

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

CRIMINAL APPEAL NO.1339 OF 2012

Sagar Ashok Taak

Age : 28 years, Occupation : Driver,

Residing at Aagwali Chawl,

Lonavala, Dist. Pune.

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

versus

State of Maharashtra

(At the instance of

Lonavala City Police Station)

... Respondent

**WITH
CRIMINAL APPEAL NO.654 OF 2010**

Sarjya alias Sarjerao Dashrath Dhage

Age : 28 years, Occupation : Driver,

Residing at Swarajya Nagar,

Taluka – Maval, Dist. Pune.

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

versus

State of Maharashtra

(At the instance of

Lonavala City Police Station)

... Respondent

.....

- Mr.D.G. Khamkar, Advocate for Appellants.
- Mrs.M.M Deshmukh, APP for the Respondent/State.

**CORAM : B. R. GAVAI &
SARANG V. KOTWAL, JJ.
DATE : 11th JULY, 2018**

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

1. The Criminal Appeal No.654/10 is preferred by the original accused No.1 and Appeal No.1339/12 is preferred by the original accused No.2 in Sessions Case No.321/08. By these Appeals, the Appellants have challenged the Judgment and Order dated 17/02/2010 passed by the Additional Sessions Judge, Pune. By the impugned Judgment and Order both the Appellants were convicted and sentenced as follows:

- (1) *Both the Appellants were convicted for the offence punishable u/s 302 r/w 34 of the Indian Penal Code and were sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- each in default to suffer rigorous imprisonment for six months.*
- (2) *Both the Appellants were convicted for the offence punishable u/s 326 r/w 34 of IPC and were sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.3,000/- each in default to suffer rigorous imprisonment for three months.*

- (3) *Both the Appellants were convicted for the offence punishable u/s 323 r/w 34 of IPC and were sentenced to pay a fine of Rs.50/- each in default to suffer simple imprisonment for three days.*
- (4) *All the sentences were directed to run concurrently.*
- (5) *The Appellants were given set off for the period during which they were in jail till they were convicted.*

2. Since both these Appellants are challenging the same Judgment and Order and since they arise from the same set of facts, they are disposed of by this common Judgment. For the sake of convenience, Appellants in both these Appeals are referred hereinafter by their status as accused in Sessions Case No.321/08 on the file of learned Additional Sessions Judge, Pune. The Appellant Sarjya alias Sarjerao Dashrath Dhage was the Accused No.1 and Sagar Ashok Taak was the Accused No.2.

3. The prosecution case in nutshell is as follows;

The deceased in this case is one Sagar Dnyaneshwar Aagale. Sagar's father had taken loan from the Railway Department from Cooperative Society of the Railway Department. The accused No.1's father had stood surety for him. The deceased's father was making regular defaults in paying the loan and therefore accused No.1's father had to pay the installments to their Society. Therefore there was dispute between the two families. In the past, the deceased had pushed the accused No.1's father Dashrath Dhage, who had lodged a complaint in that behalf. It is the prosecution case that because of this acrimony, the accused No.1 was holding grudge against the deceased. On 07/12/2007, when the deceased was consuming liquor with his friends Rahul Rokade and Ubed Sayyed, both the accused came there and assaulted him with knives. When Ubed intervened, even he was assaulted. After the assault both these accused went away from the spot. One Mahesh Waghmare informed the deceased's brother Shantanu

Dnyanesh Agale who came to the spot. The deceased was taken to Parmar Hospital, where he was declared dead. Thereafter Shantanu Agale lodged his FIR, vide C.R.No.191/07 u/s 302, 307, 323 r/w 34 of IPC, with Lonavala City Police Station. The accused were arrested. It is alleged that at the instance of accused No.1, the weapons were recovered. The weapons and the clothes seized from the accused were sent for chemical examination. The statement of various witnesses were recorded. The necessary Panchanamas were carried out during investigation and at the conclusion of the investigation, the charge-sheet was filed. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions.

4. The learned Additional Sessions Judge conducted trial vide Sessions Case No.321/08 and at the conclusion of the trial convicted and sentenced both the Appellants as mentioned earlier.

5. During trial, the prosecution examined 11 witnesses. Out of them P.W.5 Ubed Kutubuddin Sayyed and P.W.6 Rahul Namdeo Rokade, were the eyewitnesses and hence most important witnesses for the prosecution. P.W.1 Shantanu Dyanesh Agale had lodged the FIR and had removed the deceased to the hospital. P.W.2 Zakir Nazir Patel was the Pancha for the spot Panchanama. P.W.3 Mahesh Sadashiv Waghmare was a Pancha in whose presence, the accused No.1 had shown the spot of incident. P.W.4 Nilesh Bajrang Bhote was a Pancha in whose presence weapons were recovered at the instance of the accused No.1. P.W.7 Dr.Balaji Tukaram Gavade had conducted the post-mortem examination. P.W.8 Prakash Kanhu Marathe was the Pancha when the accused were arrested and their clothes were seized. P.W.9 Ajmuddin Ibrahim Mulla and P.W.10 API Umbarushi Dattatray Phadtare were the Investigating Officers at different stages. P.W.11 Dr.Chetan Vijay Pradhan had produced the medical certificate in respect of the injuries suffered by P.W.5 Ubed Sayyed.

6. We have heard the learned Counsel Mr.D.G. Khamkar for the Appellants in both the Appeals and Mrs.M.M. Deshmukh, the learned APP for the State of Maharashtra.
7. Mr.Khamkar submitted that the evidence of eyewitnesses was not believable. The witnesses did not give true version of the incident. Immediate conduct of the witnesses, is contradictory and is not properly explained. The names of assailants are not disclosed at the earliest. The evidence shows that the eyewitness P.W.6 Rahul Rokade had gone to Railway Police Force, but apparently no steps were taken by the said police, which itself is doubtful. The recovery of weapons was from the place which was accessible to all and it was unbelievable that the accused were wearing the same clothes, till they were arrested. He submitted that because of all these infirmities, the accused deserve to be acquitted.
8. On the other hand, Mrs.Deshmukh, the learned APP submitted that the evidence of eyewitnesses was consistent.

There was a motive for committing the offence. There was recovery of weapons and there are C.A. reports to connect the accused with the murder. Based on these circumstances this is a fit case where the accused deserve to be convicted as the prosecution has proved its case beyond reasonable doubt.

9. As mentioned earlier, the prosecution case rests heavily mainly on the evidence of the two witnesses. P.W.5 Ubed Sayyed is an injured eyewitness. Therefore his evidence has greater importance. He has deposed that he was knowing the deceased as this witness was plying Auto Rikshaw in the same area, where the deceased was residing. P.W.5 has claimed that he knew the accused as well. On 07/12/2007 he himself and the deceased were talking with each other in the night when P.W.6 Rahul Rokade joined them near RPF Rikshaw stand. At around 09.00 p.m. the deceased made a phone call asking someone to reach there within 5 to 10 minutes. Soon thereafter both the accused came there walking. The accused started beating Sagar Agale. P.W.5 Ubed Sayyed tried to intervene and rescue Sagar.

At that time, accused No.2 Sagar Taak assaulted him with knife, due to which P.W.5 Ubed suffered injury on hand at his wrist. He further deposed that the accused No.1 gave him a kick blow. P.W.5 Ubed further deposed that thereafter he ran towards RPF Police Station for help and claims that no one came from that side. Thereafter he again went back to the spot of assault and he saw that the accused were beating the deceased by their weapons. Then P.W.5 Ubed told P.W.6 Rahul Rokade to call the police and that he would call boys from the lane. On hearing this talk, the accused left the spot. P.W.5 Ubed has further deposed that P.W.6 Rahul waited near Sagar and he himself went to inform Sagar's family. He informed P.W.1 Shantanu Agale and other boys and came to the spot along with them. P.W.5 Ubed has further deposed that he found that Sagar Agale was having injuries on hand, chest, mouth and stomach. He further deposed that they then shifted Sagar Agale to Parmar Hospital, where he was declared dead. P.W.5 Ubed himself was treated at the same Parmar hospital and thereafter was referred to Sancheti Hospital, where he had undergone surgery for his

injury. He claims that his hand was in plaster for 2 ½ months. He had to take physiotherapy for four months. His statement was recorded by the police on the next day of incident. In his cross-examination he has stated that after the incident, he and his brother had gone to the police station and he had stood outside. His brother had gone inside the police station. He has further clarified that initially he had gone to Parmar hospital and then he had gone to the police station. He has admitted that he had given history to the Medical Officer at Parmar Hospital. Interestingly, the medical papers produced by P.W.11 Dr.Chetan Vijay Pradhan, who was attached to Sancheti Hospital, shows that the history recorded in the medical papers of that hospital was that of assault by unknown persons. He has further admitted that between 08.00 p.m. to 09.10 p.m. there were people at RPF Police Station and that there was crowd near the spot till 10.00 p.m. He has further deposed in the cross-examination that the place of incident was visible from the door of the RPF office. He had gone to RPF Office and had narrated the incident to the two policemen.

10. The prosecution examined another eyewitness P.W.6 Rahul Rokade. He stated that on 07/12/2007 he, the deceased Sagar Agle and P.W.5 Ubed Sayyed went near Railway Engine Shed for consuming liquor. P.W.6 Ubed did not consume liquor. At about 09.00 p.m. both the accused came there. They gave call to Sagar Agale. As Sagar Agale went near them, the accused No.1 assaulted him by means of a weapon, which he was carrying. The accused No.1 assaulted on the head of the deceased. The accused No.2 also assaulted the deceased on his stomach. P.W.6 Rahul has further deposed that when he and P.W.5 Ubed tried to intervene, the accused No.2 assaulted P.W.5 with his weapon, due to which Ubed sustained injury on his hand. The accused No.1 scuffled with this witness, due to which he fell down. P.W.6 has further deposed that thereafter he went to RPF office, but he did not see anyone there. He again came back running to the spot and found that both the accused had run away from the spot. Sagar was lying motionless on the ground. He was having injuries on his head, stomach and face.

P.W.5 Ubed was standing nearby in injured condition. Thereafter P.W.5 went to Agale Chawl. In the meantime this witness had given call to one Mahesh Waghmare, who reached the spot. Ubed had brought some people from Agale Chawl. Thereafter the deceased was shifted to Parmar Hospital in an Autorickshaw. In the cross-examination he has admitted that P.W.1 Shantanu was the brother of the deceased. He took this witness to the police station at 07.30 a.m. on 08/12/2007 and that he was in police station till 07.30 p.m. His statement was recorded till 10.30 a.m. He claims that he was in the Autorickshaw through which the deceased was taken to the hospital. He has categorically denied having met anyone at RPF Office.

11. P.W.1 Shantanu was the brother of the deceased. He has deposed about the past dispute between the families of the deceased and the accused No.1. He has stated that on 07/12/2007 at about 09.30 p.m. when he was at home he received message on his telephone by his brother-in-law Mahesh Waghmare regarding the assault on his brother Sagar Agale.

P.W.1 then went to the spot. He saw P.W.5 Ubed was standing there. Sagar Agale was lying on the grass with injuries on his person. P.W.1 then shifted him to Parmar Hospital, where he was declared dead. Thereafter P.W.1 lodged his FIR with the Lonavala City Police Station. His FIR is produced at Ex.19. He has deposed that he himself, his sister and Mahesh Waghmare had carried the deceased to the hospital and that when he reached the spot, Mahesh Waghmare was already present there.

12. The prosecution has examined P.W.7 Dr.Balaji Tukaram Gavade, who had conducted post-mortem examination. He has deposed that there was 18 injuries on the deceased on his head, face, chest, abdomen, back and hand. Most of the injuries were incised wounds and there were fracture to frontal and right parietal bone of the skull, haemorrhage under scalp, fracture of lower end of sternum with fracture left 7th and 8th ribs. The cause of death was “death due to cardiorespiratory failure due to shock and haemorrhage due to multiple fractures with multiple injuries.”

13. P.W.11 Dr.Chetan Pradhan had examined P.W.5 Ubed Sayyed at Sancheti Hospital and he had noticed two injuries as;

(1) Contused lacerated wound over dorsal of left forearm, 4 cm in size.

(2) All wrist extension tendons were cut.

He has deposed that the patient i.e. P.W.5 Ubed gave history of assault by unknown persons.

14. The evidence of these witnesses is relied on by the prosecution besides the other corroborative pieces in the form of recovery of weapons. The evidence of the eyewitnesses P.W.5 and P.W.6 is of course most important to decide this case. P.W.5 claims to be present during the incident. However, there is an important discrepancy between his evidence and that of P.W.6 in respect of precursor to the incident. According to P.W.5 the deceased had made a phone call and had called somebody on the spot. Thereafter the accused reached there and then the assault took place. P.W.6 does not make reference to any such call. About the assault, both these witnesses are more or less

consistent. But their evidence again differs on the material aspect as to what transpired after the assault. According to P.W.5 Ubed, after he had suffered a wrist injury, he had run towards RPF Police station for help, but nobody came from that side. He again came back to the spot and saw that the accused were beating the deceased and then he had told P.W.6 Rahul to call the police. On the other hand, P.W.6 Rahul has stated that during the assault he himself fell down. P.W.5 Uber told him to go to RPF Office and he i.e. P.W.6 Rahul went to RPF Office. He has deposed that he did not see anybody at RPF Office and then he came back to the spot to find that the accused had run away from the spot. The deceased was lying on the spot motionless and P.W.5 Ubed was standing on the spot in injured condition. These two versions given by P.W.5 Ubed and P.W.6 Rahul are divergent and contradictory. This factor coupled with the fact mentioned in Ex.61 makes their evidence very vulnerable. Ex.61 is produced by the Investigating Officer P.W.10 API Umbarushi Dattatray Phadtare. This is the report filed by the Inspector of RPF with this witness. P.W.10 has admitted this fact in his cross-

examination. The said report mentions that Inspector of RPF, Lonavala had received an information that Sagar Agale was murdered by unknown persons and Ubed had suffered injuries on his hand. Said Ubed had been to RPF office at 09.30 p.m. and the Constable No.3089 R.M. Shaikh had told him that it was necessary to give a report at the City Police Station and he was asked to wait. However, Ubed did not wait and while going he left his vehicle on the road.

15. This information noted in the said report is not mentioned either by P.W.5 Ubed or P.W.6 Rahul. All these inconsistencies raise a valid doubt that P.W.5 and P.W.6 may not be telling the complete truth.

16. Another important aspect is that P.W.11 has categorically deposed that when he had treated P.W.5 Ubed, the said witness had told him that he was assaulted by unknown persons. The said information is noted in the injury certificate at Ex.65 as well. He was admitted to Sancheti Hospital from 08/12/2007 to 11/12/2007.

17. P.W.5 has also deposed that he had gone to inform the family of the deceased and had met P.W.1 Shantanu and had brought him to the spot. However, P.W.1 himself has deposed that he had received the information from Mahesh Waghmare at 09.30 p.m. through a message on his telephone. P.W.1 has not stated that P.W.5 Ubed had informed him about the incident. In fact he has further deposed that when he reached the spot, P.W.5 Ubed was there and he pointed out the deceased to him. In his entire deposition P.W.1 has not deposed that the P.W.5 Ubed told him as to who were the assailants. Thus, P.W. 5 had not disclosed to anybody at the first instance that the Appellants were the assailants in the present crime.

18. Insofar as P.W.6 Rahul is concerned, he also claims to be an eyewitness. But even he has not informed the incident to the police immediately. In fact he has admitted in his cross-examination that P.W.1 Shantanu came to his house and took him to the police station on 08/12/2007 at about 07.30 a.m. He

was present at the police station till 07.30 p.m. and during that period he did not leave the police station. His statement was recorded till 10.30 a.m. His presence at the police station for 12 hours is rather curious. He was taken to the police station by P.W.1 himself. P.W.1 has not deposed in his deposition that P.W.6 Rahul was also present when he had reached the spot where his brother Sagar was lying motionless. P.W.6 has further deposed that they had shifted the deceased to Parmar Hospital. However, P.W.1 was specific in deposing that he himself, his sister and Mahesh Waghmare were in the Rickshaw besides the deceased. All these inconsistencies between the evidence of P.W.1, P.W.5 and P.W.6 coupled with the non-disclosure of the names of the assailants by P.W.5 and P.W.6 immediately makes the prosecution case extremely doubtful.

19. By way of corroboration the prosecution has relied on the circumstance of recovery of weapons at the instance of the accused No.1. Prosecution has examined P.W.4 Nilesh Bajrang Bhote as a Pancha who was present when the weapons were

recovered at the instance of the accused No.1. He has deposed that on 10/12/2007 he was called to the Lonavala City Police Station. At that time, the accused No.1 made a statement that he had thrown knife and sickle in the bushes and that he would point out the spot. His statement was reduced into writing. Thereafter the accused No.1 led them near a dilapidated shed of Lonavala railway station and from the bushes nearby he produced one knife and a sickle. This witness has not stated that the accused No.1 had mentioned any particular spot in his memorandum statement. According to him the accused No.1 had merely stated that he had thrown the weapons in bushes and that he would point out the spot. Moreover the spot from where the weapons were recovered was open and accessible to all and therefore we are not inclined to rely on such recovery. The C.A. report in respect of the weapons therefore is inconsequential.

20. The prosecution has examined P.W.8 Prakash Kanhu Marathe in whose presence, the clothes of the accused were

seized on 08/12/2007. He has merely stated that the police seized those clothes under seizure Panchanama. In his substantive evidence he has not stated that the clothes were sealed. He has admitted in his cross-examination that he used to go to Lonavala Police Station on several occasions, since the past 10 years before his deposition. He has given evidence in different courts on several occasions. He has further admitted that the police obtained his signature as a Pancha in many matters. In view of these admissions we do not find it safe to rely on the circumstance of seizure of blood stained clothes from the accused. Prosecution has not led any evidence to establish the link between the actual arrest of the accused and the seizure of their clothes at the police station. The prosecution has not led any evidence to show from where the accused were arrested and after how much time, the clothes were seized. Therefore we are not taking into consideration this circumstance against the accused and therefore even the chemical analysis of these clothes is of no consequence.

21. In view of the foregoing discussion, we are of the opinion that the prosecution has not proved its case beyond reasonable doubt and therefore the Appeals deserve to be allowed. Hence, the following order :

ORDER

- (i) Appeals are allowed.
- (ii) The order of conviction and sentence is quashed and set aside.
- (iii) Appellants/Accused are acquitted of the charges, charged with.
- (iv) Appellant/Accused are directed to be released forthwith, if not required in any other case.

(SARANG V. KOTWAL, J.)

(B. R. GAVAI, J.)