

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 1131 OF 2012
WITH
INTERIM APPLICATION ST. NO. 198 OF 2021**

1. Nitesh Bhima Kurhade.
Age: 24 years, Occ.:
2. Sunil Bhima Kurhade (Separate
appeal filed)
3. Sujit @ Pappu Bhima Kurhade.
Age: 28 years, Occ:
All R/a. Kurhade Niwas, Sanjay Gandhi
Nagar, Sainath Wadi, Masjid Galli, Thane. ... Appellants.
(All presently lodged at Kolhapur Central
Prison)

V/s.

State of Maharashtra. ... Respondents.
(through Srinagar Police Station)

**WITH
CRIMINAL APPEAL NO. 229 OF 2019**

Sunil Bhima Kurhade
Aged about 37 years
R/o. Kurhade Niwas, Sainath Wadi,
Masjid Galli, Thane.
Presently incarcerated at Kolhapur
Central Prison, Kalamba, Kolhapur. ... Appellant.

V/s.

State of Maharashtra. ... Respondents.
(through Srinagar Police Station)

Ms. Payoshi Roy i/b. Dr. Yug Mohit Choudhry, advocate for appellants.

Mr. P.P. Shinde, APP for State.

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

RESERVED ON : APRIL 8, 2021.

PRONOUNCED ON : AUGUST 9, 2021.

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

1 The Appellants herein are convicted for the offence punishable under section 341 and 302 read with section 34 of the Indian Penal Code by the Ad-hoc Additional Sessions Judge-3, Thane in Sessions Case No. 281 of 2011 vide judgment and order dated 30/8/2012. The Appellants are sentenced for the offence punishable under section 302 of the Indian Penal Code to suffer Imprisonment for life and to pay fine of Rs. 5,000/- (Rs. Five thousand only) each in default to suffer further RI for three months. The Appellants are sentenced to suffer Simple Imprisonment for one month for the offence punishable under section 341 of the Indian Penal Code. Hence, this Appeal.

2 It is the case of the prosecution that deceased Shiva was a

member of Nationalist Congress Party, but subsequently had defected to Republican Party of India. On 7th April 2011 deceased Shiva and his brother Hemant were returning from their office i.e. Shiva Enterprises and when they were passing from front of Balsara Company on road No. 16, Wagle Estate a young boy signalled them to halt. The deceased was riding Activa scooter, whereas Hemant was a pillion rider. As soon as they halted, deceased Shiva was encircled by three to four persons. Accused No. 2 Sunil had abused and stabbed the deceased in his abdomen by means of a knife. The accused No. 3 Sujit withdrew the same knife which was still in the abdomen of Shiva and repeated the assault with the same knife. At the same time, accused No.1 Nitesh also dealt a blow with some sharp weapon on the head of deceased Shiva. Shiva sustained serious injuries and fell on the ground in a pool of blood. He was taken to the hospital by his brother Hemant and was accompanied by Aslam the nephew of P.W. 3, Shahanoor the wife of Shiva and one Ramesh Telang to Shree Hospital. The injured Shiva was shifted to Jupiter Hospital but was declared dead on arrival.

3 P.W. 3 Hemant Jaiswal lodged a report at Shreenagar Police Station. On the basis of his report, Crime No. 64 of 2011 was

registered against Sunil Kurhade and 2 to 3 others. The investigation was set in motion. At the trial, the prosecution has examined 16 witnesses to bring home the guilt of the accused. Implicit reliance is placed on the evidence of P.W. 3 Hemant Jaiswal, P.W. 4 Aslam Shaikh, P.W.10 Shahanoor Jaiswal wife of deceased and P.W. 13 Sameer Jaiswal, as all of them claimed to be eyewitnesses to the incident in which Shiva was murdered brutally at the hands of the accused persons. P.W. 12 Dr. Saud Bubere who was attached to Jupiter hospital as clinical assistant and P.W. 7 Dr Prashant Mane who has performed autopsy on the dead body of the deceased. P.W. 5 Rinku Sharma has proved the recovery of knife at the instance of accused No. 3, whereas P.W. 6 Sushil Pandey is witness to the recovery of iron rod at the hands of accused No.3. P.W. 14 Rajendra Thakare had received instructions from P.W. 15 Abdul Shaikh to conduct investigation in Crime No. 64/2011.

4 The first information report was recorded by API Munde, the same is at Exh.19. The supplementary statement of P.W.3 was recorded by P.W. 16 Sukhdev Ovhal. On 7th April 2011 itself the accused No. 1 was arrested. The accused No. 2 and 3 were arrested on

8th April. On 9/4/2011 the investigation was entrusted with P.W. 15 API Shaikh.

5 P.W. 3 the brother of deceased Shiva has deposed before the court that his brother Shiva was Vice President of Republican Party of India. On 7/4/2011 at about 11.45 a.m. when they were passing from front of Balsara Company, two to three person had signalled his brother Shiva to stop. The moment Shiva alighted from the scooter, he was encircled by the said four persons. The accused No. 1 had pushed P.W. 3 aside. Sunil Kurhade had stabbed the deceased, the accused No. 3 has dragged the same knife and repeated the assault. At the same time, accused No. 1 has assaulted deceased Shiva on head with an iron rod. After Shiva had collapsed, P.W. 4 Aslam, P.W. 10, Shahnoor and Ramesh Telange had taken Shiva to Shree Hospital. P.W. 3 has proved the contents of the FIR and the same is marked at Exhibit 19.

6 It is elicited in the cross-examination that the same accused person had also attacked Shiva on 27/2/2006. But there was no untoward incident thereafter. No report was filed in respect of incident dated 27/2/2006. It is categorically stated that P.W.4, P.W.10 and

Ramesh had reached the spot after the assailants had fled from the scene of offence. According to P.W. 3, he was frightened when he saw assault on his brother and therefore, he had taken no steps to rescue him although he was at 10 ft. from the scene of offence. That, his younger brother Anand had reached Jupiter hospital even before P.W. 3 could reach the hospital along with the injured and therefore, Anand had admitted Shiva in Jupiter hospital.

7 P.W. 4 Aslam Shaikh has deposed before the court that on 7/4/2011 at about 11.45 a.m. he was purchasing milk in the shop of Shariffbhai, which was situated at Kisan Nagar. His attention was drawn towards Balsara company upon hearing shouts. He has seen the assault on Shiva. He has attributed the act to all the three accused and reiterated the incident narrated by P.W. 3. He had accompanied P.W. 3 to the hospital. The assailants had fled from the scene of offence even before he could reach there.

8 P.W.10 Shahanoor happens to be wife of the deceased. According to her, on the day of the incident at about 11.30 a.m. her son Sameer rushed home to inform her that his father was being

assaulted by accused Nos. 1 to 3. She rushed towards the scene of offence and found her husband lying in a pool of blood. She saw her brother-in-law Hemant, her son Aslam and Ramesh Telang on the spot. She along with them took the injured to Shree Hospital and upon medical advice, had shifted the injured to Jupiter hospital. She was acquainted with the accused since they were residents of the same locality. According to her, the names of the accused were disclosed to her by her husband while in transit to the hospital.

9 PW. 13 Sameer happens to be the son of the deceased Shiva. According to him, on the day of the incident at about 11.45 a.m. his attention was also drawn towards Balsara company due to commotion in the said direction. He had heard people having verbal altercation. He saw the incident in which his father was stabbed by the accused persons. He has reiterated the narration of PW. 3 and 4. According to him, he was in Masjid Galli which is the internal road of Kisan Nagar No. 2. It is categorically stated in the cross-examination that the gate of Balsara company is not visible from Masjid Galli. According to him, his house is situated on one side of Road No. 16 and the Masjid Galli is situated at another side of the road.

10 The scene of offence panchanama is at Exh. 50. PW. 1 and 2 are the panchas for scene of offence panchanama, however, they are declared hostile. It is pertinent to note that the scene of offence panchanama was drawn on 7/4/2011 between 1.45 p.m. to 2.45 p.m. and the scene of offence is shown by PW. 4 Aslam Gulab Shaikh and not PW. 3 Hemant Jaiswal. The scene of offence panchanama indicates that there were blood stains on the mirror and handle of the Activa Scooter. The map which is at Exh. 52 shows that the Activa Scooter was parked at some distance from where the pool of blood is seen. There are blood stains on the footpath also.

11 PW. 11 Anand Jaiswal happens to be brother of the deceased. During investigation, it had transpired that it was Anand Jaiswal, who had admitted Shiva in Jupiter Hospital. His evidence is hearsay evidence. According to him, at about 12 O' Clock he had received a phone call from Lavlesh informing him about injuries sustained by Shiva. He was further informed that Shiva has been admitted in Shree hospital. When he reached there, he saw that Shiva was being kept into an Innova car. He, therefore, rushed to Jupiter

hospital and got him admitted. The cause of injury was divulged to him by P.W. 3. He has further disclosed that in the year 2006 also Shiva and his wife were assaulted by Sunil Kurhade and a report to that effect was filed in the police station. From 2006 to 2011 although the relations between the injured and the accused were not cordial, it was neither hostile.

12 Dr. Saud Bubere was attached to Jupiter hospital and oversaw critical care clinical association. He had examined the injured Shiva in the casualty, and had declared him as dead. According to him, Shiva had sustained multiple stab injuries on his abdomen and multiple lacerated wounds on both sides of scalp. There was a tear on his left ear. He was brought with a history of assault from Sai Hospital, Shreenagar. He was already on saline and the abdominal wounds were bandaged. The death summary was prepared by Dr. Nazneen. Death summary report is at Exh. 44 and Exh. 45.

13 It is pertinent to note that according to P.W. 3 and 10, no treatment was given at Shree Hospital. However, the evidence of Dr. Bubere is supported by the death summary report at Exh. 45 which

shows that the patient was brought to Jupiter hospital with “peripheral line in situ with dressing on stab wound of abdomen.” Dr. Bubere had further elaborated that the patient was administered saline and therefore, it is difficult to believe that no treatment was given to the injured at Shree Hospital. The death summary report further shows that the information was given to Shreenagar Police Station by Jupiter hospital. The police had arrived in the hospital and the body was handed over to police i.e. Police Constable N.B. Warghade (6460) for post mortem. The death summary report shows that there were two contused lacerated wounds on the head and 3 stab wounds on the abdomen out of which the third stab wound was extending towards back. There were in all 7 stab wounds on the person of the injured. It also appears that the injured had tried to resist the assault as a result of which stab wound is seen on his ring finger and a contused lacerated wound on the proximal part of the finger.

14 The autopsy was performed on the dead body of Shiva by P.W. 7 Dr. Prashant Male. The post-mortem notes are at Exh. 32. According to P.W. 7, the deceased had sustained as many as 14 injuries in the nature of stab wounds and contused lacerated wounds. All the

external injuries had corresponding internal injuries. It is elicited in the cross-examination that 5 stab wounds mentioned in Sr. No. 7 to 11 which are in the nature of multiple omental tears must have been caused due to five independent blows. The injury No. 7, 8, and 9 were appearing on the chest. Injury No. 9 was little behind the portion of chest at auxiliary region. Injury No. 2 to 6 are outcome of independent blows. Similarly, it can be said that all the injuries were the result of independent blows. It is categorically stated in the cross-examination that there was no rigor mortis till 6.30 p.m. According to P.W. 7, Thane and Mumbai are hot region and in hot region, rigor mortis would develop rapidly. The autopsy had commenced at 4.30 pm. and had ended at 6.30 p.m. The autopsy was performed at V. S. General Hospital.

15 The FIR was registered at the instance of Hemant Jaiswal on 7/4/2011 at 1.30 p.m. As per the direction of IO API Shaikh P.W. 14 Rajendra Thakare had conducted panchanama of scene of offence. He had described the articles which were found on the spot. The scene of offence panchanama is at Exh. 50. **P.W. 14 did not find any blood stains on the clothes of Aslam.** The vehicle of the deceased was facing

towards road No. 16 and according to P.W. 13, the incident had not taken place on the road in front of Balsara company. On 9th April, 2011, the investigation was handed over to P.W. 15 Abdul Shaikh. According to him, initial investigation was carried on by P.W. 16 PI Ovhal. In fact, the papers of investigation indicate that the first information report was recorded by PI Munde who arrested the accused No. 2 and 3 on 8/4/2011 whereas accused No. 1 was arrested by PSO Chavan on 7/4/2011 itself. API Shaikh had visited Jupiter hospital and conducted inquest panchanama (Exh. 29) on the dead body. That Police Head Constable More had produced the memorandum of recovery panchanama of the accused which is at Exh. 23 and 24. According to P.W. 14, in 2006 P.W. 10 Shahanoor had filed FIR against the accused person for the offence punishable under section 324 of the Indian Penal Code. In fact, he has also filed the copy of FIR and the extract of crime register with the charge-sheet and the same is not exhibited.

16 Upon perusal of record, it appears that Crime No. 65/2006 was registered at Shreenagar Police Station against Sunil and Sujit Kurhade. A charge-sheet is filed in Crime No. 65/2006 and is

registered as Case No. 341/2006. It is pertinent to note that P.W. 10 the wife of the deceased Shahanoor has categorically stated that no report was filed at the police station.

17 P.W. 16 is the investigating officer and according to him, the role of the accused No. 1 Nitish Kurhade has transpired while recording the supplementary statement of P.W. 3 and his name was not disclosed in the FIR which is at Exh 19. P.W. 16 has proved the omission and contradictions in the evidence of the witnesses.

18 Learned Counsel for the accused has vehemently submitted that the presence of P.W.3 at the scene of offence is doubtful. According to the learned Counsel, P.W, 3 had not taken any efforts to intervene and rescue his brother from the clutches of the accused persons. Secondly, the injured was shown to be admitted in Jupiter hospital by the third brother Anand Jaiswal. Thirdly, the medical case paper, showing that the injured was ever taken to Shree/ Sai hospital is not filed on record. The learned Counsel has stated that even though, the death summary report shows that the injuries were treated at Shree/ Sai Hospital, P.W. 3 has categorically stated that no treatment was

given to the injured in the Shree/ Sai hospital. Fifthly, it cannot be a mere coincidence that the witnesses who are family members were in the same vicinity at the same time when the incident occurred. The evidence of P.W. 3, 4 and 10 are falsified to the extent that they took him to the hospital, since the clothes of none of the witnesses were stained with blood. The learned Counsel further submits that according to P.W. 3, the accused No. 3 had drawn the knife from the abdomen of Shiva who was already stabbed by accused No. 2 and he repeated the said assault second time and at the same time, accused No. 1 had assaulted the deceased with an iron rod on his head is falsified by the death summary report as well as the post mortem notes since the p.m. notes would show that the deceased had sustained as many as 8 to 9 stab wounds and the others were contused lacerated wounds. She has drawn the attention of this Court to the contents of the FIR and the substantive evidence of P.W. 3 and has submitted that the motive for assault is not spelt out by P.W. 3 in his substantive evidence. Therefore, the motive for such a brutal assault in the broad day light is not put forth before the court. And hence, according to the learned Counsel, the accused appellants have been falsely implicated in the present case only because there was some dispute between the deceased and the

accused persons in 2006. Therefore, they deserve to be acquitted of all the charges.

19 Per contra, learned APP submits that the evidence of the solemn testimony of P.W. 3 cannot be lightly brushed aside because of certain trifling lacunas during investigation. It is submitted that there is recovery of one knife and iron rod at the instance of accused No. 3 Sujit. The learned APP submits that there are four eye-witnesses, on the basis of whose testimony the conviction is recorded and the evidence of eye witnesses cannot be doubted. Hence, the judgment of the trial court calls for no interference.

20 At this stage it is pertinent to note that there is recovery of weapons at the behest of accused No. 3 Sujit only. One of the weapons is butcher's knife. The second weapon is the iron rod. It is true that P.W. 3 has only testified in respect of two stab wounds and an assault with iron rod on the head of the deceased. However, the medical evidence would show that there are more than five stab wounds, five contused lacerated wounds. Hence, the evidence of eye-witnesses is falsified by the medical evidence and it is doubtful as to whether he

had seen the injuries mounted upon the deceased. It is in view of this that the recovery under section 27 of the Indian Evidence Act cannot be said to be proved.

21 In order to place implicit reliance upon the evidence of eye-witnesses, the testimony of eye-witnesses should necessarily stand the test of cross-examination. The quality of testimony of an eye witness should be of a sterling nature. It is not the quantity of eye-witness but the quality of their testimony should be such, that it leaves no room to doubt the genuineness of the case put up by the prosecution and the possibility of there being any other view should be ruled out.

22 It is not known as to why the name of the accused No. 1 did not find place in the first information report and had transpired only in the supplementary statement, although it was the accused No. 1 who had pushed P.W. 3 aside. Accused No. 1 was the first person to approach the deceased and P.W. 3. It is stated in the first information report by P.W. 3 that a boy aged about 20 to 22 years had signalled them to stop. The investigating agency has not conducted the test

identification parade to verify as to whether it was the accused No. 1 who had signalled the deceased to halt. P.W.3 is the only witness who had seen the boy who had apprehended them. Crime No. 64 of 2011 is registered against Sunil Kurhade and his brother Sujit. The accused No. 1 is also not identified as the brother of accused Sunil. The name of accused No. 1 has transpired only by way of supplementary statement recorded by P.W. 16. In fact, the accused No. 1 was the first person to be arrested near Pipeline in a slum in Wagle Estate No. 2, Kisan Nagar, which is in close vicinity of the place where the incident had taken place. This would show that the accused No. 1 had neither absconded nor fled far away. He was arrested by police constable S.S.Patil. The accused Nos. 2 and 3 were arrested on 8/4/2011. Even according to P.W. 16, P.W.4 Aslam had not attributed any act to the accused No. 1 Nitesh. The iron rod alleged to have been used by Nitesh was also found at the behest of accused No. 3 Sujit. It is in these circumstances that the participation and involvement of accused No. 1 Nitesh is doubtful in the present case. In the absence of test identification parade, it cannot be said that P.W. 3 had identified the person, who pushed him, as the accused No. 1.

23 In the present case, according to P.W. 3, accused No. 2 first stabbed the deceased and accused No. 3 withdrew the same knife and stabbed on the same site i.e. the abdomen. This would show that only two injuries were noticed by P.W. 3, who was quietly standing at a distance and watching his brother being stabbed. Injury No. 7, 8 and 9 indicated in column No. 17 of post-mortem notes, are on the chest of the deceased. In all, there are 5 stab wounds. Injury Nos. 2 to 6 are outcome of independent blows. But according to P.W. 3, even accused No. 1 had given a single blow on the head. The medical evidence is discussed above. In this case, the discrepancy in Medical Evidence and the testimony of P.W. 3 is fatal to the prosecution. Especially because the evidence of P.W. 3 does not prove that he had seen the actual assault upon the deceased. There is no doubt that Shiva died a homicidal death. Investigation is to track the author of the said injuries and the trial is necessarily to fasten the liability of the homicidal death and punish him according to law.

24 It is the specific case of P.W. 3 and P.W. 4 that they had carried the deceased to the hospital. However, the investigating officers have categorically stated that there were no blood stains on

their clothes. It is stated by them that they had carried the injured in a rickshaw. P.W. 3, P.W. 4 and P.W. 10 all had gone in the same rickshaw with the injured who had gone in the same rickshaw with the injured who had sustained 7 stab-wounds and yet there were no blood stains on their clothes.

25 The incident had taken place in broad day light. The assailants had not fled in any vehicle. It was a busy road with shops on both sides of the road and yet, the accused was not apprehended by any member of the public and no one claims to have seen the direction in which the accused fled from the scene of offence. Non-intervention of the blood relatives, non-examination of independent witness, absence of blood-stains on the clothes of the witnesses who carried him to the hospital, non examination of Special Executive Magistrate who conducted test identification parade are all fatal to the prosecution.

26 P.W. 3 claims that no treatment was given in Shree Hospital but the records of Jupiter hospital would show that the injuries were bandaged and saline was being given to him. Moreover, the deceased was admitted by Anand Jaiswal and not by P.W. 3, P.W. 4 or P.W. 10.

27 All this aforesaid discussion would lead to inevitable inference that the prosecution has failed to establish its case beyond reasonable doubt. Hence, the appellants deserve to be acquitted of all the charges levelled against them.

28 Hence, following order is passed.

ORDER

- (i) Both the Appeals are allowed.
- (ii) The conviction and sentence imposed upon the accused/appellants in both the appeals vide Judgment and Order dated 30/8/2012 passed by Ad-hoc Addl. Sessions Judge-3, Thane is hereby quashed and set aside.
- (iii) The accused/appellants are acquitted of all the charges imposed upon them. They be released forthwith, if not required in any other case.
- (iv) Fine amount, if paid, be refunded.
- (v) Both the appeals are disposed of accordingly.
- (vi) In view of disposal of both the appeals, nothing survives in the Interim Application. The same is disposed of accordingly.

(N.R. BORKAR, J)

(SMT. SADHANA S. JADHAV, J)