

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 337 OF 2014**

1. Arvind Arjun Kamble	}	
Age: 24 years, Occupation-Service,	}	
R/o Karmale, Tal-Shirala, Dist-Sangli.	}	
	}	
2. Arjun Maruti Kamble	}	
Age: 48 years, Occupation-Labour	}	
R/o Karmale, Tal-Shirala, Dist-Sangli.	}	
	}	
3. Tajjudin Mohammed Mujawar	}	
Age: 29 years, Occ:-Agriculture	}	
R/o Karmale, Tal-Shirala, Dist-Sangli.	}	Appellants
		(Orig. accused nos. 1, 2 & 5)

Versus

The State of Maharashtra	}	Respondent
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Ms. Payoshi Roy I.by Dr. Yug Mohit Chaudhry for the appellants.
Ms. P.P. Shinde-APP for the State.

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

RESERVED ON : FEBRUARY 8, 2021.

PRONOUNCED ON : MARCH 23, 2021.

JUDGMENT :- (PER SADHANA S. JADHAV, J.)

1. The appellants herein take exception to the judgment and order passed by the Additional Sessions Judge, Islampur, thereby

convicting the appellants/original accused nos. 1,2 and 5 for the offences punishable under section 302 read with 34 of Indian Penal Code and sentencing them to suffer imprisonment for life and to pay fine of Rs. 2000/- each, in default to suffer simple imprisonment for one month, in Sessions Case No. 36 of 2011, vide judgment and order dated 26th March 2014.

2. Such of the facts necessary for the decision of this appeal are as follows:-

a) That, the deceased Sanjay Zimur was residing at village Karmale along with his family. The accused no.2-Arjun Kamble was residing in the neighbourhood of deceased Sanjay Zimur. That 2 years prior to the incident, Pravin Kamble was assaulted by deceased Sanjay Zimur.

b) On 13th July 2011, at about 8.30 p.m., the accused no.2 Arjun Kamble called Sanjay Zimur outside his house. The father of Sanjay Zimur had responded and when he came out of the house, the accused no.1- Arvind Kamble, accused no.2- Arjun Kamble and accused no.3- Sanjay Kamble started assaulting him with kicks and fist blows. Original accused no.3 stabbed Sanjay with a knife. It is alleged that the accused no. 3 – Sanjay Kamble and Accused No.4-Akash Kamble had caught hold of deceased Sanjay Zimur and the accused no.1 – Arvind Kamble stabbed Sanjay with a knife on his abdomen. Whereas the accused no.2 – Arjun Kamble gave a blow of hammer on the head

of Sambhaji Zimur and had also assaulted his mother Kantabai Zimur. It is alleged that the accused no.5 Tajjuddin assaulted Kantabai with a stick. All the injured were taken to the hospital by Rahul Zimur in a vehicle. The injured were referred to the Civil Hospital where they were admitted late at night. The statement of Sanjay was recorded in the hospital, wherein he had narrated the incident. The statement was recorded on 14th July 2011. On the basis of the said statement, Crime No. 37 of 2011 was registered at Shirala Police Station against the accused for the offences punishable under section 326, 324, 323 and 504 read with 34 of Indian Penal Code.

c) On the same day i.e. on 13th July 2011 itself, Arvind Kamble i.e. the accused no.1 lodged a report at Shirala Police Station at about 9.00 p.m., alleging therein that Sanjay (the deceased) son of Sambhaji Zimur had asked his neighbour Seema Kamble to coax his (Sanjay Kamble's) wife Sneha to enable him to win over her. On 13th July 2011 Seema informed about the same to Arvind Kamble. At that time, he along with his father and Tajjudin Mujawar went to the house of Sanjay to question him about the said approach towards his wife Sneha. Sanjay was questioned about his act. Suddenly the father of Sanjay brought a sickle and mounted assault upon the father of the first informant. He also assaulted Tajjudin with the same weapon. He was then taken to Civil Hospital Shirala by the neighbours. On the basis of the report of Arvind Kamble, Crime No. 36 of 2011 was registered against Sanjay Zimur and Sambhaji Zimur for the offences punishable under section 326, 324 and 323 read with 34 of Indian Penal Code.

d) That, all the injured were referred to Rural Hospital Shirala. They were examined by PW-17 Dr. Kishor Patki. PW.17 had noticed the following injury on the person of Sanjay Zimur.

1) Stab injury over right hypochondrium and epigastric region and there was protrusion of viscera from the abdominal wall. The dimensions of the injury could not be measured as patient was very serious. There was central and peripheral cyanosis all over the body. Blood pressure was 80 systolic.

Due to very critical general condition of the patient, he gave emergency treatment within 10 minutes and without wasting patient's golden time, he referred him to Civil Hospital, Sangli for emergency surgery.

PW.17 had noticed the following injury on the person of Sambhaji Zimur.

1) There were two C.L.Ws measuring 3 x 1 x 0.5 c.m. and 3 x 1 x 0.5 c.m. over left parieto temporal region of head. There was bleeding.

PW-17 had also noticed the following injury on the person of Kantabai Zimur.

1) There was blunt trauma with evidence of haematoma measuring 4 x 2 x 2 c.m. near vertex of head.

PW.17 had opined that the injuries sustained by Sambhaji and Kantabai are simple injury. All the 3 injured were referred to Civil

Hospital, Sangli for further treatment. The M.L.C. is at 'Exhibit-96'.

PW.17 has further stated that on 13th July 2011, at about 9.00 p.m. he had examined Arjun Kamble (accused no.2). He had given the alleged history of assault at 8.00 p.m. He had sustained the following injuries :-

1. Incised wound admeasuring 7 x 1 x 1.5 c.m. horizontal in direction. Over Inter-scapular region of back. There was severe bleeding.
2. Incised wound over left scapular region vertically oblique in direction admeasuring 7 x 1 x 1.5 c.m. There was severe bleeding.

This patient was referred to Civil Hospital, Sangli. The cause of injury above incised wounds is by sharp weapon and it is possible by sickle.

PW.17 had also examined accused no.5 Tajjudin Mohamad Mujawar at 9.00 p.m. who had given a history of assault. The injury sustained by him was as follows:-

1. C.L.W. admeasuring 1.5 x 0.5 x 0.5 c.m. over left temporo parietal region of head. There was bleeding.

e. The accused no.5 was treated as an O.P.D. patient. The M.L.C. registers are placed on record by PW.-17. PW-17 has identified the signature of Dr. Budruk on M.L.C. No. 480, which is pertaining to the injury certificate of Sanjay, Sambhaji and Kantabai. That, Sanjay

Zimur was conscious at the time of admission in the hospital but was complaining of severe pain and was not in a position to speak. Whereas Kantabai and Sambhaji were conscious, oriented and in a position to speak. According to PW.17, no sutures were given to the stab injury as it would be necessary to operate him immediately. It is clarified that all the three patients were accompanied by a police constable.

f. PW.17 had informed the police that injured Sanjay was serious, he was not in a position to speak and therefore, his statement should not be recorded, since there was a possibility of death of Sanjay Zimur, in the eventuality, he was not treated or operated within 6 hours.

g. PW.17 has asserted that the stab injury was not possible by a sickle and that the injuries sustained by Sambhaji and Kantabai were possible due to fall of stone. He had succumbed to the injury on 19th July 2011.

h. PW.12-Dr. Parmeshwar Chandawade had performed autopsy on the dead body of Sanjay Zimur on 19th July 2011 at 8.10 a.m.. He had noticed the following injuries:-

“I noticed the stab wound on right ileac region placed obliquely, midway between ASIS and umbilicus. It is blunt and wide laterally and tapering medially. 6 c.m. in length and 3 c.m. wide laterally, 2 c.m. at middle, 1 c.m. at tapered end. Depth 20 cm stitches extending from epigastrium to

pubis-21 number and 27 cm in length. There were no other superficial injuries”.

He had opined that the probable cause of death is shock due to perforation in peritoneum. The internal injuries were corresponding to the external injury. In fact, the testimony of PW.12 shows that, he was attached to Civil Hospital since 3rd March 2011. He had collected information about the treatment given to the deceased Sanjay Zimur before his death. However, he had not consulted the doctor who had given treatment to the patient. He was operated in Civil Hospital and it was noticed that the deceased Sanjay had undergone Laparotomy. However, PW.12 could not give the details of 21 stitches on the dead body. He had no information as to when the injured was operated but according to him he had opened the stab wound by removing the sutures. According to him, depth of stab injury is 20 c.m. but the length of stab injury increases due to distention of abdomen after death. This was the first case where he had performed autopsy and therefore he had issued the cause of death certificate only after proper consultation with the expert. The offence under section 326 was then converted to section 302.

3. At the trial the prosecution has examined as many as 17 witnesses to bring home the guilt of the accused. PW. 1-Sambhaji Yadav and PW. 2-Rajaram Patil, Panchas for the spot panchnama are declared hostile. PW.3 Sachin Mohite and PW.4-Munna Patel Panchas for the memorandum and recovery panchnama of weapons are also

declared hostile. PW.5 Mohan Zirange and PW.6 – Amol Kamble panchas for seizure of clothes of the accused, are declared hostile by the prosecution. Similarly, PW.7-Nishikant Jadhav and PW.8-Ankush Kamble, the panchas for seizure of clothes of the deceased Sanjay and injured Sambhaji are also declared hostile.

4. PW.9- Shankar Zimur, happens to be the paternal uncle of the deceased Sanjay and brother of Sambhaji Zimur. According to him, there was a quarrel between Arjun and Sanjay two years prior to the incident. PW.9 resides near the house of Sambhaji Zimur. According to him on 13th July 2011 at about 8.30 p.m. he heard high pitch voices in the house of his brother. He realised that there was a quarrel and when he came out of the house he saw the accused persons assaulting his brother and his nephew. They were assaulting Sambhaji with kicks and fist blows. The accused Sanjay and Akash had pushed his sister-in-law Kantabai and Mujawar had assaulted Sambhaji with a stick. According to him, Arvind Kamble assaulted Sanjay with a knife. There after Sanjay fell down. Arvind had assaulted Sambhaji with a hammer. The son of PW.9 Rahul had taken all injured to Government Hospital, Shirala. That, according to him Sanjay had succumbed to the injuries in the hospital. Suggestions are given to the witnesses that there is flooring of stone in front of the house of the deceased. Indicating therein, that the injured had sustained injuries due to fall on stones. He has denied that an offence is registered against his son Rahul and his nephew Sanjay for committing rape on the daughter of Maya Sathe. In fact, the records would show that Sanjay and Rahul were

accused in Crime No. 14 of 2003 registered at Shirala Police Station for the offences punishable under section 366 (A), 363 and 376 read with 34 of Indian Penal Code at the behest of Maya Sathe. Both the accused were arrested on 18th March 2003. It appears that the said case was registered as Sessions Case No. 33 of 2003. The accused had probably won over the victim. The accused were acquitted on 4th December 2004.

5. PW.10 – Rekha Zimur happens to be the wife of PW.9 she has corroborated the evidence of PW.9. She claims to know all the accused persons as they were residents in the same lane. She has also denied registration of the Sessions Case No. 33 of 2003 against her son Rahul and deceased Sanjay.

6. PW.-11, Kantabai Zimur is the mother of the deceased Sanjay. She is an injured witness. According to her, on the day of incident at about 9.00 p.m. the accused had come in front of her house and called her son outside. There was a quarrel. Thereafter the accused had mounted assault upon her husband with kicks and fist blows and then the accused Arvind gave a blow of knife over the abdomen of her son. She has feigned ignorance about the complaint lodged against her son by Maya Sathe. 1) She has also feigned ignorance about the cause and motive of the quarrel between the deceased and the accused two years prior to the incident. 2) She had no knowledge as to whether the accused Arjun Kamble had sustained injuries on his back. It is admitted that for 10 minutes the accused were in front of her house. She has

denied that it was her son who was armed with sickle. 3) It is admitted that except the injury on the abdomen, her son had not sustained any other injury. It is also admitted by her that the weapon like stick, hammer and knife were lying in front of their house after the incident. They were lying there till the injured were taken them to the hospital. It was Rahul who had helped them after the incident and taken to the hospital. 4) The medical officer at rural hospital had not sutured the injuries of Sanjay but had only bandaged the same. 5) Her husband was also not given any treatment for the head injury and the medical officer had simply referred them to Civil Hospital. 6) While in transit from Shirala to Sangli neither Sanjay nor his father were in a position to speak. That they had reached Civil Hospital at about 1.30 a.m. at midnight. They were kept in separate rooms in Civil Hospital. She was not conscious and therefore could not talk but explained the cause of injuries sustained by them to the medical officer and the history of incident and cause of injuries were narrated to the medical officer by Rahul. At night nobody had halted with them at the Civil Hospital. 7) She regained consciousness after 3 days of being admitted in civil hospital but she could not meet her son Sanjay during those 3 days as the medical officer had not allowed her to see her son. When she insisted upon meeting her husband and her son the medical officer had informed her that they were not in such a condition that she could meet them. She was also informed that she could meet the injured after the sutures are removed. Except her brother, no other relatives met her in the hospital. She was discharged from the hospital after the demise of her son. That her statement was recorded 3 days after the

incident when she regained consciousness. 8) That, her statement was not read over to her and therefore, she does not recollect what she had stated to the police. Her son was operated during the night and she had no intimation about the same. That her son was unconscious for 2 to 3 days. The police had visited the spot of incident after the funeral of Sanjay. She was present at the time of recording scene of offence panchnama. She has denied that the accused Arvind had filed a cross complaint against her husband Sambhaji. The assault by the accused no.5 Tajjudin Mujawar with a stick on her back is an omission.

7. PW.13 – Pandurang Tate was attached as a P.S.O to Shirala Police Station. In the station diary of Shirala Police Station there is an entry showing that head constable Mane had proceeded to Civil Hospital on 14th July 2011. He has proved the First Information Report on the basis of which Crime No. 37 of 2011 is registered.

8. PW.14-Shivaji Mane has deposed before the Court that on 14th July 2011 in the morning, police inspector had deputed him to civil hospital for recording the statement of injured Sanjay. Upon enquiry, the medical officer had disclosed that Sanjay was fully conscious and in a position to give a statement. PW. 14 has proved the contents of the statement of deceased Sanjay. The said statement is at exhibit-54. The P.S.O, Shirala had also directed him to investigate Crime No. 36/2011. He had conducted the scene of offence panchnama in the presence of 2 panchas at the scene of offence. In fact, it is admitted in the cross-examination that the investigation of

Crime No. 36/2011 was entrusted to him on 13th July 2011 itself. It is admitted that the scene of offence in Crime No. 36/2011 and Crime No. 37/2011 are the same. Crime No. 37/2011 was registered on 14th July 2011 whereas Crime No. 36/2011 was registered on 13th July 2011 and therefore, the investigation was entrusted to him. It is also admitted that before recording the statement at Exhibit-54, he had informed the injured Sanjay that Crime No. 36/2011 is registered against him. It is also admitted that Arjun Kamble was admitted in Civil Hospital at the relevant time and Arjun Kamble was present in the Civil Hospital. He had not collected injury certificates of Sambhaji and Sanjay from the rural hospital Shirala. He had arrested Sambhaji in Crime No. 36/2011.

9. It is clearly admitted that there were no blood stains at the spot of incident when he had visited the spot. It is admitted that no document is produced along with the charge-sheet about the information given by the Civil Hospital, Sangli and Rural Hospital Shirala.

10. Upon meticulous appreciation of evidence it appears that the Zimur family was not on cordial terms with Kamble family. It appears that the accused persons had been to the house of the deceased to enquire about the unwarranted approach of Sanjay towards the wife of Arjun Kamble i.e. Sneha. Being annoyed by the same Sambhaji had assaulted Arvind with a stick. The reasons for the quarrel are not assigned in the history of assault narrated in Exhibit-54

i.e. the alleged statement of deceased Sanjay. The evidence of PW.11 shows that when the injured were taken to Shirala Rural Hospital, no treatment was given to injured Sanjay and injury on the abdomen was only bandaged. That in transit from Shirala to Sangli Sanjay was not in a position to talk. They reached Civil Hospital Sangli at 1.30 a.m., the time of recording the statement of Sanjay is 1.30 a.m. The injuries seemed to be simple and therefore offence was registered under sections 324 and 323 read with 34 of Indian Penal Code. Even according to PW.11, the history of the incident and the cause of injuries were narrated to the Medical Officer by Rahul. According to PW.17, the injured was conscious but not in a position to speak and therefore, he was operated immediately. PW.17 had also informed the police that the injured is not in a position to speak and therefore, his statement should not be recorded. The scene of offence panchnama in Crime No. 37/2011 on 15th July 2011 in the presence of PW.11.

11. In this circumstance, it is doubtful as to whether the said statement of Sanjay can be treated as a dying declaration. It appears to have recorded in the name of Sanjay but narrated by his cousin Rahul.

12. In fact, the accused / appellants are also injured in the same incident and Sambhaji, father of deceased was arrested in Crime No. 36/2011. However, the prosecution has not been able to adduce any material explaining the cause of injuries sustained by the accused in the same transaction. At this stage, it would be relevant to refer to the judgment of the Apex Court in the case of **Lakshmi Singh and**

Others Vs. State of Bihar¹ has held as follows :-

“It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences:

(1) That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version:

(2) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

(3) that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one”.

13. In fact, although a trifling quarrel had taken place between the accused and the deceased 2 years prior to 2011, there was no untoward incident between both the families till 13th July 2011.

14. The admission of PW.11 that the weapon of assault was scattered in front of their house, makes it clear that the weapon of assault was not carried by the accused and therefore the recovery of the weapon under section 27 of the Indian Evidence Act does not inspire the confidence of the Court.

1 AIR 1976 SC 2263

15. The learned counsel for the accused/appellants rightly submitted that the accused had reasons to go to the house of the deceased to question him about his misbehavior with the wife of accused no.2 Arjun Kamble and that it was the father of the deceased who had first mounted assault upon accused no.1. This makes the defence version more probable. The cause of altercation, or the motive of assault to the extent that it is because of the quarrel two years ago, shows that the genesis of the incident is suppressed. It is submitted that the accused had acted in self-defence, as they apprehended a danger at the hands of father of the deceased. It is also submitted that the accused have not taken undue advantage of the situation and the deceased had sustained a single injury.

16. Per contra, the learned APP submits that non- explanation of the injuries by the prosecution are not fatal to this case as the injuries sustained by the accused are not on vital parts, that there is no material to show that they were admitted in the hospital and therefore it outweighs effect of the omission on the part of the prosecution to explain the injuries. It is also submitted that even according to PW.12 the injury sustained by the deceased is sufficient in ordinary course of nature to cause death. The judgment of the lower court calls for no interference in the present case.

17. The prosecution has failed to bring on record as to whether the accused were armed with a weapon at the time when they had been to the house of the deceased. There is a categorical assertion that

injured Sambhaji was being assaulted by kicks and fist blows. In Crime No. 36/2011 the accused Sambhaji was shown as the assailant, this would show that the first assault was made on Arjun because soon after Sanjay had fallen down, the accused had left the spot.

18. The prosecution has suppressed the genesis and the origin of the occurrence. Even according to the F.I.R. the accused were not armed with a weapon when they had been to the house of the deceased. It is nobody's case that the accused had gone to the house of the deceased with an intention to assault. It was the deceased who had got the sickle from his house and in the said altercation the deceased was injured. The parents of the deceased had sustained simple injury.

19. The prosecution has not examined Sambhaji Zimur i.e. the father of the deceased who is an accused in Sessions Case No. 14 of 2012 where he was charged for an offence punishable under section 326 of Indian Penal Code.

20. The prosecution has not proved beyond reasonable doubt as to whether the accused persons had gone to the house of the deceased with an intention to assault. The accused have put forth a clear case, demonstrating their intention to go to the house of the deceased and that they had lodged the F.I.R., on the basis of which, Crime No. 36/2011 was registered prior to the registration of Crime No. 37 of 2011.

21. In view of the above discussion and the judgment of the Hon'ble Apex Court in the case of Lakshmi Singh (supra), the accused deserve to be acquitted of all the charges levelled against them. Hence the following order .

ORDER

- i) Appeal is allowed.
- ii) The judgment and order dated 26th March 2014 passed by the Additional Sessions Judge, Islampur, thereby, convicting the appellants for the offence punishable under section 302 read with 34 of Indian Penal Code is hereby quashed and set aside.
- iii) The appellants are acquitted of the offence punishable under section 302 read with 34 of Indian Penal Code.
- iv) They be released forthwith, if not required in any other offence.
- iv) The fine amount, if paid, shall be refunded.
- iv) The appeal is accordingly disposed of.

(N.R. BORKAR, J)

(SMT. SADHANA S. JADHAV, J)