

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.1356 OF 2003**

The State of Maharashtra	.. Appellant
Versus	
Shivaji Bandu Gaikhe	.. Respondent

WITH

CRIMINAL APPEAL NO.1355 OF 2003

The State of Maharashtra	.. Appellant
Versus	
Balu @ Dattatray Digambar Chavan and others	.. Respondents

WITH

CRIMINAL APPEAL NO.1409 OF 2003

Shivaji Bandu Gaikhe	.. Appellant
Versus	
The State of Maharashtra & ors	.. Respondents

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Ms.Jyoti Lohukare for the appellant in Appeal No.1356/2003 and 1355/2003 and respondent State in Appeal No.1409/2003.

Mr.Vikas Shivarkar I/b Sunil Jain for the appellant in Appeal No.1409/2003.

Mr.R.D. Soni I/b Ram & Co. for Respondent No.1 in Appeal No. 1356/2003.

Mr.R.S. Kate for Respondent Nos.2 and 3 in Appeal No. 1356/2003.

**CORAM: PRADEEP NANDRAJOG, C.J.
AND BHARATI DANGRE, J.**

DATED : 6th SEPTEMBER, 2019

ORAL ORDER:- (Per Chief Justice)

1 26th November 1997 was an unfortunate day in the life of Sudam, a noble man, a teacher. Unfortunately for him he became a victim of transferred malice.

2 Process of criminal law was set into motion when Balu Appa Pimple (PW 1) was contacted by a Head Constable from Vadgaon Maval Police Station (unfortunately name not surfacing from the record) and he made the statement Exhibit-31/1. He disclosed in the statement that he resided in village Pimpoli, Taluka Maval, District Pune with his parents, his brothers, their wives and their children. The family was having agricultural land and to supplement income they were selling milk. His brother Sudam was a primary teacher. His brother Ramchandra was an employee of the Railways. Few days prior to the incident i.e. 24th November 1997 at about 6.45 a.m, he, along with his brother Ramchandra and a guest named Bharat were

travelling to Kamshet on a motorcycle and at a slope near the village their motorcycle brushed the cycle of Shivaji Gayake (A3). He stopped the motorcycle. Shivaji abused. An altercation took place. Ramchandra brokered the peace and they returned to their house. He learnt that Shivaji had brought boys at Kamshet. On 28th November 1997 at 5.00 am he carted milk on bicycle to Kamshet as usual. He parked the cycle in the room of one Kisan Garde and took the milk to Chinchwad by local train. After distributing the milk to the customers, he took the local train back to Kamshet at 8.30 am and reached Kamshet at 9.15 a.m. Alighting from the train he went to the shop of Mahipati Seth at Kamshet market to buy fodder for the cattle. His paternal uncle Gorakh B Pimple (PW 5), nephew Dattatraya and one Ganpat Bingude were present. Sudam was standing outside the shop. Shivaji (A3) asked him to come out. He obliged. As he went out, Shivaji assaulted him on his face and struck a blow with a knife on the left side of his rib, Mahesh (A2) and Bandu (A4) were also present with Shivaji at the time. As he was assaulted, his brother Sudam rushed to intervene and the three persons named assaulted his brother with a knife. Balu Chavan (A1) came on a motorcycle as he rushed to save his brother Sudam. Balu assaulted him with a knife. He was injured on his hand. People gathered. His brother Sudam who was grievously injured died on the way to the hospital. He was brought to Maval Hospital.

3 FIR for the offence punishable under Section 302 IPC was registered. In view of statement (Exhibit 31/1) four persons were named. Two of them were assigned with a role of having a knife. Needless to state that the police official, pursuant to the disclosure statement made by A3 and A1 got recovered a knife each. In respect of each recoveries, we find discrepancy in the panch witnesses and as regards A1, we would additionally note that human blood detected on the knife could not be linked to that of the deceased because the report was inconclusive.

4 Be that as it may, the dead body of the deceased was sent to the mortuary for post mortem. Dr.Mahadeo Waghmare (PW 11) conducted the post mortem and drew a post mortem report (Exhibit-86) recording therein a singular stab injury on the left side of the chest piercing between the 4th and 5th ribs. The knife pierced ruptured the heart and left lung. Death was instant because of shock caused by haemorrhage. Dr.Laxmikant (PW 4) examined PW 1 at the Government hospital and as per the injury report (Exhibit-63) noted two injuries on the person of PW 1 being incised wound over the left 6th sixth costal space i.e. the injury attributable to Accused No.3 and an incised wound over right ring finger i.e the injury attributable to A1 as per the statement made by PW 1. PW 6 Dr. Sanjeev also examined PW 1 and drew up the report (Exhibit-69) recording therein only one

stab injury on the left side of the chest.

5 Statements of Gorakh Pimpale (PW 5), Radhabai Garde (PW 7) and Ganpat Bingude (PW 9) were recorded who claimed to be the eye witnesses.

6 The testimony of PW 1, PW5, PW 7 and PW 9 are substantially in sync with the statement made by PW 1 on basis whereof FIR was registered. The improvements are whereas in Exhibit 31/1, no role of catching hold was ascribed to A3 or A4 and qua them a statement in the plural was made that the three named persons i.e. A2, A3 and A4 assaulted the deceased, in the testimony of the Court, the witness assigned the role of catching hold of deceased by A2 and A4 and role of assailing the deceased with a knife to A3. PW 1 who in his statement to the police stated that A1 assaulted him with a knife resulting in he being injured on his hand stated in his deposition that he was injured with a knife on his left hand.

7 With reference to the aforesaid evidence which we have captured in its bonsai form vide judgment dated 19th August 2003 acquitting A1, A2 and A4, A3 has been convicted for the offence punishable under Section 302 for the homicidal death of Sudam, For the injury caused to PW 1, he has been convicted for the offence punishable under Section 307 IPC.

8 For the offence of murder, he has been sentenced to undergo RI for life and to pay fine in sum of Rs.10,000/- in default to undergo RI. For two years for the offence punishable under Section 307 IPC i.e. to the injury on the chest caused to PW 2, he has been sentenced to undergo RI for a period of 10 years and pay fine in the sum of Rs.7,000/- in default to undergo RI for one year.

9 Vide Criminal Appeal No.1356 of 2003, the State seeks enhancement of sentence imposed upon A3 and the State wants him to be hung by his neck till he dies i.e. death sentence. Vide Criminal Appeal No.1355 of 2003, the State seeks conviction of A1, A2 and A4 for the offence of murder pertaining to the homicidal death of Sudam. Vide Criminal Appeal No.1049/2003, A3 prays for his acquittal.

10 From the testimony of witnesses with which variations above noted by us are substantially in sync with the statement Exhibit-31/1 made by PW 1, it emerges that four days prior to the incident, A3 had an issue with PW 1 when the motorcycle on which PW 1 was driving along with his brother Ramchandra and a guest named Bharat brushed the cycle of A1. There was an exchange of abusive words. On the day of the incident, A3 came alone to the shop of Mahipati and asked PW 1

to come out and as he stepped out of the shop, A3 assaulted him and struck a blow on the knife of the left side of his ribs. A2 and A4 were present. The improvement in the form of role to A2 and A4 of catching hold of Sudam is a substantial improvement and thus, the learned trial Judge giving benefit to said two accused is a reasonable and a probable view. Initially, no role other than being present at the spot was assigned to A2 and A4 and thus, qua them, we agreed with the view taken by the learned trial Judge. Taking the incident forward as narrated and proved after A3 assaulted PW 1 and as the deceased went to rescue PW 1, A3 gave a stab wound to the deceased and thereafter, Balu Chavan (A1) came to the spot. Thus, qua the homicidal death of the deceased, A1 has rightly been acquitted.

11 Further, the question of any common intention being shown is also ruled out and thus, neither of the accused can be saddled with vicarious liability under Section 34 of IPC. The evidence go on to show that A1 assaulted PW 1 on the hand. Qua A1 stated injury to PW 1, the learned trial Judge has given the benefit of doubt to A1 on the reasoning that the recovery of the knife was doubtful. There was no conclusive report regarding linkage of the blood on the knife to that of the deceased. In the statement Exhibit-31/1, a generic statement was made that A1 injured PW 1 on the hand. The testimony of PW 4 was of an incised wound over the right ring finger. The testimony of PW 6

noted no injury on the right hand finger. While deposing, PW 1 stated that he was injured on the left hand. Witnesses do not speak as a pre-recorded statement when a button is switched on. PW 1 in his initial statement disclosed that he was assaulted by A1 with a knife and was injured in the hand. He did not say whether the hand was the left or the right hand. It was for the police officer who record the statement who could have sought the clarification. Be that as it may, PW 4 has deposed and the medical report authored by him shows PW 1 to be injured on the right hand index finger. PW 6 may have not noted the injury because the injury was fairly superficial and PW 1 had to be treated for the fatal injury on the chest. Thus, it has to be held that qua A1, the prosecution has proved that using a knife he caused hurt to PW 1 and the offence would be punishable under Section 324 IPC.

12 Thus, as regards Criminal Appeal No.1355/2003 while dismissing the same against A2 and A4, we allow the same and convict A1 for the offence punishable under Section 324 of the IPC. Noting that A1 was 30 years of age when the incident took place and he was the pevit of the crime, he reached after the deceased and PW 1 had been fatally wounded, we impose sentence to suffer Imprisonment for the period already undergone by him which we are informed is four months.

13 As regards the Appeal filed by A3 seeking his acquittal and the Appeal filed by the State seeking enhancement of the sentence to one of the death, keeping in view the fact that A3 caused only one injury each to PW 1 and the deceased with the fact that it was PW 1 who was the target of the anger of A3 and the deceased became a victim of transferred malice, it cannot be said that A3 launched the assault on PW 1 or the deceased with any intention to cause death. The intention was to cause a grievous injury using a knife. One stab wound is indicative of the intention. The blow directed towards the chest of the deceased as also PW 1 would require knowledge to be attributed to A3 that by his act, he could reasonably know that death would end. Thus, for the injury caused to PW 1 the offence by A3 would be punishable under Section 308 and not 307 of the IPC. For the death of the deceased, the offence would be punishable under Section 304 Part II of IPC. Dismissing the Criminal Appeal No.1356/2003 filed by the State, we allow Criminal Appeal No.1409/2003 by altering the conviction of A3 for the offence punishable under Section 304 Part II pertaining to the death of the deceased Sudam and for the offence punishable under Section 308 IPC for the injury caused to PW 1. For the former offence, we sentence him to undergo RI for a period already undergone by him which is a few days more than five years. For the latter

offence, same sentenced is imposed. The two sentences would run concurrently and this would mean that A3 who is already on bail need not surrender to serve the remaining sentence.

14 The bail bonds and surety bond furnished by the four accused are discharged.

SMT. BHARATI DANGRE, J

CHIEF JUSTICE