

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1389 OF 2011

Anwar Abdul Aziz Pathan.	]	
Age - 20 years, Occ. - Service,	]	
R/A - D. H. Patil, Kanruni, Chinchpada,	]	
Ambernath.	]	
Presently lodged at Kolhapur Central Prison.	]	... Appellant /
		Orig.Accd.No.14
Versus		
The State of Maharashtra.	]	... Respondent

ALONG WITH
CRIMINAL APPEAL NO.1390 OF 2011
WITH
CRIMINAL APPLICATION NO.474 OF 2017

Inden @ Mohiddin Sayyed Ali Shaikh.	]	
Age - 39 years, Occ. - Service,	]	
R/A - Deepak Nagar, Chinchpada, Ambernath.	]	
Presently lodged at Kolhapur Central Prison.	]	... Appellant /
		Orig.Accd.No.12
Versus		
The State of Maharashtra.	]	... Respondent

ALONG WITH
CRIMINAL APPEAL NO.248 OF 2012
WITH
CRIMINAL APPLICATION NO.1697 OF 2017

1. Algu Muttu Shankar Pandiyan	]	
@ Mohd. Ayyub.	]	
Age - 31 years, Occ. - Service,	]	
R/A - Woolan Watchman Chawl, Room	]	
No.4, Sardar Patel Road, Ambernath (West)	]	... Appellant /
		Orig.Accd.No.2

2. Rahimtullah @ Pappa Sayyed Ali Shaikh.]
 Age - 46 years, Occ. - Service,]
 R/A - Opp. Jatale Hospital, Woolen Chawl,]
 Ambernath (West); Also at Behram]
 Zopadpatti, Jogeshwari, Mumbai.] ... Appellant /
 Orig.Accd.No.11
3. Firoz Abdul Aziz Pathan.]
 Age - 22 years, Occ. - Service,]
 R/A - D. H. Patil, Kanruni, Chinchpada,]
 Ambernath.]
 Presently lodged at Kolhapur Central Prison.] ... Appellant /
 Orig.Accd.No.13

Versus

The State of Maharashtra.] ... Respondent

Mr. N. N. Gawankar i/b Ms. Sharon Patole for Appellants / Applicants.
 Ms. P. P. Shinde, APP for Respondent - State.

CORAM :- A. S. OKA &
SARANG V. KOTWAL, JJ.
DATE :- 10 MAY, 2018

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

1. All these Appeals arise of the same Sessions Case No.46 of 2003 before the Additional Sessions Judge-3, Kalyan. In all these Appeals, the respective Appellants have challenged the same Judgment and Order dated 16/08/2011 passed by the learned Additional Sessions Judge-3, Kalyan in Sessions Case No.46 of 2003. Therefore, all these Appeals are disposed of by this common Judgment.

2. Criminal Appeal No.1389 of 2011 is preferred by the original accused no.14 Anwar Abdul Aziz Pathan. Criminal Appeal No.1390 of 2011 is preferred by the original accused no.12 Inden @ Mohiddin Sayyed Ali Shaikh and Criminal Appeal No.248 of 2012 is preferred by the original accused no.2 Algu Muttu Shankar Pandiyan @ Mohd. Ayyub, original accused no.11 Rahimtullah @ Pappa Sayyed Ali Shaikh and original accused no.13 Firoz Abdul Aziz Pathan. During pendency of the Appeals, the Appellant / original accused no.2 Algu Muttu Shankar Pandiyan @ Mohd. Ayyub expired on 15/08/2013 as per the report received from Kolhapur prison. Therefore, the Appeal on his behalf has abated. For the sake of convenience, all the Appellants are referred to as the accused at the serial numbers mentioned in the impugned Judgment and Order.

3. In all, there were 14 accused. The trial of accused no.4 Manoj Lalan Choubey was separated and except the Appellants, the rest of the accused were acquitted. The Appellants were convicted for commission of the offence punishable under Section 302 read with Section 34 of the IPC and were sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- each and in default of payment of

fine, to suffer R.I. for three years. The Appellants were convicted for commission of offence punishable under Section 452 read with Section 34 of the IPC and were sentenced to suffer R.I. for five years and to pay a fine of Rs.2,000/- each and in default of payment of fine, to suffer R.I. for one year. The Appellants were convicted for commission of offence under Section 504 read with Section 34 of the IPC and were sentenced to suffer R.I. for one year and to pay a fine of Rs.1,000/- each and in default of payment of fine, to suffer R.I. for three months. The Appellants were also convicted for commission of offence punishable under Section 506 read with Section 34 of the IPC and were sentenced to suffer R.I. for one year and to pay a fine of Rs.1,000/- each and in default of payment of fine, to suffer R.I. for three months. The substantive sentences were directed to run concurrently. While convicting the Appellants, the learned trial Judge acquitted the Appellants from the offences punishable under Sections 120B, 147, 148, 452, 504, 506 and 302 read with 149 of the IPC, under Sections 25(1)(a) and 27 of the Arms Act and under Section 201 read with Section 34 of the IPC.

4. The prosecution case, in brief, is as follows :

Deceased Naresh Ananda Gaikwad was the President of Republican Party of India ('RPI') for District Thane (Rural) and was a Councilor of Ambernath Municipal Council. On 08/11/2002 at about 5.45 p.m. when he was present in his office, the accused nos.2 and 11 to 14 entered with weapons. The accused nos.11 and 12 were carrying revolvers and the others were carrying choppers and they assaulted the deceased. The accused nos.11 and 12 fired bullets at the deceased and the others assaulted him with choppers. The incident was witnessed by Prashant Channe and Devidas Asadi who were present in the offence, as also by Naresh's driver Anant Gaikwad. The accused, after threatening the witnesses, went away in a rickshaw. Naresh Gaikwad was initially removed to the hospital of Dr. Singh and on his advice, was removed to the Central Hospital, Ulhasnagar. However, Naresh was declared dead before admission at the Central Hospital, Ulhasnagar. Thereafter, Prashant Channe lodged his FIR naming the accused as the assailants. The investigation was conducted. The police visited the spot and conducted the spot panchanama. Statements of various witnesses were recorded. Post-mortem was conducted on the dead body of the deceased. One pistol and a knife were recovered from the spot. The

accused were subsequently arrested at different times and after completion of the investigation, charge-sheet was filed. The case was committed to the Court of Sessions for trial. The accused pleaded not guilty to the charges framed against them and claimed to be tried.

5. During trial, the prosecution examined 30 witnesses. However, it is not necessary to refer to the evidence of all these 30 witnesses. It is sufficient for the purpose of this Appeal to consider the evidence of the important eye witnesses who had deposed against the present Appellants. As mentioned earlier, except the present Appellants, all the other accused were acquitted and the charge of conspiracy was not proved. The learned trial Judge has also relied on the evidence of the eye witnesses to convict the Appellants.

6. As mentioned earlier, the prosecution case against the present Appellants is based on the evidence of the eye witnesses. PW 1 Prashant Anant Channe was the nephew of the deceased. He had witnessed the incident and had lodged the FIR. PW 2 Devidas Narsappa Asadi was another eye witness who was present in the office when the incident had taken place. PW 3 Anant Shivram Gaikwad

was the driver of the deceased Naresh Gaikwad and he had seen the incident from the window. This witness was outside the office cleaning the vehicle of the deceased. PW 4 Namvar @ Munna Dayashankar Pathak had seen the Appellants coming out of the office of the deceased with weapons and going away in a rickshaw bearing no.MH-05-S-7723. PW 5 Hemraj Paragji Someshwar was a shop owner who had heard the Appellants talking with each other that they would eliminate the deceased. He had heard their conversation at about 5.30 p.m. on 08/11/2002. He has also deposed that the accused no.12 used to tell him that he would kill Naresh Gaikwad as he had demolished his shop. These are the important witnesses on whose evidence the prosecution has relied heavily to prove their case against the Appellants.

7. The prosecution case has unfolded through the evidence of PW 1 Prashant Channe. The deceased Naresh Gaikwad was his maternal uncle. PW 1 has deposed that the deceased Naresh was President of Republican Party of India for District Thane (Rural) and was a Councilor of Ambernath Municipal Council. Naresh's wife Sudha was also a Municipal Councilor from another ward. PW 1 was

himself was an office bearer of the RPI at Ambernath. Deceased Naresh had his office at Navre Park Road at Chinchpada. PW 1 was knowing all the accused present before the Court. He has further deposed that the accused no.12 Inden was earlier working with the deceased as a party member but about two to three years prior to the incident, he had joined another political party. According to him, the accused no.12 and the deceased were not on good terms. The accused no.11 was the brother and the accused no.13 was the nephew of the accused no.12. PW 1 was an eye witness to the incident and he has deposed that on 08/11/2002, he had gone to the office of the deceased at about 5.30 p.m. PW 2 Devidas Asadi was also present in the office. PW 1 was sitting on a chair and the deceased was sitting on the revolving chair facing the window. PW 2 was standing on the left side of the deceased. At that time around 6.15 p.m., the door of the office was suddenly opened from outside and the accused nos.2 and 11 to 14 and one Kallu entered the cabin of the deceased. PW 1 had deposed that the accused nos.11 and 12 were holding revolvers and the accused nos.2, 13, 14 and Kallu were holding choppers. The accused nos.11 and 12 fired shots at Naresh. This witness claims to have heard 4 to 5 shots. The other accused assaulted the deceased

with choppers on his head, neck and stomach. The accused no.2 threatened the PW 1. Before leaving, the accused no.12 put his revolver on the left occipital region of the deceased and fired one shot and thereafter they all went out of the cabin and office. PW 1 has further deposed that he and Devidas Asade came out of the office and on their inquiry, the driver Gaikwad told them that the assailants had gone away in an autorickshaw towards the side of Dargah. This witness, along with others, put Naresh in an autorickshaw and took him to the hospital of Dr. Singh who, in turn, advised them to take Naresh to the Central Hospital at Ulhasnagar. By that time, Naresh's wife Sudha and their two children had reached there. PW 1 then took the deceased in a Qualis car to the Central Hospital at Ulhasnagar where he was declared dead before admission. PW 1 then went to Ambernath Police Station and lodged his FIR. The FIR is on record at Exh.180. At the time of lodging of the FIR, PW 1 had not mentioned name of Kallu. In his cross-examination, some minor omissions were brought on record. One of the omissions was in respect of the actual number of shots which he had heard. The FIR did not mention that while going, the accused no.12 had fired the last shot by putting his revolver on the left occipital region of the deceased.

8. PW 2 Devidas Asadi was another eye witness. He was serving in the office of the deceased since about 12 years before the incident. He was present in the cabin of the deceased on 08/11/2002 at about 6.15 p.m. when the accused nos.2 and 11 to 14 and one Kallu entered the cabin. The accused nos.11 and 12 were holding revolvers and the others were holding choppers. This witness has narrated the incident in the same manner as narrated by the PW 1. PW 2 stayed back in the office when Naresh was taken to the hospital of Dr. Singh by the PW 1. At that time, Naresh's wife Sudha and children came there. Anand Gaikwad, the driver, then took them to the Central Hospital at Ulhasnagar. At about 7.30 p.m., the police came to the office and recorded statement of this witness. In the cross-examination, some omissions were brought on record in respect of the timing of arrival of PW 1 in the cabin and in respect of the omission to mention Kallu's name in his statement before the police. He was cross-examined on the exact abuses hurled by the accused nos.11 and 12.

9. PW 3 Anand Gaikwad was the driver of the deceased. He was cleaning the vehicle when the incident occurred. He was outside the office but he had seen the incident from the window of the cabin.

At 6.15 p.m. he had seen that the afore-mentioned accused came to the office in a rickshaw and went inside holding their weapons. He heard firing of two to three shots. Then he went towards the window and saw from the window that the accused nos.11 and 12 were holding revolvers and others were assaulting the deceased with choppers. The assailants came out of the office, threatened him and boarded a rickshaw bearing no.MH-05-7723. Thereafter PW 1 took the deceased in a rickshaw to a nearby hospital and then this witness had taken deceased's wife and children to the Central Hospital at Ulhasnagar. According to him, the accused no.12 had constructed two shops which were demolished by the municipality and therefore, he was holding grudge against the deceased. He was cross-examined mainly on the point that it was not possible to see inside the cabin of the deceased. His evidence was also criticized on the ground that he did not carry his master in the car and the deceased had to be removed in a rickshaw.

10. PW 4 Namvar @ Munna Dayashankar Pathak was playing cricket on an open ground near the office of the deceased. On hearing the shots of fire, he rushed towards the office of the deceased and saw

the accused nos.1 and 11 to 14 coming out of the office and boarding a rickshaw bearing no.MH-05-S-7723. While going, the accused nos.11 and 12 threatened the people around the office. This witness had accompanied the PW 1 when the deceased was taken to the hospital of Dr. Singh and then to the Central Hospital, Ulhasnagar.

11. PW 5 Hemraj Paragji Someshwar was a shop owner. The accused no.11 had his office near the PW 5's shop. According to this witness, on 08/11/2002 at about 5.30 p.m., the accused nos.13, 14 and Kallu were playing cards with this witness. At that time, the accused nos.2 and 12 came there in a rickshaw and the accused no.12 said that Naresh Gaikwad was alone in the office and on that day they should eliminate him. The accused no.12 told this witness that Naresh Gaikwad had demolished his shop and that he would kill him. This witness has stated that even two to three months prior to the incident, he was aware that the Naresh was going to be murdered. His statement was recorded by the police on 13/11/2002. As far as the incident of assault and the roles played by these assailants are concerned, these are the important witnesses.

12. Besides these important witness, the prosecution has examined PW 13 Dr. Ramesh Deshmukh who had conducted the post-mortem examination. PW 13 has given a list of 20 injuries suffered by the deceased and according to his deposition, injury nos.1, 3, 4 and 5 were firearm injuries and the others were incise wounds. According to him, the injury nos.3 and 4 were caused by the same bullet as the injury no.4 was an entry wound and the injury no.3 was the exit wound. Thus, it appears that there were 3 bullets which have penetrated the body of the deceased. A piece of bullet was found in right cerebral hemisphere. According to him, the cause of death was 'acute cardio respiratory arrest due to haemorrhagic shock due to injury to liver with cerebral injury due to firearm'.

13. We have heard Mr. N. N. Gawankar, learned Counsel for the Appellants and Ms. P. P. Shinde, learned APP for State. With their assistance, we have read the entire evidence and we have gone through the record and proceedings of the case.

14. Mr. Gavankar submitted that the conduct of the eye witnesses was unnatural and the evidence discloses that they could

not be present at the spot. He submitted that it does not stand to reason that the deceased would be shifted to a nearby hospital in a rickshaw if his own vehicle i.e. Qualis jeep was available with the driver outside the office. Mr. Gavankar submitted that the evidence of the eye witnesses that before leaving the accused no.12 put the revolver on the occipital region of the deceased and then fired a shot, is not supported by the medical evidence as the firearm wound is on the temporal region and not on the occipital region. He further submitted that the injury no.1 described in the post-mortem notes shows that the bullet had travelled from the right intestine upwards as the exit wound was above the intestine but below the umbilicus. Mr.Gavankar submitted that this injury was not possible if the deceased was sitting and if the assailant had fired at him from a standing position. He pointed out that there was no recovery of firearm either from the accused no.11 or from the accused no.12. One pistol was found from the spot and one revolver was recovered at the instance of the accused no.2. Hence, both these firearms cannot be connected with the accused nos.11 and 12. He further submitted that the bloodstained clothes of the eye witnesses were not seized by the Investigating Officer which is a serious lacuna in the prosecution case.

He further submitted that there were important omissions of the important facts which were mentioned in the deposition before the Court which were not stated by the witnesses before the police.

15. On the other hand, Mrs. Shinde, learned APP for State, submitted that the evidence of eye witnesses was cogent and reliable. That, by itself, can form the basis for conviction. She submitted that the omissions referred to by the defence were very minor and they do not impact the prosecution case in any way. She submitted that the cabin of the deceased was having small area of 10ft. X 10 ft. and therefore from the short distance, tract of the bullet in the body of the deceased was not unusual and therefore, the medical evidence was not contrary to the ocular evidence. She submitted that the occipital region is close to the temporal region and there was no distinctive line between these two regions and therefore, the evidence of the eye witnesses who were not medical experts, should not be treated as running contrary to the medical evidence.

16. Having considered the rival submissions, we agree with the submissions of the learned APP Mrs. Shinde. In our opinion, the

presence of the eye witnesses at the scene of offence was natural and the defence has not thrown any doubt regarding their presence at the spot at the time of the incident. PW 2 was working in the office since past many years. PW 1 was the nephew of the deceased and also a party worker. PW 3 was the driver of the deceased. Therefore, presence of all these witnesses in the office of the deceased at the time of the incident was not unusual. PW 1 and PW 2 have corroborated each other on all material aspects of the assault committed by the Appellants in the deceased. Only because Kallu's name was introduced in their subsequent statements to the police, that by itself, cannot be a reason to discard their evidence in respect of the roles played by the Appellants. There is no inconsistency between the evidence of PW 1 and PW 2 insofar as the roles played by each of the assailants is concerned. Their evidence is fully corroborated by the evidence of PW 3 Anand Gaikwad. The spot panchanama shows the presence of a window in the cabin of the deceased. PW 3 who was present outside the office could very well see the incident which took place inside the cabin. Mr. Gavankar submitted that the PW 1 has stated that he heard 4 to 5 shots but the medical evidence shows that there were only 3 bullets which were fired and had penetrated the

body of the deceased. This, according to Mr. Gavankar, was a major inconsistency. It is important to note that the incident has taken place on 08/11/2002 and the evidence of the eye witnesses was recorded in the year 2006. The witnesses were not expected to remember each of the circumstance with precision. In any case, if the witnesses have stated that they heard 4 to 5 shots and if only 3 bullets had penetrated the body of the deceased, this fact, in our opinion, is not very significant which would affect the prosecution case.

17. The evidence of PW 1, PW 2 and PW 3 is corroborated by the evidence of PW 4 to the extent that the assailants had left the place together in a rickshaw. PW 4 was playing cricket nearby and reached the spot on hearing the sound of shots being fired. This witness has seen all the Appellants with their weapons. There is nothing in his cross-examination which throws doubt on his evidence.

18. We do not agree with the submission of Mr. Gavankar that the witnesses have falsely stated that just before leaving, the accused no.12 put the revolver on the occipital region of the deceased and fired the last shot and that there was no such injury on the occipital

region. As we have discussed, the prosecution witnesses have stated that before leaving, the accused no.12 put his revolver on the left occipital region and fired one shot. The very fact that the witnesses have stated that it was on the left side would mean that it was not on the backside of the head. It is very difficult for a layman to describe where the temporal region ends and the occipital region begins. There is an injury on the left side of the head and therefore, the eye witnesses are not contradicted by the medical evidence. The injury no.5 specifically shows that there was firearm wound above the left ear penetrating the skull. This, in fact, shows that the evidence of PW 1 is supported by the medical evidence.

19. We do not find force in the submission of Mr. Gavankar that since the bloodstained clothes of the witnesses were not seized by the police, their presence is not established by the prosecution. In this connection, since their evidence is wholly reliable, we do not find that the omission on the part of the Investigating Officer to seize clothes of the witnesses goes to the root of the matter destroying the prosecution case.

20. As mentioned earlier, the evidence of PW 3 and PW 5 establishes that the accused no.12 was holding a grudge against the deceased for demolition of his shops and that is the reason why this offence was committed. Thus, the prosecution has established that there was a motive to commit the offence. All the Appellants came together with their respective weapons and have assaulted the deceased as described by the eye witnesses. In our opinion, therefore, the prosecution has established their case against the Appellants beyond reasonable doubt. With the result, we do not find any merit in the Appeals. Hence, the following order.

ORDER

- (i) The conviction and sentence of the Appellants under the impugned Judgment and Order dated 16th August 2011 is hereby confirmed.
- (ii) The Appeals are accordingly dismissed.
- (iii) Pending applications do not survive and the same are disposed of.

(SARANG V. KOTWAL, J.)

(A. S. OKA, J.)