

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 255 OF 1998**

(1) Maruti Narayan Shinde,
Age: 29 years.
(2) Vilas Atmaram Mirashi,
Age: 30 years, Occ: Labourer,
All residents of Lokmanya Nagar,
Pada No. 4, Thane. ... Appellants.

v/s.

The State of Maharashtra
(At the instance of P.I. Vartak Nagar Police
Station, Thane.) ... Respondent.

**WITH
CRIMINAL APPEAL NO. 309 OF 1998**

Prakash Narayan Tawde,
Age : 30 years, Occ. Typist,
R/o. Lokmanya Nagar, Pada No. 4, ... Appellant.
Thane.

v/s.

The State of Maharashtra
(At the instance of P.I. Vartak Nagar Police
Station, Thane.) ... Respondent.

Mr. Abhishek Singh, advocate for appellants in both the appeals.
Ms. P.P. Shinde, APP for State.

**CORAM : SMT. SADHANA S. JADHAV &
N.R. BORKAR, JJ.**

RESERVED ON : MARCH 22, 2021.

PRONOUNCED ON : AUGUST 9, 2021.

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellants herein are convicted for an offence punishable under section 302 r/w 34 of Indian Penal Code and are sentenced to suffer imprisonment for life and shall pay fine of Rs.5,000/- each, in default to suffer further RI for a period of two months by the Additional Sessions Judge, Thane in Sessions Case No.384 of 1996 vide Judgment and Order dated 31st December 1997. Hence, these Appeals.

2 It is the case of the prosecution that, on 1st January 1996, Dilip Mane lodged a report at Vartak Nagar Police Station, Thane alleging therein that at about mid night of 1st January 1996 his sister Shaila woke him up and informed him that their brother Sanjay has been assaulted by someone. He followed his sisters and his mother, who had rushed to the nearby Pooja Hotel. They saw Sanjay lying in a pool of blood. He had noticed a bleeding injury on the left side of his chest. They had taken him to a nearby hospital, where they were advised to take the injured to Civil Hospital. He was taken to the Civil Hospital. He was declared dead on arrival. Their neighbours Lahu

Chavan (P.W. 2) and Jitendra had been to the hospital to see the injured. In the Civil Hospital, P.W. 2 informed Dilip that, Sanjay was in their company celebrating the arrival of new year. They were having drinks in the house of Sunil Gurav. Except Sunil, all other friends had been to answer nature's call at about 12.30 a.m. At that time, some unknown person had assaulted Sanjay with some weapon. That, Sanjay had sustained two injuries on his back also. Based on the said report, Crime No.1 of 1996 was registered at Vartak Nagar Police Station, Thane for offence punishable under section 302 of Indian Penal Code against unknown person. The prosecution has examined 15 witnesses to bring home the guilt of the accused.

3 Implicit reliance is placed upon the evidence of P.W. 7 Datta Dhavri and P.W. 8 - Shekhar Pujari. P.W. 1 is the first informant Dilip, the real brother of the deceased. He has proved the contents of First Information Report, which is at Exh.10. It is elicited in the cross-examination that his brother-in-law Sunil was at his home and that Sanjay was at home upto 10.30 to 11 p.m. The deceased was seen lying unconscious on the road.

4 PW. 2 Lahu Chavhan informed Sunil Gurav about the said incident, but before they reached, Sanjay was already taken to the hospital. PW. 3 Santosh Polekar is declared hostile by the prosecution.

5 The inquest panchanama at Exh. 41 would indicate that the deceased had sustained a semi-circle shaped injury in the intercostal space, which was a quarter of an inch. There is no other injury noticed on the body of the deceased. PW. 4 - Dr. Sushil Bahedi performed autopsy on Sanjay. He had noticed two external injuries. According to him, on opening of thorax, he found a hole in intercostal muscle and fourth rib beneath the external injury No.1 and a vertical hole in pericardium admeasuring 1 ½ cm. x 1 cm. with haemoperitoneum and incised wound on the lateral border of left ventricle near the valve and it was vertical in shape admeasuring 2.5 cm. x 1 cm., but it was not penetrating through the heart. Both the lungs were found lying in the pool of blood. The opinion of cause of death was “due to haemorrhagic shock due to stab injury to the heart.” The post-mortem notes are at Exh. 18. The injuries sustained by the deceased could be possible due to gupti and the blade marked at Articles 15 and 17 respectively were recovered from accused Nos. 2 and 3.

6 PW. 7 Datta Dhavri is the star witness. He has deposed before the Court that on 31st December 1995, he along with his friends including Sanjay had consumed liquor in the house of Sunil Gurav till 11.30 p.m. Then, he along with Sanjay went to Hotel Pooja whereas the other friends proceeded to the water tank. They both had consumed beer in Pooja Hotel. One person on the adjoining table had received an accidental dash from Sanjay. The unknown person was annoyed and therefore, Sanjay had tendered apology. PW. 7 had identified the accused No. 3 as a person who had received a dash from Sanjay. The apology was not accepted and in response, Sanjay had told him to act as per his will. After they left Pooja Hotel, Sanjay wanted to smoke a cigarette and therefore, PW. 7 had proceeded to a pan stall to purchase cigarette for his friend. That, all the three accused came towards them and started beating both with fist blows. After some time, he saw Sanjay lying in a pool of blood. He, therefore, rushed towards the house of Sanjay to inform about the incident. It is pertinent to note that PW. 7 is not sure as to whether Sanjay had accompanied him to the pan stall or whether he had gone alone to fetch cigarette for Sanjay. According to him, Sanjay had died on the

spot.

7 It is pertinent to note that P.W.7 had categorically stated that after five days of the alleged incident he was called at Thane prison for identifying the accused. That, fifty persons were presented and he had identified the three accused persons who had assaulted Sanjay.

8 It is admitted in the cross-examination that on 1st January 1996 he was taken into custody by the police and was detained till 9 p.m. The police had not inquired with them about the incident. All friends who were celebrating the new years' eve along with Sanjay and P.W. 7 were called to the police station. There are material omissions and contradictions in his testimony.

9 His statement was recorded on 1st of January 1996. The portion marked 'A' in the evidence of P.W.7 reads as follows:

“that after the family members of Sanjay had taken him to the hospital, I slept on the terrace of Hasmukh Shah.”

The portion marked 'B' is read as follows:-

“Today I learned that Sanjay had succumbed to the injuries sustained by him on the previous night and that he has died in civil hospital, Thane.”

His testimony to the extent that he had informed brother-in-law of the deceased is falsified. Similarly, his contention that he was in civil hospital till 2 a.m. is also falsified

10 PW. 8 Shekhar Pujari is the Manager of hotel Pooja. According to him, on 31st December 1995 Vilas Bhosale and his two friends had occupied a table. He could not recollect as to whether accused Nos.1 and 3 were accompanying Prakash Tavde. There was a verbal altercation between Prakash Tavde and Sanjay since Sanjay had given a dash to one of the friends of Prakash Tavde. A glass was broken in the said altercation and therefore, he had driven both the groups out of the hotel. Thereafter, he closed the hotel and had no knowledge about the aftermath of the said altercation. There are material omissions and contradictions in the evidence of PW.8, but they are pertaining to the incident in the hotel.

11 PW. 9 Dr. Mohan had examined accused No. 3 on 1st January 1996 at 4.45 a.m. The injured and his relative that is accused

No.1 were found under the influence of alcohol. Accused No. 3 has sustained an incised wound on right mid-forearm at flexer aspect lateral side measuring 4 c.m. x 3 c.m. muscle deep. P.W.8 has opined that the injuries sustained by the patient could be possible by a broken piece of glass. The injury certificate is at Exh.26.

12 There is a recovery of Hacksaw at the hands of accused No. 2 from an electrical shop on 3rd January 1996. The P.W. 10 who was the panch of recovery was declared hostile.

13 It is pertinent to note that the Special Executive Magistrate who had allegedly conducted Test Identification Parade has not been examined by the prosecution, but the trial court has placed reliance upon P.W. 7.

14 P.W.15 - Vasant Ingavle has testified that P.W.1 had lodged a report on 1st January 1996 at 2 a.m. That, the accused Nos. 1 and 2 were arrested on 1st January 1996. They were wearing blood stained clothes. Late in the evening, their blood stained clothes were recovered between 10.30 to 11.15 p.m. On 3rd January 1996, there was recovery

of hacksaw at the behest of accused No.1 from his workshop. On 4th January, accused No.3 was arrested. On 8th January 1996, a gupti was recovered at the instance of accused No. 2. It is pertinent to note that he has categorically stated that on 7th March 1996, he had issued a letter requesting the Executive Magistrate to conduct Test Identification Parade, but the chargesheet was filed on 21st February 1996. He had proved the omissions and contradictions in the evidence of P.W.7 and P.W.8.

15 The learned counsel for the appellants has drawn the attention of this court to all the inconsistencies in the evidence of P.W.7 and P.W. 8. It is urged that the prosecution has utterly failed to stand on its own legs and hence, the accused deserve to be acquitted.

16 Per contra, the learned APP submits that P.W.7 is an eyewitness, and his evidence is trustworthy and therefore, no interference is called for.

17 Upon meticulous examination of evidence, it needs to be noted as follows:

(i) P.W. 7 was confused as to whether the deceased had accompanied him to the pan stall.

(ii) According to him, the accused had assaulted P.W. 7 as well as deceased with fist and kick blows. He had not seen any weapon in the hands of any of the accused. Therefore, the recovery of gupti and hacksaw at the hands of accused Nos. 1 and 2 is of no significance. Moreover, the panchas to the recovery of weapon are declared hostile.

(iii) According to P.W. 7, he had informed the brother-in-law of the deceased about the incident in which Sanjay succumbed to the injury. However, the same is marked as a contradiction.

(iv) P.W. 7 has stated that he was called to Thane prison on the fifth day for the purpose of identification of the accused. However, the accused were in police custody for more than five days. The prosecution has not examined the Special Executive Magistrate who had conducted the Test Identification Parade. The memorandum of the test identification parade is dated 18/8/1997. In view of this, it is clear that there is no possibility of P.W. 7 having been called to Thane Prison for the purpose of identification as according to him, he was called on the fifth day of the incident. Hence, the prosecution has failed to establish that P.W. 7 had identified the assailants of Sanjay.

(v) The conviction of the appellants is mainly based upon the evidence of P.W. 7 who has claimed to be an eye witness. His conduct soon after the incident would show that he is not a reliable witness. His credence has been shattered in the cross-examination. The material omissions and contradictions in the evidence of P.W. 7 need to be taken note of.

18 It is a settled position of criminal jurisprudence that the evidence of the eye witness necessarily needs to be a sterling testimony in order to warrant conviction on the basis of his/her evidence. It is not the quantity but the quality of the evidence which should weigh upon the court. The Apex Court in the case of **Rai Sandeep @ Deepu v/s. State of NCT of Delhi** held as under :-

“In our considered opinion, the ‘sterling witness’ should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness

¹ (2012) 8 SCC 21

should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness.”

19 In the case of **Anil Phukan v/s. State of Assam**², the Supreme Court has held that :-

“Indeed, conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye-witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then, the courts generally insist upon some independent corroboration of his testimony, in material particulars, before recording conviction. It is only when the courts find that the single eyewitness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect.”

20 The prosecution has miserably failed to establish that the assailants had assaulted the deceased with any sharp weapon which would cause bleeding injuries. The accused had no motive to eliminate the deceased. The whole incident is an outcome of a trifling

² 1993 AIR 1462

quarrel. And even according to eye witness, the assailants had dealt fists blows upon the deceased. Hence, it cannot be said that the prosecution has proved that the assailants have committed an offence punishable under section 302 of the Indian Penal Court. Therefore, both the appeals deserve to be allowed.

21 Hence, following order is passed :

ORDER

- (i) Both the appeals are allowed.
- (ii) The conviction and sentence passed against the appellants vide Judgment and Order dated 31/12/1997 passed by the Additional Sessions Judge, Thane in Sessions Case No.384 of 1996 is hereby quashed and set aside. The appellants are acquitted of all the charges levelled against them.
- (iii) The bail bonds stand cancelled.
- (iv) Fine amount if paid be refunded.
- (v) Both the appeals are disposed of accordingly.

(N.R. BORKAR, J)

(SMT. SADHANA S. JADHAV, J)