him to Dr.Mane's Hospital. He came to know that Yogesh succumbed to his injuries and therefore after returning from the hospital, he lodged his FIR with the police. He showed the spot of incident. His clothes were seized by the police as they were blood stained.

8. According to this witness, the deceased had criticized the Appellant for not paying his contribution for the trip and called him a person, who splurged others' money. This, according to the first informant, angered the Appellant and therefore he had assaulted the deceased. In his cross-examination he had admitted that the area near the spot of panchanama was crowded. He denied the suggestion that he

was standing with the Appellant in front of Somnath Laundry and he denied the suggestion that he had left his house alongwith the deceased for consuming liquor. He denied that some unknown persons had caused injuries to Yogesh and that he had lodged the FIR after consultation with others and had implicated the Appellant falsely.

9. The learned counsel Mr.Khamkar, for the Appellant submitted that the evidence of two eyewitnesses is inconsistent with each other and both should be disbelieved. He further submitted that the recovery of the knife was effected from an open space which was accessible to all and therefore that cannot be an incriminating circumstance. He submitted that the clothes of the accused were not sealed properly and therefore even that circumstance should not be held against the Appellant. He further submitted that the prosecution has not brought out the motive behind the offence. The P.W.1 has not given reliable evidence as to the genesis of the incident and from the evidence of P.W.5 Ganesh Ubale, it is apparent that, the motive was so

insignificant that the incident could not have taken place. In the alternative, he submitted that there was no intention to commit murder of the deceased on the part of the Appellant. There was no premeditation and the incident had occurred on the spur of moment and therefore the offence would not fall under the definition of murder.

10. As against this, the learned APP Mr.Arfan Sait, submitted that the inconsistency between the eyewitnesses does not go to the root of the matter and in any case P.W.1, being the injured eyewitness, should be believed. He further submitted that there are no infirmities in the evidence of the prosecution witnesses and the evidence of the eyewitnesses is fully corroborated by other circumstances of recovery of knife, seizure of Appellant's clothes and the CA reports.

11. The prosecution also examined P.W.5 Ganesh Ubale as another eyewitness to the incident. According to this witness, the deceased was his nephew. On 04/07/2008, he had gone to Dr.Mane's hospital for treatment at about 06.00 p.m. with P.W.1

Surendra Lokhande and from the hospital he along with P.W.1, deceased Yogesh and two others came to Somanth laundry and stopped there. He has further deposed that even the Appellant was with them and they were discussing and planning their trip. It is his case that the deceased told the Appellant that he should not come for the trip as he never used to pay. After that there was heated exchange of words. The Appellant got annoyed and went towards his house. P.W.1 and deceased followed him. He has further deposed that, at that time, the Appellant assaulted Yogesh with a knife. When P.W.1 tried to intervene, the Appellant had assaulted him on his hand by means of knife. According to this witness at that time he was at the laundry and the P.W.1 came to him and narrated that the Appellant was beating Yogesh and had assaulted P.W.1 as well. Thereafter immediately this witness had rushed to the spot and found Yogesh lying on the ground. P.W.5 observed that Yogesh was lying on the spot and was having injuries on his stomach and face and blood was still oozing from his nose. Thereafter Yogesh was removed at first to Dr.Mane's hospital, then to Sethiya

Hospital at Mohanwadi and then to Sasoon Hospital, where he was declared dead. In his cross-examination he admitted that, at the laundry itself, he, P.W.1, the deceased Yogesh and two others consumed liquor. He denied the suggestion that he had implicated the Appellant at the instance of P.W.1. He admitted that prior to the incident there was no quarrel between the Appellant and the deceased.

12. Thus, considering the evidence of these two eyewitnesses, there is apparent inconsistency in their depositions. According to P.W.1, he alone started from his house for consuming liquor and on the way he saw that the Appellant was assaulting the deceased with a sharp weapon. When he intervened, he was also assaulted by the Appellant. At that time, the deceased Yogesh had suffered injury on his stomach and thereafter this witness ran away from the spot and then met P.W.5 Ganesh Ubale and Arvind Gaikwad, who took him to the hospital. As against this, P.W.5 has deposed that all of them including P.W.1, deceased Yogesh and the Appellant were sitting

together and the quarrel had started between the Appellant and the deceased and thereafter the Appellant went towards his house and the P.W.1 and the deceased Yogesh followed him and thereafter the incidence of assault took place. P.W.5 Ganesh Ubale claims that at that time he was at the laundry. Thus, he says that P.W.1 came to him by holding his wound and then P.W.1 told him that the Appellant was beating Yogesh and had assaulted P.W.1 and then P.W.5 rushed to the spot. The spot panchanama shows that spot of incident is barely 3 ft away from the laundry where P.W.5 was sitting. If P.W.5 was present at the laundry he could have definitely seen the entire incidence and as a natural conduct he would have rushed to the spot where the incident was going on. However, P.W.5 does not appear to have rushed to the spot for intervention. On the contrary, according to him the P.W.1 came to him and narrated that the deceased was being assaulted by the Appellant. Thus, reading deposition of P.W.5 entirely, we are satisfied that he has not seen the incident. His conduct is not natural and he does not appear to be a truthful witness.

13. Though, we have discarded the evidence of P.W.5 as being unreliable, we do not find such infirmity in the evidence of P.W.1 Surendra Lokhande, the first informant. We find that he has given sufficiently reliable evidence and has not exaggerated his narrations. According to this witness, when he was passing by, on the road, he saw that the Appellant was already assaulting the deceased and the deceased had suffered injuries on his stomach. This witness then intervened in the quarrel, which is a natural conduct of a friend of the person who was being assaulted. He himself had suffered incised wound on his hand and his injuries are proved through the evidence of P.W.3 Dr.Ganesh Mane. The evidence shows that the medical certificate in respect of the injuries of the P.W.1 is produced at Ex.24 and the evidence in that behalf is given by said P.W.3 Dr.Ganesh Mane. P.W.1 had suffered incised wound having dimension of 4 x 0.5 x 0.3 cms. on his left forearm. The injury suffered by P.W.1 corroborates his presence at the time of incident.

14. The learned counsel Mr.Khamkar submitted that P.W.1 has suppressed the genesis of the incident. After his evidence is read carefully it is seen that this witness had come on the scene when the incident had already started and immediately on receiving injury himself he ran away from the spot. Therefore there was no question as to why he should depose about the genesis of the incident. Though in his evidence he says that the cause of quarrel between the Appellant and the deceased was because of non-payment of the contribution by the Appellant and the deceased having criticized him on that count. At least when the incident took place, P.W.1 could not have seen as to why the assault had started. Since, the narration of the actual incident given by this witness is truthful and he has not exaggerated and he had not improved on his earlier statement given to the Police, we are satisfied that his evidence is quite reliable. There is nothing in his cross-examination which would discredit him or his deposition. He had properly shown the spot of incident and the blood was found on the spot.

15. It can also be seen that after taking treatment for his injuries, the first informant P.W.1 had immediately lodged his FIR at 01.00 a.m. with the police station and there is no scope for deliberation resulting in false implication of the present Appellant.

16. The evidence of the P.W.1 is corroborated by other circumstance brought on record by the prosecution. The clothes of the Appellant were seized on 05/07/2008 under the panchanama Ex.28. Though, Mr.Khamkar had argued that clothes were not properly sealed, the seizure panchanama, the evidence of P.W.9 PI Dilip Mane and the evidence of P.W.10 Harischand Nanak, the Pancha for the said seizure shows that those clothes were sealed and labels bearing signatures of the Panchas were affixed on them. Those clothes were sent for analysis and were found to have blood stains of 'B' group, which was the same group of blood which was found on the clothes of the deceased. Therefore, this is another strong circumstance

against the Appellant. The prosecution has brought on record that at the instance of the Appellant, a knife was seized under a tree near Sathe Biscuit Company. The knife was recovered from the bushes nearby. It was wrapped in a napkin and then was concealed there. Since it was concealed from the public, the authorship of concealment and recovery pursuant to his statement u/s 27 of the Evidence Act and is properly proved by the prosecution. Even chemical analysis of this knife showed that it had blood stains of 'B' group. Thus, even the recovery of murder weapon is proved against the Appellant, as it was recovered at his instance. Though it appears to be a crowded locality the prosecution has not examined any independent witness. However, since the evidence of the injured eyewitness is found to be truthful, this factor cannot be held against the prosecution.

17. This leaves us with the next submission of Mr.Khamkar in respect of the offence being a lesser offence, than the offence of murder. In that regard, it is necessary to refer to the medical evidence led by the prosecution in the form of P.W.2 Dr.Milind

Vable, who had conducted post-mortem examination on the dead body. P.W.2 had found 11 injuries, out of which three were abrasions. The remaining 8 injuries were stab wounds, incised wounds, caused by a sharp weapon. Injury No.5 was horizontal stab on the right side of chest measuring 4 x 1.5 cm opening in thoracic cavity. The corresponding internal injury showed that the right lung was pale and had collapsed.

18. The injury Nos.6 and 7 were on the stomach and abdomen. Injury No.6 was measuring 2 x 1 cm opening in abdominal cavity and injury No.7 was 3.5 x 2 cms with coils of intestine protruding through opening in abdomen. Injury No.6 showed the right lobe of liver was cut. The other injuries were on the hand showing that they could be defence injuries. One injury i.e. the injury No.1 was on the right side of the cheek. In the opinion of Doctor, the injury Nos.5, 6, and 7 along with the corresponding internal injuries were sufficient to cause death in ordinary course of nature, individually, collectively and associated with other injuries.

19. Thus, it can be seen that the Appellant had assaulted the deceased with such intention to cause death and the nature of injuries are such that the death was certain. Looking at the nature of the injuries, the offence falls under the definition of murder as provided u/s 300 of the Indian Penal Code and there is no scope to hold that it is a lesser offence. When P.W.1 had gone to save the deceased, even he was assaulted showing the intention of the Appellant to commit Yogesh's murder. Though the prosecution has not clearly brought out the genesis of the incident, through the evidence of P.W.1 his narration coupled with the medical evidence shows that it is a clearly falling within the definition of murder as provided u/s 300 of IPC. Therefore we are unable to accept the submission of Mr.Khamkar that is lesser offence.

20. As a result of the foregoing discussion, the Appeal must fail and is accordingly dismissed.

(SARANG V. KOTWAL, J.)

(MRS.MRIDULA BHATKAR, J.)