

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

CRIMINAL APPEAL NO. 402 OF 1997

The State of Maharashtra.

.... **APPELLANT.**

// **VERSUS** //

1. Baban Gangaram Chirate,
Age 50 yrs.,
2. Ramchandra @ Shriram Baban
Chirate, Age 24 yrs.,
3. Harishchandra Baban Chirate,
Age 21 yrs.,
4. Sukrya @ Sukhdev Baban
Chirate, Age 30 yrs.,
5. ~~Pandurang Devu Bhagat,~~ }
6. ~~Bachhu Govind Chirate,~~ }
7. ~~Jairam Yeshwant Chirate.~~ }

Appeal dismissed as per
Order dated 08.06.1998.

All R/at Village Talekhal,
Tah. Murbad, Dist. Thane.

.... **RESPONDENTS.**

Mrs. M.M.Deshmukh, A. P. P. for Appellant/State.

Shri Shantanu Phanse, Advocate (appointed) for Respondent Nos. 1 to 4.

CORAM : S.S.SHINDE AND N.B.SURYAWANSHI, JJ.

DATE OF RESERVING THE JUDGMENT : 24/01/2020.

DATE OF PRONOUNCING THE JUDGMENT: 30/04/2020.

JUDGMENT : (Per : N.B.Suryawanshi, J.)

1. Heard.

2. Acquittal of the respondent-accused recorded by the learned Sessions Judge, Kalyan for the offences punishable under Sections 147, 148, 149, 302, 307 and 302 read with Section 34 of the Indian Penal Code and under Section 27(3) of the Arms Act is questioned by the State in the present appeal.

The prosecution case, in short, is that:

3. On 03/09/1992 at 7.30 a.m. complainant Yeshwant Nanu Chirate, who is injured witness and son of deceased Nanu @ Nenu Ganpat Chirate, lodged complaint with Police Station, Murbad vide CR. No.I/178/92 alleging that accused Nos.1 to 7 were members of unlawful assembly and in prosecution of the common object of that assembly committed riot and thereafter committed murder of his father Nanu by sword. In furtherance of the same transaction, the accused Nos. 1 to 4 went to the field of the complainant and assaulted him with swords, due to which he sustained injuries on vital parts. On completion of the investigation, chargesheet came to be filed and case was committed to the Sessions Court. All the seven accused were charged for commission of the offences punishable under Sections 147, 148, 149, 302, 307 and 302 read with Section 34 of the Indian Penal Code and under Section 27(3) of the Arms Act.

4. The prosecution in support of its case examined in all 11 witnesses. The learned trial Court, after considering the evidence of the prosecution came to the conclusion that the prosecution has failed to prove guilt of the accused persons and hence, acquitted all the accused. The said acquittal is impugned by the State in this appeal.

5. Heard learned A.P.P. for the State and the learned Advocate appointed to represent the respondents/ accused. With their able assistance we have gone through the grounds raised in the appeal memo, notes of evidence and the record.

6. The learned A.P.P. vehemently argued that though there is reliable and cogent evidence of eyewitness P.W. No.2, P.W. No.3 and P.W. No.6 available on record, so also of injured witness P.W. No.1/complainant, the learned trial Court has failed to appreciate the evidence in the proper perspective and erroneously acquitted the accused persons. After taking us through the evidence of eyewitnesses including the injured witness, the learned A.P.P. submits that the prosecution proved its case beyond reasonable doubt. The finding recorded by the learned trial Court are perverse and the reasoning adopted while acquitting the accused is faulty, hence, she prayed that the appeal may be allowed and the accused be convicted. She placed reliance on following judgments :

- i) *Appabhai and another vs. State of Gujarat*, reported in **AIR 1988 SC 696**,
- ii) *State of Gujarat vs. Bharwad Jakshibhai Nagribhai*, reported in **1990 CRI.L.J. 2531**,
- iii) Judgment of the Hon'ble Supreme Court in **Criminal Appeal No.562 of 2007** in *Bhajan Singh @ Harbhanjan Singh vs. State of Haryana*,

7. Per contra, the learned Advocate representing the accused would urge that the learned trial Court was justified in acquitting the accused by giving proper reasonings. The evidence of the accused has full of omissions and contradictions and it does not inspire confidence. He, therefore, states that there is no merit in the appeal filed by the State and the same deserves to be dismissed. In support of his arguments, he relied upon the ratio laid down in the following judgments:

- i) *Kashinath B. Palkar vs. The State of Maharashtra*, reported in **1995(1) ALL MR 412**,
- ii) *Murlidhar @ Gidda and Anr. vs. State of Karnataka*, reported in **AIR 2014 SC 2200**,
- iii) *Tota Singh and others vs. State of Punjab*, reported in **AIR 1987 SC 1083**.

8. PW. 1-Yeshwant (complainant) is not eyewitness to the incident of assault on deceased Nanu, but is injured in the second incident wherein four accused have assaulted him. In his deposition, he has stated that PW. 2 and PW. 3 came and told him that his father is not alive. He states that his

statement was recorded by the police in the hospital and in the second breath he states that his statement was recorded after he reached Murbad Police Station. The incident of his assault has occurred at 07.45 a.m. and he became unconscious. He regained consciousness after two hours, however, though he was acquainted with the assailants, he failed to disclose their names to his family members as well as large number of people gathered near his house. The fact that he failed unconscious after the assault is proved to be an omission. P.W. 1 states that he had been to the Police Station along with P.W. 4 at 11.00 a.m. However, the Investigating Officer (P.W. 11) states that P.W. 1 had gone to the Police Station in injured condition, but it is not mentioned in the Station Diary, as to who caused injuries to the P.W. 1 and with what weapon. It is, therefore, clear that P.W. 1 failed to disclose the names of his assailants and the assailants of his father at the first opportunity, at his own house and also at the second opportunity at the Police Station at 11.00 a.m.

9. In the evidence of P.W. No.10 Dr. Rajendra Rathod it has come on record that for the first time he came across P.W. 1 at 3.00 p.m. and prior to that he did not see P.W. 1. If this statement is considered along with the statement of P.W. 1 that his F.I.R. was recorded at Hospital the F.I.R. must have been recorded either at 3.00 p.m. or after 3.00 p.m. However, as per the evidence of Investigating Officer P.W. 11 the F.I.R. was registered at 13.45 hrs. P.W. 1 in his evidence states that all the 4 accused inflicted one blow

each on him with sword. However, he has given history to P.W. No.10 Dr.Rathod that he was assaulted with a knife. M.L.C. Certificate of P.W. 1 shows that he has given history of assault with knife at 7.30 a.m. No names of assailants are mentioned in the M.L.C. Register. All these aspects cast serious doubt on the veracity of these witnesses.

10. P.W. 2-Dashrath is an eyewitness to the incident of killing Nanu. He claims to have informed P.W. 1 that assailants have murdered his father. He states that Nanu was alive till he was brought at home and he disclosed names of his assailants to his brother and thereafter he became unconscious and succumbed to the injuries. If this witness has told P.W. 1 that his father was killed there was no occasion of Nanu being alive and disclosing names of his assailants to his brother. This witness has not stated to the police that he had gone to the house of Nanu so also he has not stated that he was waiting for Nanu in the field of Jairam Chitare on the day of the incident. The presence of this witness on the spot is doubtful.

11. According to P.W. 2 at about 8.00 a.m. in the morning the assailants committed murder of deceased Nanu and thereafter they came running to the spot, where P.W. 1 Yeshwant was assaulted. The distance between the two spots is 3-4 kms. The assailants were armed with swords, but no-one in the village have seen the assailants, though it was day of Gauri festival. Material omissions are brought on record in the evidence of this

witness. His statement that “he heard the talk of assailants where they disclosed intention to kill P.W. 1”. “Since he heard this conversation he reached to the spot where P.W. 1 was assaulted and accordingly he became eyewitness to the second incident of assault on P.W. 1” are proved in the form of omission. Thus, his presence on both the spots is highly doubtful.

This witness P.W. 2 has shown spot of incident to the police. The spot panchnama Exh.10 does not show that any incriminating articles were found on the said spot. The Investigating Officer, who conducted spot panchnama has not attached soil or mud containing blood stains, further raises doubt about the spot of incident where Nanu was assaulted. P.W. 2 though says that Tukaram (P.W. 6) was present on the spot of incident, this is also proved to be an omission. The material omissions in the evidence of the witnesses are brought on record by the defence casts serious doubt on the veracity of the witnesses.

12. P.W. 3 Balu is also an eyewitness to the incident. This witness also does not disclose presence of eyewitness P.W. 6-Tukaram. This witness knew the assailants/accused, however, he failed to disclose the names of the assailants to the police. P.W. 3 was not sure whether Nanu was alive or dead after he became unconscious, after the assault. He has stated that he was knowing names of the assailants before Nanu disclosed names to his brother and statement of this witness was recorded by the police in the evening.

Thus, it is clear that this witness failed to disclose names of the assailants to the brother of the deceased and to the police officers at the first opportunity, which renders the evidence of this witness unreliable. Even the evidence of this witness is full of material omissions and it is unsafe to rely upon the testimony of this witness.

13. P.W. 4-Shantaram is brother of the deceased. He carried Nanu from the spot of incident to his house on his shoulders. His clothes were stained with blood but they were not seized by the police. After bringing Nanu to his house, Nanu regained consciousness and he disclosed names of all the 7 assailants. Thereafter he proceeded to bring Yeshwant and he found Yeshwant in unconscious condition. He further states that statement / F.I.R. of Yeshwant was not recorded in the police station when he accompanied Yeshwant to Murbad Police Station at about 10.45 a.m. to 11.00 a.m. Material omissions are brought on record by the defence in the evidence of this witness. Theory of oral dying declaration of this witness is unacceptable in view of the evidence of P.W. 1-complainant Yeshwant that P.Ws. 2 and 3 came running to him and disclosed that his father was killed by the accused persons.

14. P.W. 6-Tukaram claims to be the eyewitness to the assault on complainant Yeshwant (P.W.1). Presence of this witness is not given by P.W. Nos. 2 and 3 and they have first time stated about his presence before the

Court. This witness has also not spoken about the presence of P.W. Nos. 2 and 3 at the time of assault on P.W. 1. P.W. 6 does not state in his evidence that he saw P.W. 2 and 3 running towards the spot of incident and they shouted and warned P.W. 1 Yeshwant that he would be assaulted by the accused charging towards the said spot with swords. This creates doubt about presence of P.W. Nos.2 and 3 on the spot. In cross-examination, P.W. 6 has stated that at about 9.00 to 9.30 a.m. police had arrived in village and he informed the incident witnessed by him to the police. But this version is not corroborated by any Police Officer examined by the prosecution.

15. P.W. 11 Investigating Officer has stated that he personally secured Injury Certificate of P.W. 1 Yeshwant. However, no Injury Certificate of P.W. 1 was brought on record by the prosecution except MLC Register. This witness further states that there is entry in the Station Diary about Yeshwant having brought to the Police Station in injured condition by his relatives. This witness admitted in his evidence that in the said entry there is no mention as to who caused injuries to Yeshwant and with what weapon. He, further admitted that there is no mention in the Station Diary as to who killed father of Yeshwant i.e. Nanu and with what weapon. From the F.I.R. he has confirmed that crime is registered at 13.45 hrs. and prior to 3 and 3½ hrs. of registration of the crime, Yeshwant had been to the Police Station. The said time gap was mentioned in his police diary. He states that no articles were attached from the spot during spot panchnama. So also soil/ mud

mixed with blood was not attached from the spot. He further admits that the family members of the deceased have not produced any clothes worn by the deceased at the time of the incident. Though he recorded statements of witness who lifted the deceased, clothes of those witnesses have not been seized. No map of scene of the offence has been drawn by the Investigating Officer. No blood samples of P.W. 1 and accused persons were collected to ascertain the blood group. Even the clothes of P.W. 1 Yeshwant were not attached during investigation.

16. Considering the evidence brought on record by the prosecution, it is clear that the evidence of the eyewitnesses P.W.2, P.W.3 and P.W.6 does not inspire confidence. P.W. 2 and P.W.3 do not speak about presence of P.W. 6 so also P.W. 6 does not speak about presence of P.W. 2 and P.W. 3. In the evidence of these witnesses material omissions and contradictions are proved on record. The evidence of P.W. 1 also is not reliable as he has failed to disclose names of the assailants at the first opportunity to the relatives and other villagers, even in the hospital he has failed to disclose the names of the assailants and at the second opportunity in the Police Station, which fact is admitted by the Investigating Officer that P.W. 1 did not disclose names of his assailants, so also all the assailants of deceased Nanu. Disclosure of P.W. 1 in the hospital which is recorded in the form of history, is history of the assault with knife, which goes contrary to the version of the P.W. 1 that he was assailed with swords by 4 accused persons and each one gave one blow. The

Injury Certificate of P.W. 1 is not brought on record by the prosecution. So also the clothes worn by him at the time of assault are not attached during investigation. Similarly, the clothes of P.W. 4 who allegedly carried deceased Nanu on his shoulders to his house are not attached. All these aspects render the prosecution case doubtful.

17 The spot of incident where Nanu was assaulted and thrown is also doubtful and the same is not proved by the prosecution. Absence of blood mixed soil/ mud from the spot of incident, non-drawing of the map of the scene of the offence during the investigation renders the spot of incident doubtful. From the fact that prior to 3-3½ hours of registration of the crime, P.W. 1 Yeshwant had been to the Police Station and even at that time there was no disclosure by P.W. 1 Yeshwant to the Investigating Officer about the incidence and the names of the assailants casts serious doubt on the prosecution case.

18. Theory of oral dying declaration of deceased Nanu made to P.W. No.4 is unsustainable, particularly in view of the medical evidence on record. The Medical Officer has admitted that considering the injuries suffered by Nanu loss of consciousness was possible. By referring to author P.D. Contor's Traumatic Medicines and Surgery for the Attorney he admitted the proposition that 'the energy of blow to the head is transmitted to the brain in the form of shock wave which, if severe enough, can cause damage to any

region of the brain'. He further admitted the proposition from the said book that 'with an injury to the frontal or parital area of skull, the shock waive may carry through the brain directly down to the brain stem and medulla oblowangata. The full force of shock waive of this nature can cause contusion and vascular damage so that sudden death can result from disfunction of these vital brain centers.' He also admitted that since the brain was found congested during post mortem, it is suggestive that the victim would lose consciousness. Considering these admissions it is difficult to believe that Nanu was in position to make dying declaration. The dying declaration is also not believable because the PW. No.1 and PW. No.3, the alleged eyewitnesses informed P.W. No.1 that his father was killed by the accused persons. Thus, Nanu was not alive when the said information was given to P.W. No.1. We are unable to accept the oral dying declaration theory claimed by the P.W. No.4.

19. It is pertinent to note here that as per the evidence on record adjoining to village Alekhal, where the incident has taken place, there is village namely Dehri. Simply a stream is flowing in between the two villages. There is only a Police Out-Post and one Police Head Constable and Police Constable are stationed there. The incident has taken place during Ganpati Festival when both the police personnel were working there. Noting in the Station Diary Exh.86 shows that Jamadar Pardhi and two other constables were on duty at that point of time. On close scrutiny of the evidence of P.W.

1-complainant and P.W.2 Dashrath, after Yeshwant was brought in the house, within 30 minutes Police Constable came there. According to P.W. 3, Police came there within 50 minutes after Nanu was brought to the house. The police visited the house immediately after the incident, before Yeshwant was taken to the hospital. P.W. 1 has stated that police inquired with him in his village itself and he gave details. Same is the version given by P.W. 3 Balu. It is therefore, clear that before P.W. 1 reached Police Station the police were already intimated about the incident. However, there is no occurrence report prepared by the police. P.W. 1 is giving inconsistent statements. At one place he claims that as soon as he approached the Police Station his statement was recorded and in the next breath he states that his statement was recorded in the hospital. P.W. 4-Shantaram, who accompanied P.W. 1-Yeshwant, states that he gave details and names of the assailants to the police when he arrived in the Police Station with Yeshwant. However, entry in the Police Station diary taken at 13.00 hrs. does not speak about the name of any assailant. It only mentions that Nanu was dead and lying on the spot. All these aspects create a serious doubt about the prosecution case.

20. As per the medical evidence, death of Nanu occurred at about 1.00 a.m. whereas the witnesses have witnessed the assault on Nanu at about 7.30 a.m. which further clears doubt about the prosecution version. Though swords were allegedly recovered from the accused persons there were no blood stains on the sword and therefore, the said recovery cannot be of any help to the prosecution case.

21. Taking into consideration all these aspects the prosecution has failed to prove the offence against the accused persons beyond reasonable doubt. The learned trial Court was justified in acquitting the accused persons by giving cogent reasons and no fault can be found with the view taken by the learned trial Court regarding acquittal. There is no merit in the appeal filed by the State against acquittal. Hence, the following order:

- i) Criminal Appeal No. 402 of 1997 is **dismissed**.
- ii) Bail bonds of the accused persons, if any, stand cancelled.
- iii) Muddemal property be dealt with according to law.
- iv) We appreciate the assistance rendered by the learned Advocate Mr. Shantanu Phanse appointed to represent the case of 1st to 4th respondents. We quantify his fees at Rupees Ten Thousand (plus) actual expenses, if any incurred by him, which shall be paid by the High Court Legal Services Committee, Mumbai to him within a period of four weeks from the date of this order.

(N.B.SURYAWANSHI, J)

(S.S.SHINDE, J)