

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1043 OF 2001

The State of Maharashtra	}	Appellant (Orig. Complainant)
Versus		
1. Dattatray Krishna Desai, Age : 23 years., Occ : Agriculturist,	}	Respondents (Orig Accused)
2. Nagesh Krishna Desai, Age : 30 yrs, Occu. Agri,		
3. Pappya @ Sudhir Krishna Desai, Age 18 years, Occ : Agri,		
All resident of Ori, Tal. & Dist. Ratnagiri	}	

Mr. H.J. Dedhia, APP for Appellant – State.
None for the Respondents.

CORAM : PRASANNA B. VARALE &
S.M. MODAK, JJ.

DATED : JANUARY 21, 2021.

JUDGMENT (PER PRASANNA B. VARALE, J)

1. The present Appeal is filed by the Appellant – State of Maharashtra challenging the judgment and order passed by the learned Additional Sessions Judge, Ratnagiri, dated 28.09.2011 in Sessions Case

No. 02/1991 whereby the Respondents herein (Orig. Accused) who were charged for the commission of offences punishable under Sections 302, 324, 323 read with Section 34 of Indian Penal Code (for short “IPC”), and Section 3 read with Section 30 of Indian Arms Act were acquitted.

2. The case of prosecution, in brief, can be summarized as under:

That the Respondents original accused who are brothers *inter se* and the complainant are the residents of village Ori, Tq. Ratnagiri. The house of accused is situated at a distance of 15 ft. from the house of complainant. Though the complainant is resident of village Ori, he and his brothers Vilas, Uday and Suhas were residing at Mumbai and their father Mahadev was residing in their house at village Ori. A dispute was going on between the family of the complainant and the accused family since last 3-4 years on the ground that lurking of the fruits from Kokam trees (locally known as Ratamba). On 14.05.1999 accused Dattatray and Nagesh have assaulted and abused the complainant and his father on account of dispute over the land. Then complainant had filed the complaint in Malgund outpost on 15.05.1988 (this incident can be referred as prelude to the main incident). The main incident took place

on 16.05.1988 at about 08-08.15 am. At that time, complainant and his brother Vilas were plucking fruits from the trees of Kokam in a land near to their house. At that time accused no. 1 – Dattatray was standing in his own house and gave a call to Vilas. Vilas entered in the courtyard of house of accused and complainant followed him. As soon as Vilas went near the house Dattatray opened fire from a gun over Vilas. A bullet struck to the person of Vilas. Complainant immediately rushed to Dattatray and caught hold Dattatray. Dattatray had fired another bullet and as complainant had rushed over the Dattatray he missed the object. Accused Nagesh entered on the scene with knife and started assaulting complainant. Though, complainant made an attempt to avoid the blows, he sustained injuries due to the knife blow. Accused no. 3 Pappya Desai also entered on the scene with a stick and gave a stick blow over right eye of the complainant. After the assault accused ran into their house. Vilas was having profused bleeding. Brother of complainant Uday and Suhas also rushed on the spot. A car of one Mr. Khandare was arranged. Vilas was brought to Civil Hospital, Ratnagiri and on examination doctor declared him dead.

3. Satyendra Desai (PW 6) lodged a complaint against the

accused person. He himself produced the knife and gun to the police. The investigating agency which was set in motion undertook the other steps of the investigation such as, drawing the panchnama, recording the statement etc. On completing the exercise of investigation, charge-sheet was filed. Accused persons pleaded not guilty and claimed trial. Accused persons took a bold stand in their defence that they were acting in exercise of their right of self defence as the complainant and his associates who were armed with weapons like iron rod, scythe, but-axe were the aggressor and in self defence the accused acted and opened fire. It is further defence of accused persons that in the scuffle one bullet stuck to the wooden plank in the house of the accused whereas another bullet stuck to shoulder of Vilas. The accused further submitted that they have thrown away their weapons on the spot itself and ran away to their house. It was also the defence of the accused persons that Dattatray and Nagesh were not on the spot when the incident took place.

4. Learned Trial Judge on appreciation of evidence though recorded the finding in affirmative on the point as to whether Vilas Desai died homicidal death, but recorded negative finding on the other points in respect of proving the case against the accused beyond reasonable

doubt.

5. Learned APP vehemently submitted that the prosecution has brought on record the evidence in the form of eye witnesses, the medical evidence, the fact that the weapons were left at the spot and the complainant himself handed over the weapon to the investigating agency. Thus, it is the submission of learned APP that learned Trial Court failed to appreciate the evidence in its proper perspective and committed a grave error in recording the judgment and order of acquittal.

6. None appeared for the Respondents.

7. With the assistance of learned APP, we have gone through the material placed on record.

8. Prosecution in support of its case has examined as many as 9 witnesses. As the complaint was lodged at the instance of Satyendra Desai (PW 6), we may refer his evidence firstly.

Satyendra in his testimony stated that in the year 1988 he was serving at Mumbai and there was residential house and agricultural land at Ori. He further stated that house of accused is adjacent to his

house. Then he stated about the prelude on 15.05.1988. Then he stated that on 16.05.1988 he and Vilas went to field for plucking Kokam (Ratambe). The field is at distance of 15 ft. from the house of accused. Then he stated that Dattatray gave call to Vilas. On his call Vilas went to the house of Dattatray. He followed Vilas immediately. When they reached the door of resident of Dattatray, Dattatray call Vilas inside house but Vilas did not entered in the house and asked him whatever he wanted to talk he should talk there only. Then Dattatray said “eye will show” and immediately he took a gun which was kept behind door and opened bullet shot on Vilas. He immediately jumped toward Dattaraya and caught-hold the gun, by that time second shot was fired from the gun. Then he stated that Nagesh led an attack with knife as such, he changed the grip of the gun in his left hand and caught-hold knife in his right hand. In that process he received injury at his right hand and stomach. Accused no. 3 Pappya @ Sudhir who was armed with stick gave a blow on his head and he received injury on his right eye. Then he throw the gun on his back side and also threw the knife on his back side. Then he identified the gun, knife and stick.

In the cross-examination this witness stated that in the course

of the said incident a situation arose where he was holding gun by one hand and was dealing with Dattatray and simultaneously he was holding knife by other hand and was dealing with Nagesh. He further stated in the cross that after the incident police came to his residence and recorded the statement and seized the articles. Then he had shown an ignorance on a suggestion that his father was dealing in sell of Kokam fruit as yield from the said trees. He further stated that he went for plucking fruits merely for enjoyment. He further stated that initially one Mr. Sawant, PSI visited his residents and later on the investigation was handed over to CID and his statement was recorded by officer of CID Shri. Nalawade. He further admitted in the cross-examination that his house at Ori is on upper level than the house of accused. Then he had shown ignorance in respect of anticipatory bail being granted to the accused person as well the proceeding initiated by the prosecution for cancellation of bail of the accused persons. He further admitted in the cross-examination thatailable warrant was issued against him for securing his presence as witness on commission in the Court under the orders of the High Court. He further admitted that on many dates of hearing he remained absent in the Court. He further admitted that while carrying Vilas for some

distance his clothes were stained with bloods which was oozing from the injuries of Vilas. Then he admitted that Vaishali came to the place when he was carrying Vaishali. Then Vilas was lying on the lap of Vaishali at the corner of the house of accused. An omission was brought on record to the effect that on an information about the dispute that the accused family, he came from Bombay to settle the dispute. Then he admitted that Krushna Desai father of accused was a retired police personnel and he was having a gun with him. Then suggestions were given that a false case was filed against the accused and accused Dattatray and Nagesh were not present at the place, this suggestions were denied. This witness also denied the suggestion that he along with Vilas and Uday went to the house of accused with Scythe, axe and rope.

9. Vasant Desai (PW 1) is the panch to inquest panchnama as well as seizure panchnama. This witness turned hostile and he is of no help to the prosecution.

10. Dr. Uday Aranke (PW 2) is the autopsy surgeon and was working as medical officer at Ratnagiri Civil Hospital at the relevant time. Dead body of Vilas Desai was brought to Civil Hospital on

16.05.1988. This witness stated in his testimony that deceased was well built and nourished. He found the following external injuries on the person of Vilas:

1. Oval injury over left arm in the deltoid region of the size $1\frac{1}{2} \times 1 \times 1\frac{1}{2}$ inches, with direction posteriorly and lower side caused by penetrating injury about 12 hours, with hard and blunt object. It was serious in nature.
2. Oval brown colour patch over the left shoulder region of the size 1 inch x $\frac{1}{2}$ inch. It was dry on touch.
3. Skin laceration curved in shape on the size $\frac{1}{2} \times \frac{1}{2} \times \frac{1}{2}$ cm over left side of the back at a place 5 cm from the midline in between 9th and 10th rib, black pigmentation of crecentric shape on lower and medial side. It is penetrating injury of grievous nature caused by hard and blunt object.
4. Communated fracture of neck of humerous.
5. Dark red to black coloured straight track 10 inches in length, half inch in breadth from injury no.1 directed medially and deep into the muscles.
6. Dark red to black coloured straight track 9 inches in length and $\frac{1}{2}$ inch in breadth in injury no. 2. Directed deep and down in the muscles.
7. Through and through parforations four in number over the left lung on posterior surface of upper lobe of the

lung.

8. Holes 4 in number associated with injury no. 7 over the plaura.
9. Loss of periosteum and cortex on inner aspect of ribs no. 6, 7 and 8 of the length 1 inch at tow sides on each rib.
10. communited fracture of 9th rib with loss of rib continuity of ½ cm width.

He found following internal injuries:

1. Fracture of 9th rib on left side.
2. Plural cavity and thorists cavity were filled with blood on left side.
3. Four circular holes on posterior aspect of lung in upper lobe associated with black discolouration around and about it.
4. Three object found in the body.
 1. A plastic white colour circular object 2 cm in diameter with mark on it.
 2. A lead irregular pillet of white colour.
 3. Four black colour irregularly sized object were found in the muscle plane of pactoral along the tracks of external injury no. 1 and 2.
5. All these injuries were anti-mortem.

He further stated that as per his opinion deceased succumbed

to death on account of shock due to internal hemorrhage due to gun shot wounds to the left lung and fracture of ribs and fracture humerous.

12. In the cross-examination the witness stated that injuries were bullet injuries. He further stated that there was only one exit injury on the body. Though he was unable to give any specific opinion as to whether the shots were fired accidentally or it was a homicidal. He stated that considering the blacking spaciung and burn edges of the injury, it can be said that shot was fired within a short range.

13. Uday Desai (PW 3). This witness was examined after 12 years of the incident. He is the real brother of deceased Vilas and he turned hostile.

In the cross-examination at the instance of the accused persons he stated that he appeared in the Court on that day in execution ofailable warrant.

14. Anant Khandare (PW 4) whose vehicle was arranged for shifting Vilas to the Hospital. He stated that on hearing shouts and sound of firing bullets he came out of his house. He saw that Satyendra and Uday were carrying Vilas and Suhas was following them and they

asked him to take car immediately. Accordingly, he went to the palace where car was parked and brought it. Anant (PW 4) is brother-in-law of Udy and Vilas.

In the cross-examination he stated that he is unable to identify the assailants. He further stated that after his marriage he was occasionally visiting the residence of his father-in-law and except two relatives other relatives not of his acquaintance.

15. Vaishali Desai (PW 5) is wife of Vilas Desai. Her entry at the place of incident is of hearing the sound of firing bullet. She stated in her testimony that she came out the residence and again heard sound of firing another bullet and said sound came from the house of accused. She saw that his husband Vilas was carried by Satyendra and Suhas. She saw that her husband was in pool of blood. Thereupon, she kept husband on her lap by sitting on the ground. She further stated that her husband told her that Dattatray shoot a bullet on him. She further stated that accused no. 1 Dattatray is known as Datta. She further stated that her clothes were full of blood as she took her husband in her lap. Saree article no. 13 was shown to the witness and she identified the saree. She also identified the clothes of her husband namely, baniya and underwear.

In the cross-examination she stated that she had accompanied to her husband to the hospital. Then she stated that in the night police came to her residence for investigation and recorded her statement. Next day also police came to her residence for investigation. Then an omission is brought on record about Vilas and Satyendra were called by Dattatray.

16. Prabhakar Sawant (PW 7) at the relevant he was attached to Ratnagiri Rural Police Station. On the basis of complaint lodged by Satyendra on 16.05.1988 he registered the offence against the accused person and took over the investigation. Then he stated about the steps taken by him in the process of investigation. Then omission in the version of witnesses are proved through this witness.

He admitted in the cross-examination that on 16.05.1988 he has seen the gun and he came to know at that time only that it was not possible to use that gun as the said gun was in broken condition. He also admitted that though he was aware that in a serious crime like murder it is necessary to record the statement of eye witnesses as early as possible. He had not recorded the statement of eye witnesses for considerable length of time. He further admitted that the seized property was not sent

to the chemical analysis till 22.05.1988 and the reason assigned by him is on going investigation. He further admitted that there is no entry in the papers of investigation in respect of handing over the articles to the head constable. He also admitted that there is no record in the investigation papers that till the time of sending the articles to chemical analysis they were kept as it is as per the condition at the time of seizure.

17. Anil Nalawade (PW 8). He stated that on 07.07.1988 he was discharging his duty as inspector with Bombay Unit of CID Crime Branch. He further stated that on 07.07.1988 the investigation was handed over to him. He recorded the statement of wife of deceased at Mumbai as well as statement of father of deceased was also recorded by him.

Then he had shown an ignorance about the reason of handing over the investigation of crime to CID.

18. Uttam Ahire (PW 9). He stated that in the year 1990 he was discharging duty as inspector with Crime Detection Branch, Pune. He further stated that investigation of the said crime was handed over to him for some time. Then he stated that on 05.10.1990 he forwarded an

application to District Magistrate, Ratnagiri for sanction of prosecution under Arms Act. On 22.02.1990 charge-sheet was filed by him along with necessary documents.

19. On perusal of evidence, we found that the learned Trial Judge has scanned the evidence thoroughly, assessed and appreciated the same in proper perspective and arrived at just and proper conclusion. The prosecution though claims that there are eye witnesses to the incident, on considering the evidence learned Trial Judge found that these so called eye witnesses had not occasion to see the incident and they have reached on the spot after the incident took place. In so far as Udaya Desai (PW 3) is concerned, who is claimed as an eye witness, interestingly had turned hostile. It has come in record that he was subjected to examination before Court after lapse of 12 years of the incident. He has stated in his evidence that his relations with accused were cordial and he had not opportunity to speak with accused persons either prior to the incident or post the incident. On the backdrop of the fact that this witness is real brother of deceased Vilas has not supported the case of prosecution. Learned Trial Judge was pleased to observe that the evidence of this witness supports the case of defence in so far as the

incident in question is concerned.

20. Perusal of testimony of Anant Khandare (PW 4) show that he reached on the spot of hearing the notice of firing the gun and when he came out of the house he found Vilas in injured condition. Then he stated about the arranging car and putting Vilas in the vehicle and shifting him to the Civil Hospital, Ratnagiri. Though, in the examination-in-chief itself it disclosed that he had not seen the actual incident and in the cross-examination he further reiterates that he had not seen the incident and he is unable to identify the assailants. Therefore, testimony of this witness is also of no help to the prosecution.

21. Eye witness as claimed by the prosecution is Vaishali Desai (PW 5). Considering the evidence of this witness Vaishali in depth, we are of the opinion that this witness cannot be termed as an eye witness to the incident. In her testimony she stated that Vilas and Satyendra left house in the morning of 16.05.1988 for plucking the fruits of Ratamba. Her version that they were called by accused Dattatray and they went to the residence of Dattatrya. It is only a hearsay evidence because as per her own version she came out of the house on hearing noise of firing of the

bullet. She stated before the Court that she saw that her husband Vilas was being carried by Satyendra and Suha. Then she immediately went to her husband and took him in her lap. Accepting this sequence of events stated by the witness as it is it only show that Vaishali came out of the house and rushed to her husband after the incident was over. It is further the case of prosecution that when Vaishali took her husband's head in her lap her husband told her "Vaishali Datta shoot bullet on me". The prosecution vehemently submitted before the Court below that this statement of Vilas to Vaishali is an immediate disclosure of the overt-act of accused Datta. It was also vehemently submitted before the Trial Court that this statement be accepted as dying declaration and as this is an immediate disclosure. A heavy reliance was placed by the prosecution on this statement.

22. As stated above, Vaishali is not the eye witness to the actual incident and she came out of the house on hearing the sound of firing of the gun, learned Trial Judge assigning cogent reasons observed that the so called statement of the deceased Vilas to Vaishali cannot be treated as dying declaration. In our opinion, learned Trial Judge committed no error in discarding the said statement and not treating the same as a

dying declaration. Firstly, it was observed by the learned Trial Judge that as per the case of prosecution when Vaishali took the head of her husband on her lap he was fully conscious and as such, there was no reason for Vilas to support his sentence by referring name of Vaishali. It could have been natural conduct of Vilas stating simply that he was shot by Datta.

Now interestingly enough the other witnesses who are claimed as an eye witness i.e. Anant Khandare (PW 4) and Satyendra Desai (PW 6) nowhere stated before the Court that Vilas made a statement to Vaishali. As per the case of prosecution Anant and Satyendra were carrying Vilas who was injured and Vaishali on hearing the sound of firing the gun immediately rushed to Vilas and took head in her lap. Anant and Satyendra where at close distance and as such had every opportunity to hear the conversation between Vilas and Vaishali. Despite of this fact, no such reference is found in the version of these eye witnesses. The prosecution submitted before the Trial Court that saree of Vaishali was soaked in blood and it came in the evidence that Vaishali took head of hear husband in her lap who was having profuse bleeding. Thus, the prosecution submitted before the Court that this material

supports the theory of prosecution of dying declaration made to Vaishali. Learned Trial Judge was pleased to observed that saree of Vaishali was soaked in blood and this article was referred to chemical analysis cannot be a factor to accept the statement as dying declaration, in our opinion, learned Trial Judge justified in recording these observations.

23. Apart from the above referred reasons namely, Vaishali reaching on the spot on hearing the sound of firing gun and the other eye witnesses not supporting the version of Vaishali, there is another factor which assumed importance. Statement of Vaishali was recorded on 25.05.1988 and incident took place on 16.05.1988, though Vaishali stated before the Court her statement recorded by the investigating immediately in the night of incident, the state of investing officer clearly show that he recorded statement of Vaishali on 20.05.1988. In the cross-examination he also stated reasons for recording the statement of Vaishali belatedly and he stated that as he was busy in the other steps in the investigation such as, drawing the panchnamas he could not visit house of complainant in the night of incident and as such, he could not recorded the statement in the night.

Learned Trial Judge was justified in making the

observations :

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It must have been recorded likewise with an intention to strengthen the case of the prosecution. It appears to be a later development made by the prosecution, otherwise it definitely would have found place in the statement of Satyendra (PW 6) in the FIR itself.

24. The very important witness of prosecution is Satyendra (PW 6) – Complainant who is an eye witness to the incident. It was stated before the learned Trial Court that even if there is a solitary witness and if his evidence inspires confidence, conviction can rest upon the version of solitary witness. There cannot be any dispute on the said proposition of law but the prerequisite is of inspiring confidence in the detailed assessment of version of this witness. Learned Trial Judge found that this witness was changing his version time and again, there were inconsistencies and material contradictions. Learned Trial Judge arrived at a conclusion that as the version of this witness fails to inspire confidence of the Court he cannot be treated as reliable witness. We may summarize the reasons assigned by the learned Trial Court for not

accepting the version of witness Satyendra.

This witness admitted the enmity between the accused persons and his family. Reference is made to an incident which took place prior to the main incident on 14.05.1988. The complainant and his father were manhandled and abused by the accused no. 2 and a complaint was lodged about this incident in Malgund outpost on 15.05.1988. On the backdrop of this fact, learned Trial Judge was justified in observing that therefore, in the natural course the aggrieved party is the complainant because of this incident and not the accused. In the background of this incident therefore, it is but natural the complainant and his brother manhandle and they would react in the natural course.

25. Another factor is Satyendra complainant stated before the Court that he and his brother were residing at Mumbai and they were occasionally visiting their village. It is also stated before the Court that there was a dispute between father of complainant and accused and father wanted to settle the dispute. So even considering this aspect accused would carry any grudge that would have been against the father of Satyendra and Vilas and not against them as they were only occasional

visitors. It is again interesting to note that Satyendra (PW 6) stated that he has incorrectly mentioned in his complaint dated 15.05.1988 as he was also abused and manhandle by accused on 15.05.1988 in fact he was not present their at that time. H also stated before the Court that it is incorrectly mentioned in the complaint dated 16.05.1988 that he came Ori before 3-4 days of incident in fact he came to Ori on 15.05.1988 at about 7.30 am (i.e. only a day earlier to the main incident). He further stated that his father informed about the quarrel dated 15.05.1988 to hom at Mumbai on phone. So these statements show that on 14.05.1988 Satyendara (PW 6) was not at all present in the village Ori. Thus, the accused person had no reason to carry a revengeful attitude against Sateyndra (PW 6). On the contrary, the version of Satyendra (PW 6) and Anant (PW 4) support the case of defence that in the morning of the incident Vilas, complainant Satyendra, Suhas and Udyia had been to their house for settling dispute.

26. Learned Trial Judge was also justified in observing that Vilas and Satyendra went to the house of accused, Satyendra nowhere stated in his complaint or refers the presence of Suhas and Uday on the spot. To the version of Satyendra there is contradictory version of witness Anant

Khandare and Vaishali. These two witnesses have stated that Satyendra, Vilas, Suhas and Uday all these four brothers have proceeded to the field for plucking the Ratamba fruit. Thus, in view of this contrary versions, the version of this witness i.e. Satyendra could not have been accepted as reliable and trustworthy.

27. There is another reason for not accepting the version of Satyendra (PW 6) in his complaint as well as in his testimony before the Court he has stated as to how he received the injuries of knife and stick in the process of rushing towards accused no. 1 and caught-hold his gun but surprisingly no injury of Satyendra is placed on record by the prosecution. Complainant Satyendra also maintains silence on the aspect as to after receiving the injuries where he was referred to any medical officer, any medical officer examined him, issued medical certificate to him or he got treatment from any private medical officer. On the backdrop of these facts, learned Trial Judge was observed thus:

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In the absence of medical evidence, the version of complainant cannot be accepted that he sustained any

injury by the knife over his right palm and stomach and he sustained the injury over the right eye with the stick. Then the only inference can be drawn that complainant must not have sustained any such injury as alleged by him. The another inference that can be drawn that the incident must not have taken place as stated by him. One more inference that can be drawn that complainant was not assaulted with the knife by accused no. 2 Nagesh and with stick by accused no. 3 Pappya @ Sudhir. It therefore seems to be a development in the story of the prosecution, made with an intention to give some other picture of the incident, concealing the real incident.

28. The theory of prosecution that the accused no. 1 opened the gun fire at deceased Vilas and Vilas received one bullet injury could not find any favour by the learned Trial Judge and the learned Trial Judge has assigned the detailed reasons on assessment of the evidence. We may refer to these observations reflected in paragraphs 69, 70, 71, and 73 as follows:

69. Now according to the complainant there two rounds were fired by accused no. 1 Dattatray from his gun. First round struck to the person of Vilas, the another round has gone somewhere else. Neither the

complainant nor the F.I.R. is much specific, where the 2nd bullet has gone. It is not their specific case that the second bullet struck to the wooden log of the Maznine floor in Oti. The panchnama of the scene of offence and the evidence of the prosecution goes to show that two led pellets were found in Oti. One Pellet was found near the wooden pole in the Oti, which is near the steps. Another leg pellet was found inserted in the wooden leg of the maznine floor of Oti. The wooden planks of the wall in between oit. and Padavi found to have been broken. It was cracked. A led pellet was found to have been inserted in the crack. Not only that a paper of the covering of the cartridge was also found in the crack. The panchnama of the scene of offence therefore proves that bullet fired from the rifle must have struck to the wooden plank and has broken the plank. Therefore, one led pellet and a paper cover of the cartridge caught in the crack of the plank. Nowhere panchnama goes to show that there was any blackening around this crack or the broken plank near the led pellet. What is show that the fire must have been beyond powder range of a weapon. If bullet have been fired from the gun by a man standing near a door of oti, then such a firing would have been within the powder range of weapon of gun. When the led pallet was found in the plank of the same wall.

Inference therefore has to be drawn, that the bullet as alleged by the prosecution must not have been fired from the rifle of the accused when he was standing in the door of oti. The bullet must have been fired from some longer distance.

70. The positive case of prosecution is that accused called Vilas to their house. When Vilas came near the step in the courtyard, accused no. 1 Dattatray shoot him. Place of offence, according to the prosecution is the courtyard of house of the accused. It means, Vilas and accused no. 1 Dattatray, when the firing was opened were facing to each other. When there was a firing towards Vilas the bullet must have struck to his person from the front side. There ought to have been injury over the right shoulder from its anterior side. There ought to have been injury near the throat of Vilas. However, post mortem notes shows a different story.

71. The medical officer (P.W. 2) Dr. Aranke has given the picture of the body of Vilas showing the location of the injuries. Vilas has sustained the injury over the right shoulder just below the neck i.e. the injury was on the posterior side. This location of injury therefore speaks in volume that the fire must be from back side of Vilas and not from his front side. It is not

the story of the prosecution that Vilas started running away from the house of accused. When accused no. 1 shoot him. They were facing to each other. It is therefore, impossible for the accused no. 1 to shoot him causing the injury towards neck of Vilas. Therefore, the inference has to be drawn that bullet must have been fired by accused no. 1 Dattatray as alleged by complainant i.e. the prosecution. Sustaining of the injury towards the neck I..e posterior side of the body by Vilas speaks that the bullet must have been fired from his backside.

73. Vilas has sustained the injury from the backside, it shows that the bullet must have been fired from his backside. The another bullet has also fired from the backside of Vilas which struck to the wooden leg of Maznine floor in the oti of the house of the accused. Happening of this incident in this manner, therefore is more probable, in view of the position of the bullets as mentioned in panchnama of the scene of offence vide exh. 109.

29. Apart from these factor, there is another strong factor which makes the prosecution story unbelievable and unacceptable. The prosecution comes before the Court with a case that the rifle attached is the same weapon by which there was a firing over the Vilas by accused

no. 1. It is interesting to note that this weapon gun was in broken condition. Its barrel and but are separated from each other and in the report of chemical analyzer it was specifically mentioned that the shot gun owing to defective components, of its firing mechanism and damaged barrels the gun cannot be used for firing full rounds. If the gun was not at all in working condition for firing, the entire story of the prosecution that with that gun accused no. 1 Dattatray shoot deceased Vilas cannot be accepted.

30. The fact that the gun was not recovered from the accused but the complainant himself produced the gun and the knife makes the story of prosecution suspicious one. Learned Trial Judge on the basis of this material made observation that production of broken gun itself indicate that recovery has been plated by the investigation only with an intention to connect accused with this incident. The accused persons have submitted that the article no. 1 gun attached was there gun which was being used by their father who was earlier serving in police department and before 15 days of the incident gun was broken and it was hanged to a peg in the house. Learned Trial Judge found that as the prosecution failed to throw any light on the article broken gun the defence of the

accused could be accepted that the investigating agency picked up the gun from their house for making out the case that the gun has been used for firing Vilas.

31. It may not be out of place to state here that the learned Trial Judge has framed point no. 4 for consideration whether the accused have contravened the provisions of the license of their gun and committed an offence punishable under the Arms Act? and replied it in the negative and assigned the reasons as follows:

18. Secondly, during the investigation licence of the gun involved in this case has not been attached by the investigating officer. Nothing has been shown which condition of the licence has been contravened by the accused. It is also not shown that the licence of the gun involved in this case is standing in the name of any of the accused. On the contrary, the statements under Section 313 of Cr.P.C. of the accused discloses that the licence of the gun is standing in the name of their father Krishna Desai. Had it been a fact, then there cannot be any charge against the present accused for contravening the condition of the licence of the gun, which is standing in the name of their father.

32. Considering all these aspects, we are of the opinion, that learned Trial Judge was justified in observing that though the death of Vilas was homicidal, prosecution failed to establish the complicity of the accused persons in commission of the crime and the evidence brought by the prosecution failed to prove beyond reasonable doubt that the accused persons have committed offences charged against them. On the contrary, the defence version is reliable and acceptable. Learned Trial Judge committed no error either in appreciating the evidence or arriving at the conclusions. Appeal, thus, being devoid of any merit, deserves to be dismissed. Accordingly, Criminal Appeal is dismissed.

(S.M. MODAK, J.)

(PRASANNA B. VARALE, J.)