

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CRIMINAL APPELLATE JURISDICTION****CRIMINAL APPEAL NO. 1593 OF 2011**

Sadashiv Basappa Madgyal,
Age 21 years, Occu. Driving,
R/o. Jath (Near Potdar Mala),
Taluka Jath, District Sangli,
(At present lodged at
Sangli District Prison,
District Sangli)

.....Appellant

Vs.

The State of Maharashtra,
(Through Jath Police Station,
Jath, Taluka Jath District Sangli
Crime No. 80/2009)

.....Respondent.

Ms. Ragini Ahuja I/by Dr. Yug Mohit Chaudhary for the Appellant.
Ms. P.P. Shinde, APP for the Respondent-State.

CORAM : A. S. OKA, AND

A. S. GADKARI, JJ.

DATE : 18th FEBRUARY, 2019.

ORAL JUDGMENT (PER- A.S. GADKARI, J.):

The Appellant/Original Accused No.1 is convicted under Sections 302, 324 and 452 of the Indian Penal Code and is sentenced to suffer life imprisonment and to pay a fine of Rs.3,000/-, in default of payment of fine to further undergo 3 months of rigorous

imprisonment, by the learned Additional Sessions Judge, Sangli, in Sessions Case No. 159 of 2009 by its Judgment and Order dated 22nd November, 2011. The said Judgment and Order dated 22nd November, 2011, is impugned herein.

By the same Judgment and Order dated 22nd November, 2011, the Original Accused No.2 Shri. Ramesh Madane has been acquitted from all the offences, charged against him.

2 Heard Ms. Ragini Ahuja, the learned counsel appearing for the Appellant and Ms. P.P. Shinde, the learned APP for the State. Perused the entire record.

3 It is the prosecution case that, Prakash Potdar (deceased) was into the business of jewelery. The Respondent was working with him as a worker. The Respondent committed theft of certain articles and therefore, Prakash Potdar (deceased) had removed him from service. It is the motive as has been propounded by the prosecution for commission of the present crime.

That, on 19th June, 2009, between 00.15 to 1.15 a.m., the Appellant along with co-accused broke open the window of the house of Prakash Potdar (deceased) and committed criminal trespass therein.

At that relevant time, Smt. Rajani Potdar (P.W. No.3) i.e. the wife of Prakash Potdar (deceased) and Ms. Puja Potdar (P.W. No.4) daughter of Prakash Potdar (deceased) were present inside.

It is the further prosecution case that, on that particular day, there was no electricity supply to the said house and therefore, two kerosene lamps were burning to provide minimal possible light in the house. After the Appellant along with the co-accused entered into the house, Smt. Rajani Potdar (P.W. No.3) saw the Appellant in the said light of kerosene lamp and as per her narration given to the police, one of the person was 4 to 5 feet in height, having knife in his hand. When the inmates of the said house heard the noise, in the torch light, they saw the assailants. That, the assailants were having knives in their hands and they immediately committed assault on the person of Prakash Potdar (deceased). When Smt. Rajani Potdar (P.W. No.3) tried to rescue Prakash Potdar (deceased), she was also assaulted with the knives. That, Ms. Puja Potdar (P.W. No. 4) raised an alarm and also gave phone call to Jat Polie Station, whereupon, the police reached at the scene of offence after a gap of 10 to 15 minutes. Due to the call given by the inmates of the house, Shri. Parappa, a servant of the uncle of Ms. Puja Potdar (P.W. No. 4) and Shri. Hussain Mulla a

neighbour reached at the scene of offence. The said two persons along with the help of police, took Prakash Potdar and Smt. Rajani Potdar (P.W. No. 3) to the hospital. Prakash Potdar (deceased) was declared dead before admission. Smt. Rajani Potdar (P.W. No. 3) was admitted to the hospital for treatment of Dr. Mallikarjun Kalgi (P.W. No. 5) for about 10 days.

4 The first information report was lodged by Smt. Rajani Potdar (P.W. No. 3) on 19th June, 2009 at about 2.35 a.m. in the presence of Ms. Puja Potdar (P.W. No. 4). In the first information report Smt. Rajani Potdar (P.W. No. 3) has expressed suspicion against unknown persons. A supplementary statement of Smt. Rajani Potdar (P.W. No. 3) was recorded on 19th June, 2009 wherein, she expressed her suspicion against the Appellant as the Appellant had motive to commit the said crime and it is alleged that on the basis of the voice of the Appellant, which she had heard at the time of commission of the offence, she expressed the said suspicion.

5 The Appellant came to be arrested on 24th June, 2009 at about 9.45 p.m. by the police and the blood stained clothes which were on his person were seized by effecting a panchanama (Exhibit-38) under Section 27 of the Evidence Act. After receipt of Chemical

Analysers report, which gives a positive opinion about the matching of blood group of deceased and completion of investigation, the police submitted charge-sheet, in the Court of Judicial Magistrate First Class, Jat, District Sangli. The learned Judicial Magistrate, First Class, Jat, committed the said case to the Court of Sessions, as the offences punishable under Sections 302 and 307 of the Indian Penal Code are exclusively triable by the Court of Sessions.

6 After committal, the Trial Court framed charge below Exhibit 11. The same was read over and explained to the Appellant to which, he denied and claimed to be tried. It is the specific defence of the Appellant that he is neighbour of Smt. Rajani Potdar (P.W. No. 3) and Ms. Puja Potdar (P.W. No. 4). There was long standing dispute between the said two families over the band of the land and with a view to settle the same, he has been falsely implicated in the present crime.

The prosecution, in support of its case examined in all 9 witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said case acquitted the original Accused No.2 and convicted the Appellant by the impugned Judgment and Order.

7 The record clearly indicates that, the evidence of the prosecution witnesses namely Smt. Rajani Potdar (P.W. No. 3), Ms. Puja Potdar (P.W. No. 4), Dr. Mallikarjun Kalgi (P.W. No. 5) and Mr. Shivappa Koli (P.W. No. 7) a panch witness to the seizer of the clothes of the Appellant, is relevant for deciding the present Appeal.

8 Smt. Rajani Potdar (P.W. No. 3) in her testimony has stated that, after she alongwith her husband noticed a loud sound, they inspected their premises in the light of torch and thereafter, gave call to Shri. Parappa, a servant and also to Shri. Hussain Mulla a neighbour. At that time, she heard the sound of barking of dog near the bedroom. At that relevant time, her husband noticed two persons inside the room. On questioning them, both said persons came out of the room. Smt. Rajani Potdar (P.W. No. 3) and her husband Prakash Potdar (deceased) diverted the direction of the light of the torch towards them and saw two youths thereof. She noticed that, out of the two youths, one was having straight small hair and was holding knife in his hand. The said person gave knife blows on the chest, back, ribs and thighs on the person of Prakash Potdar (deceased). Due to the said assault, Prakash Potdar collapsed on the spot, and Smt. Rajani Potdar (P.W. No. 3) started shouting. One of the persons

threatened her and asked her to keep quiet. When Smt. Rajani Potdar (P.W. No. 3) tried to rescue her husband from the clutches of the assailants, one of the assailants gave knife blow on her left hand and left side ribs. After hearing the hue and cry of Smt. Rajani Potdar (P.W. No. 3) and Ms. Puja Potdar (P.W. No. 4), the accused persons fled away from the scene of offence. The police came at the spot in furtherance of the phone call given by Ms. Puja Potdar (P.W. No. 4) after a gap of about 10 to 15 minutes.

Prakash Potdar (deceased) was taken to the hospital of Dr. Mallikarjun Kalgi (P.W. No. 5) wherein, he was declared dead. Smt. Rajani Potdar (P.W. No. 3) was admitted to Dr. Kalgi's Hospital and was under treatment for about 10 days.

9 In her cross-examination, Smt. Rajani Potdar (P.W. No. 3) has admitted that, at the time of recording of her statement by police Ms. Puja Potdar (P.W. No. 4) was with her. In her presence, Ms. Puja Potdar (P.W. No. 4) was not interrogated by police and Ms. Puja Potdar (P.W. No. 4) also did not say anything to the police on her own. She has denied the suggestion that, initially she had lodged complaint against two unknown persons. The said witness was confronted by the defence with her statement recorded under Section

164 and it has been brought on record that, her denial to the extent that, her lodgment of FIR against unknown person, is an omission. The first information report is at Exhibit 29.

10 We have carefully perused the omissions amounting to improvement noticed by the Trial Court and marked with portion 'A' and 'B' in the evidence and are convinced that the denial of Smt. Rajani Potdar (P.W. No. 3) would undoubtedly amount to improvement and is contrary to her statement given to the police. As noted earlier, the defence has successfully brought on record, material improvements at the instance of Smt. Rajani Potdar (P.W. No. 3). The defence has further brought on record improvements at the instance of Smt. Rajani Potdar (P.W. No. 3) while confronting her with the supplementary statement and the portions marked as 'A' and 'B' therein having been proved to be improvements. Smt. Rajani Potdar (P.W. No. 3) further admitted that, from 19th June, 2006 till 23rd June, 2006, she was making inquiry with the police whether the names of assailants were revealed by them or not. It is thus, clear that, Smt. Rajani Potdar (P.W. No. 3) was not aware of the name of the Respondent till 23rd June, 2006 and it appears to us that, the suspicion raised against the Respondent in her supplementary statement

recorded in the late hours of 19th June, 2009 by the police has no basis for it.

11 The evidence of Ms. Puja Potdar (P.W. No. 4) is similar to that of Smt. Rajani Potdar (P.W. No. 3). In her examination-in-chief itself she has given an admission that on 24th June, 2009, when she was with her mother in the hospital, the police came with both the accused persons and their identity was established by the said witnesses in the hospital. It is, thus apparent that, the identification of the accused persons was made by the police in utter violation of the guidelines framed under the Criminal Manual and the decisions rendered by the Hon'ble the Supreme Court of India. It is to be noted here that, as per the evidence of Smt. Rajani Potdar (P.W. No. 3) who recorded her first information report, her daughter Ms. Puja Potdar (P.W. No. 4) was present with her and despite the said fact, the statement of Ms. Puja Potdar (P.W. No. 4) has been recorded on 20th June, 2009, i.e. much belatedly after the statement of Smt. Rajani Potdar (P.W. No. 3) has been recorded. The prosecution has not offered any explanation about the said delay.

12 Dr. Mallikarjun Kalgi (P.W. No. 5), in his cross-examination has admitted that Smt. Rajani Potdar (P.W. No. 3) herself

narrated history of assault to him which is jotted down in Exhibit-35, recorded in the case papers of the said hospital. The Medico Legal Certificate issued by Dr. Mallikarjun Kalgi (P.W. No. 5) is at Exhibit-35 on record. He has stated that Smt. Rajani Potdar (P.W. No. 3) was not knowing the name of the assailants and therefore, it is not mentioned in the history of the case papers. He has further admitted that in his presence the police did not record statement of Smt. Rajani Potdar (P.W. No. 3).

13 Mr. Shivappa Koli (P.W. No. 7) is a panch witness to the seizure of clothes of the Appellant. In his testimony, he has stated that in his presence, the clothes which were worn by the Appellant were seized by the police, were stained with blood. We have personally perused the original testimony of witnesses Mr. Shivappa Koli (P.W. No.7), which is recorded in vernacular Marathi. As per the said original statement, Mr. Shivappa Koli (P.W. No.7) has stated that, police seized the cloths which were on the person of the Appellant and gave him another pair of clothes for wearing. The clothes which seized by the Police were having blood stains.

It is to be noted here that, the date and time of alleged offence was 19th June, 2009 at about 01.15 a.m. The Appellant has

been arrested by the police on 24th June, 2009 at about 9.45 p.m. The record is absolutely silent from which place the Appellant has been arrested by the police. It is further surprising to note that, the Appellant was wearing the same clothes for about 4 to 5 days. Though the Appellant is immediate neighbour of the informant and the police visited the spot of offence on more than one occasion during the course of investigation, they did not notice the Appellant wearing blood stained clothes for about 4 to 5 days. This creates strong suspicion in the mind of this Court about the veracity of the prosecution case about the seizure of clothes from the person of accused. It is the prosecution case that, though the said clothes were seized after a gap of about 5 days, blood stains found on the said clothes and its blood group is tallying with the blood group of the deceased. It is to be further noted here that, the seizure panchanama of clothes of the Appellant lacks legal sanctity of its seizure.

14 As noted earlier, there is a strong suspicion about the establishment of identity of the Appellant in the mind of this Court, coupled with the fact narrated hereinabove pertaining to the doubtful seizure of the clothes of the Appellant by the police. The Appellant is therefore, entitled for benefit of doubt.

15 In view of the above, in our opinion, the prosecution has failed to prove its case beyond reasonable doubt as the identity of the Appellant is not established by the prosecution beyond a reasonable doubt coupled with the fact of aforestated doubtful seizure of clothes of the Appellant with blood stains after a gap of about 5 days. The Appellant is therefore, entitled for benefit of doubt.

Hence the following order:-

- a) The Judgment and Order dated 22nd November, 2011 passed by the Additional Sessions Judge in Sessions Case No. 159 of 2009, convicting and sentencing the Appellant under Sections 302, 324, 452 of the Indian Penal Code, is hereby quashed and set aside and the Appellant is acquitted from all the charges framed against him;
- b) The Appellant shall be forthwith set at liberty provided he is not required in connection with any other offence;
- c) Fine amount, if any, deposited by the Appellant be refunded to him;

- d) Appeal is accordingly allowed, in the aforesaid terms;
- e) All the concerned to act on an authenticated copy of the Operative part of the Order.

(A.S. GADKARI, J.)

(A.S. OKA, J.)