

1

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

**CRIMINAL APPEAL NO.198 OF 2017
AND
CRIMINAL APPEAL NO.199 OF 2017**

CRIMINAL APPEAL NO.198 OF 2017

Arif Baksh Mehboob Baksh,

Aged about 35 years, occupation -

Driver, resident of Shaukat Ali

Square, Ganjipeth, Nagpur.

..... **Appellant.**

:: VERSUS ::

The State of Maharashtra, through

Police Station Officer, Police Station

Sakkardara, Nagpur.

..... **Respondent.**

CRIMINAL APPEAL NO.199 OF 2017

Jakir Baksh Mehboob Baksh,

Aged about 40 years, occupation -

Private, resident of Mahendra

Nagar, Nagpur.

..... **Appellant.**

:: VERSUS ::

The State of Maharashtra, through

Police Station Officer, Police Station

Sakkardara, Nagpur.

..... **Respondent.**

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Shri G.S.Shegaonkar, Counsel appointed for Appellants.

Shri T.A.Mirza, Additional Public Prosecutor for Respondent/State.

Shri H.G.Katekar, Counsel for the Complainant.

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CORAM : **V.M.DESHPANDE, & AMIT B.BORKAR, JJ.**
DATE : **SEPTEMBER 16, 2021**

COMMON JUDGMENT (Per : V.M.Deshpande, J.)

1. These two appeals are directed against judgment and order of conviction dated 17.2.2017 passed by learned Additional Sessions Judge, Nagpur in Sessions Trial No.186/2013.

2. By the said judgment and order of conviction, learned Judge convicted appellants for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and directed that they shall suffer imprisonment for life and to pay fine Rs.5000/- by each of them and in default of payment of the fine amount to undergo further rigorous imprisonment for 6 months.

In addition to the said, appellant-Arif Baksh Mehboob Baksh is also convicted for offence punishable under Section 294 of the Indian Penal Code and directed that he shall suffer rigorous imprisonment for 3 months and to pay fine Rs.1000/- and in default of payment of the fine amount to undergo further simple imprisonment for 15 days.

3

Appellant-Arif Baksh Mehboob Baksh, is also convicted for offence punishable under Section 506-B of the Indian Penal Code and directed that he shall suffer rigorous imprisonment for 3 years and to pay fine Rs.2000/- and in default of payment of the fine amount to undergo further simple imprisonment for 3 months.

Learned Judge directed that all substantive jail sentences shall run concurrently.

Remaining accused persons were acquitted.

3. Criminal Appeal No.198/2017 is filed by Arif Baksh Mehboob Baksh, original accused No.1. Whereas, Criminal Appeal No.199/2017 is filed by Jakir Baksh Mehboob Baksh, original accused No.2. These two appeals were taken up for hearing simultaneously and they are decided by this common judgment. In both these appeals, appellants are represented by learned counsel Shri G.S.Shegaonkar who was appointed by the High Court Legal Services Sub Committee at Nagpur to represent them. Respondent/State is represented by learned Additional Public Prosecutor Shri T.A.Mirza.

4

4. The prosecution case, disclosed during course of trial, is as under:

(A) Abhijit s/o Narayan Sonawane (PW5), on 5.1.2013 was attached to Sakkardara Police Station, Nagpur as Police Sub Inspector. He was on duty from 10:00 p.m. of 5.1.2013 to 10:00 a.m. of 6.1.2013. In the night, when he was patrolling along with staff, he received a wireless message from control room that somebody is stealing tyres of vehicle at Bhande Plot Square. He, therefore, reached Bhande Plot Square. Though search was made, nobody was found stealing tyres of vehicle. When he was at Bhande Plot Square, a person came and intimated him about assault being made by two persons by means of weapon near Shitla Mata Mandir. Therefore, he hurriedly rushed towards Shitla Mata Mandir by police vehicle. When police party was proceeding, Abhijit Sonawane received a wireless message from control room that some persons are

5

beating somebody near Shitla Mata Mandir. When the police party reached near Shitla Mata Mandir, Abhijit Sonawane noticed that a four wheeler vehicle was parked and two persons were standing and one person was lying on ground. Out of these two persons, who were standing, one of them was beating a person, who was lying on ground, by means of a stone. Abhijit Sonawane, along with police party, hurriedly alighted from vehicle and rushed towards those persons. That time, another person, who was standing, shouted “चलना बे चलना बे पोलीस आ गयी”. However, the police party was successful to apprehend those two persons. Abhijit Sonawane, thereafter, enquired about their identities. The person, who was beating by stone, disclosed his name as Arif Baksh and name of another person was Jakir Baksh. In the meanwhile, two persons came there and they informed Abhijit Sonawane that Arif Baksh and Jakir Baksh beat third person whose name was Naushad. Abhijit Sonawane

6

made enquiry with those two persons and they disclosed their names as Kaisar (PW1) and Rafique (PW2). On the spot, they disclosed Abhijit Sonawane that Arif Baksh and Jakir Baksh beat Naushad by a sharp edged weapon and stones. After some time, relatives of Naushad came in vehicle. In the said vehicle, Abhijit Sonawane sent Naushad along with his constable to medical hospital. He also sent apprehended Arif Baksh and Jakir Baksh to police station by police jeep and gave an information to superior about the entire incident. He, thereafter, called additional staff. He also requested two persons on the spot to act as panchas. He executed spot-cum-seizure panchnama (Exhibit-132). He also found blood stained stones and blood stained knife on the spot. Those were seized. He also seized simple soil and blood smeared soil from the spot. Thereafter, he along with staff and Kaisar went to the police station where Kaisar gave his report. The report was typed as per

7

information of Kaiser. The report was read over to him and he signed it. His report is at Exhibit-111. Thereafter, Abhijit Sonawane registered the offence, vide Crime No.5/2013, punishable under Sections 302 and 506-B read with Section 34 of the Indian Penal Code and under Sections 4 and 25 of the Arms Act, 1959. Printed First Information Report is at Exhibit-112.

(B) First Information Report (Exhibit-111) is lodged by Kaiser (PW1). He is also known as Shahgaji Khan alias Kaiser s/o Sofi Ahmed Khan. As per the report, he and Naushad (deceased) were partners in their transport business runs under the name and style as “Maharashtra Karnataka Transport” and one Ishwarlal Sahu was there Manager. In intervening night of 5.1.2013 and 6.1.2013, when he and Naushad were proceeding towards their houses by Activa vehicle of Naushad, near Shitla Mata Mandir Square, Naushad

8

gave a phone call to Sheikh Rafique s/o Sheikh Ibrahim (PW2) for dinner. When he and Naushad were standing near Shitla Mata Mandir Square, a silver colour Tata Indigo car came and two persons alighted from the said car and they picked up a quarrel initially verbal with Naushad and also started abusing him and when the first informant tried to intervene, he was threatened and asked to leave the place. Thereafter, under the fear, the first informant left and hid himself nearby. As per the First Information Report, Arif Baksh, original accused No.1, took out a knife from his car. Jakir Baksh, original accused No.2, caught hold hands of Naushad from his behind. Arif Baksh started assaulting by means of the weapon in his hand. Naushad was shouting and he fell down on the ground. Thereafter, Arif Baksh threw the knife on the ground and uplifted a big stone and hit on the head of Naushad. That time Sheikh Rafique came to whom the first informant disclosed the entire incident. That

9

time, Sheikh Rafique tried to save Naushad. However, he immediately came back and the first informant along with him started to proceed towards Sakkardara Police Station on vehicle. However, near Bhande Plot Square the two wheeler of Sheikh Rafique dried and, therefore, the first informant informed on telephone No.100 and intimated the incident.

The above is the gist of the First Information Report.

(C) Police Sub Inspector Abhijit Sonawane (PW5), arrested both the accused under arrest form (Exhibits-157 and 18 respectively). He also executed arrest panchnama (Exhibit-146) in presence of two panchas. Clothes of both accused persons were seized under seizure panchnama (Exhibits-147 and 148 respectively). That time, clothes were stained with blood. He also recorded statement of one Ishwarlal Sahu. Thereafter, further investigation was carried by

10

Police Inspector Appasaheb s/o Baba Lengre (PW11).

(D) After the investigation was entrusted to Police Inspector Appasaheb Lengre (PW11), he ordered to conduct inquest. Accordingly, Police Sub Inspector Chaware conducted inquest panchnama (Exhibit-178). He also recorded statements of staff members who were accompanied by Police Sub Inspector Abhijit Sonawane (PW5). Also, recorded statement of first informant Shahgaji Khan alias Kaisar (PW1). He also seized clothes of the deceased under seizure panchnama (Exhibit-220) which were having numerous blood stains.

(E) During course of the investigation, Police Inspector Appasaheb Lengre (PW11) obtained police custody remand of both accused persons. During course of the investigation, on the basis of memorandum statements made by both the accused, complexity of other accused persons was revealed and, therefore, they were

11

arrested. Test Identification Parade was also held. After completion of other usual investigation, he filed chargesheet.

(F) Charge was framed against appellants and 4 others. However, only appellants, i.e. accused Nos.1 and 2, were convicted for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and others were acquitted.

5. We have heard in detail learned counsel Shri G.S.Shegaonkar appointed by the High Court Legal Services Sub Committee at Nagpur to represent appellants and learned Additional Public Prosecutor Shri T.A.Mirza for the respondent/State. With their able assistance, we have gone through both volumes of paper-books.

6. According to learned counsel for appellants, evidence of first informant Shahgaji Khan alias Kaisar (PW1) is not trustworthy. He, therefore, submitted that his entire evidence is to be discarded. He also submitted that evidence of Police Sub

12

Inspector Abhijit Sonawane (PW5) does not implicate at all appellant Jakir Baksh. Therefore, it was his submission that both appeals be allowed.

7. *Per contra*, learned Additional Public Prosecutor for the respondent/State supported the judgment and order of conviction impugned in these appeals.

8. While re-appreciating and re-evaluating entire prosecution case afresh, we noticed that the prosecution case is basis of direct evidence which is fully corroborated by circumstances and scientific evidence.

9. Dr.Hrishikesh Pathak (PW10), who conducted more than 2000 postmortems till 6.1.2013, conducted postmortem over dead body of Naushad. He noticed following injures :

“(i) Lacerated wound present over right temporal region, 4 cm above right ear pinna of size 4.5. cm x 1.5 cm. Bone deep underlying bone fractured. Lacerated wound placed horizontally.

10.(ii) Lacerated wound present over left occipital region of size 4 cm x 2.5 cm x bone deep.

13

(iii) Chop wound present over left forehead of size 7 cm x 0.5 cm x bone deep underlying bone fractured, chop wound vertically oblique with lower end placed over middle 1/3rd part of left eyebrow.

(iv) Chop wound present over left side of face of size 6.5 cm x 0.5 cm x bone deep, horizontal with medial end placed over left infraorbital region and lateral end just in front of upper 1/3rd part of left ear pinna.

(v) Chop wound present 5 cm below injury No.4 of size 17 cm x 3 cm x bone deep, horizontally oblique spanning from left maxillary region to left ear with chopping of ear lobule.

(vi) Multiple contused abrasions present over right forehead, right zygomatic region and adjacent area of cheek, of size varying from 2.5 cm x 2 cm to 0.5 cm x 0.5 cm..

(vii) Incised wound present over anterior aspect of neck, 5 cm below chin of size 7 cm x 2 cm x muscle deep, horizontally, incised wound placed on either side of midline, 5 cm left side and remaining 2 cm on right side.

(viii) Abrasion present over right mandibular region 3 cm from midline of size 6 cm x 0.2 cm horizontal red.

14

(ix) Abrasion present 1 cm below injury No.8 of size 6 cm x 0.2 cm horizontal red.

(x) Incised wound present over area overlying lower margin of right jaw 1 cm from midline of size 3 cm x 0.3 cm x muscle deep horizontal with tailing towards midline.

(xi) Stab wound present over anterior aspect of chest on left side 3 cm below supra sternal notch and 7 cm from midline of size 3 cm x 1 cm x muscle deep, vertical both end sharp and margins clean cut.

(xii) Stab wound present over anterior aspect of chest on left side, 5 cm below and 2 cm lateral from left nipple of size 5 cm x 2 cm @ muscle deep, horizontal, both ends sharp and margins clean cut.

(xiii) Stab wound present 7 cm below left nipple of size 3.5 cm x 1.5 cm x muscle deep, horizontal, both ends sharp and margins clean cut.

(xiv) Stab wound present over right epigastric region region, 3 cm below xiphisternum and 2 cm from midline, of size 4.5 cm x 1 cm x cavity deep, vertical, both ends sharp and margins clean cut, directed backward, downward and medially.

(xv) Stab wound present over umbilical region on right side, 2.5 cm above umbilicus and 2 cm from

15

midline of size 4 cm x 1.5 cm x cavity deep, vertical, both ends sharp and margins clean cut, directed backward, downward and medially with coils of intestine protruding out from the stab wound.

(xvi) Stab wound present over anterior aspect of abdomen on right side, 10 cm lateral to injury No.15 of size 3 cm x 1.5 cm x cavity deep, vertical, margins clean cut, both end sharp, directed backward, medially and downward.

(xvii) Stab wound present over left epigastic region, 2.5 cm from midline of size 4.5 cm x 2.5 cm x cavity deep vertically oblique, margins clean cut, both ends sharp, directed backward, downward and laterally with coils of intestine protruding out from the stab wound.

(xviii) Stab wound present over umbilical region on left side, 2.5 cm above umbilicus of size 2.5 cm x 1 cm x muscle deep, horizontally oblique both and sharp, both margins clean cut.

(xix) Stab wound present over left hypochondrium of size 4 cm x 1.5 cm x cavity deep, vertical, both ends sharp and margins clean cut, directed medially, downward and backward.

(xx) Stab wound present over anterior aspect of left thigh, middle 1/3rd of size 5 cm x 1.5 cm x muscle deep, horizontal, both ends sharp and margins clean cut.

16

(xxi) Abrasion present over anterior aspect of right knee of size 0.5 cm x 0.5 cm, red

(xxii) Incised wound present over anterior aspect of left wrist of size 5 cm X 1 cm X muscle deep, horizontal.

(xxiii) Incised wound present over left palm over thenor area of size 5cm x 2 cm x muscle deep, horizontally oblique.

(xxiv) Chop wound present over dorsum of left hand of size 5 cm X 1 cm X bone deep, horizontal.

(xxv) Abrasion present over posterior aspect of left thigh, middle 1-3rd of size 10 cm X 0.5 cm, vertically, oblique red.

(xxvi) Abrasion present over posterior aspect of left elbow of size 1 cm X 1 cm, red.

(xxvii) Abrasion present 1 cm below injury No.26 of size 1 cm X 0.5 cm, red.

(xxviii) Incised wound present over dorsum of right hand and adjacent area of dorsum of right index finger of size 4 cm X 1 cm X bone deep, vertical.

(xxix) Incised wound present over dorsal aspect of right ring, little and middle finger over overlying proximal phalanges, horizontal each of size 2 cm

17

X 0.4 cm X bone deep.

(xxx) Multiple abrasions present over posterior aspect of right elbow and adjacent area of posterior aspect of right forearm of size varying from 5 cm X 0.3 cm to 3 cm X 0.2 cm, horizontally oblique, red.

(xxxi) Chop wound present over posterior aspect of right forearm, upper 1/3rd of size 6 cm X 1.5 cm X bone deep, horizontally, oblique.

(xxxii) Chop wound present over posterior aspect of right wrist and adjacent area of dorsum of right hand of size 5 cm X 1.5 cm X bone deep, horizontal.”

He proved Postmortem Report (Exhibit-209).

According to evidence of Dr.Pathak and contemporaneous document Exhibit-209, all injuries found on the body of Naushad were ante-mortem. Cause of death was given as, “*injuries to vital organs.*”

11. In view of injuries noticed by panchas, while conducting inquest panchnama, injuries noticed by the Autopsy Surgeon as mentioned in Postmortem Report (Exhibit-209), and his

18

substantive evidence, there cannot be any doubt in anyone's mind that Naushad died not only unnatural death but also he suffered homicidal death.

12. According to the prosecution, both accused persons are responsible for homicidal death of Naushad. In order to prove the said aspect, the prosecution examined 3 witnesses as eyewitnesses, they are :

- (1) first informant Shahgaji Khan alias Kaisar (PW1);
- (2) Sheikh Rafique s/o Sheikh Ibrahim (PW2),
- (3) Police Sub Inspector Abhijit Sonawane (PW5).

However, Sheikh Rafique (PW2), though supported and corroborated version of first informant Shahgaji Khan alias Kaisar (PW1) about deceased made phone call to him, he resiled from his earlier statement in respect of witnessing of actual incident of murder.

13. Evidence of Police Sub Inspector Abhijit Sonawane (PW5) shows that he has not seen earlier part of assault made by Arif Baksh by means of knife. He is the witness to later part of

19

assault made by Arif Baksh when Naushad was lying on the ground in an injured condition and he was hit by big 10 kilograms stone.

14. According to the prosecution case, there was a motive for eliminating Naushad as there was a previous quarrel between acquitted accused No.4-Sheikh Ilyas Sheikh Bahadar and Naushad on 31.12.2012.

15. According to Sayed Mohsin Sayed Salim (PW9), who speaks about earlier quarrel dated 31.12.2012, also states in his evidence that on 2.1.2013 when he was going to bring spare parts of vehicle, that time in front of office of Jakir Baksh, he and others were standing and acquitted accused No.4-Sheikh Ilyas Sheikh Bahadar told this prosecution witness that, “नौशाद को देखना पड़ेगा”. On the point of earlier dispute, one Sardar Khan s/o Hanif Khan (PW7) was examined, but he turned hostile. Salman (PW8), the son of deceased Naushad, was also examined to prove the previous dispute.

16. Though the prosecution examined witnesses, in respect of the previous dispute, it appears that the previous dispute was not

between appellants and deceased Naushad but the dispute was between the deceased and the acquitted accused.

In that context, it was submitted by learned counsel for appellants that there was no motive on the part of appellants to commit murder of Naushad.

17. Motive plays a very important role in cases which are solely basis of circumstantial evidence. Motive loses its importance when direct evidence in the nature of eyewitness account is available.

18. In present cases, we have seen that there are eyewitnesses and we have noted that those eyewitnesses are examined by the prosecution.

19. Shahgaji Khan alias Kaisar (PW1), is not only first informant but also he is eyewitness. This prosecution witness proved his oral report (Exhibit-111) which was lodged immediately after the incident. His evidence is on the line of facts which he disclosed immediately to police in the First Information Report. His

21

evidence is corroborated by Sheikh Rafique s/o Sheikh Ibrahim (PW2) to the extent deceased Naushad made a phone call to him and he called him near Shitla Mata Mandir Square.

20. Evidence of first informant Shahgaji Khan alias Kaisar (PW1) shows that after initial verbal altercation on spot of incident, which was started by both the accused, when he tried to intervene, he was threatened and was asked to leave place and due to the threat extended to him that if he is not living the place of the incident, he will require to face dire consequences, it appears that under fear this prosecution witness went nearby from where he has seen the entire assault. His evidence shows that Jakir Baksh, accused No.2, caught hold hands of Naushad and Arif Baksh, accused No.1, firstly assaulted by means of knife all over the body of Naushad and, thereafter, when he fell down Arif Baksh lifted a big stone and hit on injured Naushad.

21. Evidence of first informant Shahgaji Khan alias Kaisar (PW1) is fully corroborated by Police Sub Inspector Abhijit Sonawane (PW5) in respect of the assault made by Arif Baksh,

22

accused No.1, by means of stone.

22. According to evidence of first informant Shahgaji Khan alias Kaisar (PW1), by means of knife Arif Baksh, accused No.1, assaulted all over the body of Naushad. The said stands corroborated looking to injuries as mentioned in Postmortem Report (Exhibit-209).

23. The patrolling police party led by Police Sub Inspector Abhijit Sonawane (PW5) apprehended both the accused on the spot itself. Blood stained knife and blood stained stone were seized from the spot itself. Clothes of accused persons were also seized immediately after their arrest and they were having blood stains on the same.

24. Similarly, it was noticed that Arif Baksh, accused No.1, was having injury on his palm and, therefore, he was referred for his medical examination to Dr.Nilesh Agrawal (PW14). Dr.Agrawal's evidence shows that he found, "*lacerated wound over his right hands' middle finger distal phalanx of size 1x0.25x0.25 cm.*" Exhibit-286 is his injury report. No injury was found on the

23

person of Jakir Baksh, accused No.2. When Arif Baksh was examined by learned Judge of trial Court under Section 313 of the Code of Criminal Procedure, he could not offer any explanation for injuries appearing on his person.

25. We cannot forget that, as per eyewitness account of first informant Shahgaji Khan alias Kaisar (PW1), it is Arif Baksh, accused No.1, who assaulted Naushad by means of knife. Thus, he was handling a sharp edged weapon. In that context, injury found, as noted by Dr.Nilesh Agrawal (PW14), has its own importance.

26. After careful consideration of evidences of first informant Shahgaji Khan alias Kaisar (PW1) and Police Sub Inspector Abhijit Sonawane (PW5), we found that their evidences are trustworthy. There is no reason for Abhijit Sonawane to falsely implicate any of accused persons. Similarly, nothing could be brought on record during course of cross-examination of Shahgaji Khan alias Kaisar that there was any motive on his part to implicate any of accused falsely. Rather, on spot arrest of both accused persons, having blood stains on their clothes, has its own

24

importance in favour of the prosecution.

27. The Investigating Officer sent muddemal properties to Chemical Analyzer in a sealed condition. Chemical Analyzer's Report (Exhibit-88) shows that the knife and the stone in a sealed condition were received in the office of the Chemical Analyzer. On examination, the Chemical Analyzer found that the knife was stained with blood having Blood Group "A". Whereas, though blood group of blood noticing on the stone was not determined, it was human blood. None of blood group was determined as Blood Group "A". Chemical Analyzer's Report (Exhibit-91) shows that clothes of deceased Naushad as well as soil smeared with blood collected from the spot were having blood of "Group-A". The said Chemical Analyzer's Report further shows that full shirt; jean full pant; and pare of sports shoes of Arif Baksh, accused No.1, were stained with blood having Blood Group "A". Similarly, full shirt and pare of sport shoes of Jakir Baksh, accused No.2, were also stained with blood of Blood Group "A".

In our view, thus, scientific evidence also corroborates

the prosecution case.

28. One of submissions of learned counsel for appellants was that there was overt act on the part of appellant Jakir Baksh, accused No.2, and role attributed to him only by first informant Shahgaji Khan alias Kaisar (PW1) was that he caught hold hands of Naushad. In our view, the law laid down by the Honourable Apex Court in the case of Manik Das and ors vs. State of Assam, reported at AIR 2007 (Vol.94) SC 2274 clinches the issue in favour of the prosecution and in the light of the law laid down, we have no difficulty to reject the submission advanced on behalf of Jakir Baksh and accordingly we rejected the said submission.

29. Re-appreciation of the entire prosecution case, we are of view that evidences of first informant Shahgaji Khan alias Kaisar s/o Sofi Ahmed Khan (PW1) and Police Sub Inspector Abhijit Sonawane (PW5) are found to be trustworthy and the scientific evidence in the nature of Chemical Analyzer's Reports fully corroborate the prosecution case.

30. Learned Judge before whom the trial was conducted,

26

in our view, has rightly appreciated the entire prosecution case in detail and was right in recording finding of guilt against both the accused persons.

31. In view of the above, we pass following order:

ORDER

(1) Criminal Appeal Nos.198 and 199 of 2017 are hereby dismissed.

(2) Learned counsel Shri G.S.Shegaonkar, appointed through the High Court Legal Services Sub Committee at Nagpur to represent appellants, is entitled to receive his professional charges from the said Committee and we quantified the same at Rs.5000/-.

The criminal appeals are dismissed and disposed of accordingly.

JUDGE

JUDGE

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