

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO. 5 OF 1990

Abdul Rasheed s/o Abdul Gani Qureshi,
Age : 56 yrs, Occ. Business,
R/o. Labour Colony, HIG Colony,
Nanded, Tq & Dist. Nanded.

...Rev. Petitioner

Versus

1. Khalil Pasha s/o Shaikh Bashir
Age 30 yrs, Occu. Labourer,
R/o Labour Colony, Nanded.
2. Shaikh Bashir s/o Sk. Maheboob
Age 45 yrs, Occu. Mill Servant
R/o As above.
3. Maheboobali Khan s/o Akbarali Khan
Age 40 yrs, Occu. Kiran Shop,
R/o Labour Colony, Nanded.
4. Sk. Aleem s/o Sk. Bashir
Age 19 yrs, Occu. Wireman
R/o Labour Colony, Nanded.
5. Rahim Nabi Patel
Age 19 yrs, Occu Flour Mill,
R/o Badegaon, Tq. Bhokar,
Dist. Nanded.
6. Khaja Pasha s/o Sk. Bashir
Age 30 yrs, Occu. Electric Wireman,
R/o. Labour Colony, Nanded.
7. The State of Maharashtra ...Respondents.

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Mr. Zia-ul-Mustafa & Mr. Taher Ali Quadri, Advocate for the petitioner.
Mr. Anant R. Devakate, Advocate for respondent nos.1, 5 & 6.
Mr. Anil M. Gaikwad, Advocate for respondent nos.2 & 4.
Mr. S.B. Narwade, APP for the State.

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CORAM : S.G. MEHARE, J.

RESERVED ON : 12th OCTOBER, 2022
PRONOUNCED ON : 16th DECEMBER, 2022

JUDGMENT :-

1. Being aggrieved by the Judgment of acquittal passed by the learned Additional Sessions Judge, Nanded, in Sessions Case No.106 of 1998 for the offences punishable under Section 147, 148, 302 read with 34 of the Indian Penal Code dated 27.09.1989, the complainant has preferred this revision under Section 401 of the Criminal Procedure Code.

2. Heard the learned counsels for the petitioner/complainant and respondents/accused after the remand of the case from the Hon'ble Supreme Court.

3. The facts of the case, in brief, were that the deceased was the son of the complainant. It was alleged against the accused that on 14.2.1988 at about 8.30 p.m. at Labour Colony Nanded, they beat the deceased with kicks and blows. Accused no. 2 Sk Bahsir Sk. Mehboob held the deceased from behind and accused no.4 Sk. Alim Sk. Bashir beat the deceased on his chest and left arm with the iron punch. The eyewitness witnessed the blood oozing from his chest and arm. After the assault, the accused fled to a labour colony. The deceased ran towards the Fire brigade station and fell into the mud. P.W. 3, the

eyewitness, intimated the incident to the family of the deceased. Then in a short time, P.W. 10, Firoz Abdul Gani, the brother of the deceased, reached the spot of the incident. P.W. 3 Moinuddin Isamudding and P.W. 4 Sayyad Jamil were present there. They picked up the deceased and kept him in the autorickshaw. P.W.10 Firoz took him to the Government Hospital. On the way to the hospital, the deceased narrated the incident to him. P.W. 5 Abdul Gani Sk. Mehboob, the father of the deceased, went to the hospital. The deceased narrated the incident to him. During treatment, he died between 11 to 11.30 pm on the same day. P.W.5 Abdul Gani lodged the report to the police station at 3 to 3.30 a.m. The Police registered the crime against the accused and put the wheel of the investigation into motion. After completing the investigation, the Investigation Officer submitted the investigation completion report under section 173 of Cr.PC. against the accused.

4. The prosecution has examined twelve witnesses in all as follows,

(i) P.W.3 Moinuddin Isamuddin, P.W. 4 Sayyad Jamil Sayyad Aziz, and P.W. 8 Altaf Hussain Haji Gulam Ahmad as eyewitnesses.

(ii) P.W. 5 Abdul Gani Sk Mehboob and P.W. 10 Firoz Abdul Gani, the father, and brother of the deceased, as witnesses on the oral dying declaration.

- (iii) PW. 1 Dr. Munjajirao Vithhalrao Mohite, Medical Officer, attended to the deceased first and performed the autopsy.
- (iv) PW. 11 Dr. Mohammad Jeelani Mohammad Khaja, Medical Officer, treated the deceased.
- (v) PW. 2 Aleem Khan Jaleel Khan Panch witness on the scene of occurrence.
- (vi) PW. 9 Abdul Moinoddin Sk Abdul Panch witness on weapon recovery under section 27 of Indian Evidence Act from accused no. 4.
- (vii) PW.12 Uttam Lahanu Chaban, the investigation Officer.

5. Before advertng to the grounds for setting aside the acquittal, it would be appropriate to decide first the legal issues raised by the learned counsels for the petitioner and respondents.

6. Learned counsel for the petitioner would submit that where acquittal is granted to the accused, ignoring the reliable testimony of the eyewitnesses, without considering the material evidence on record, and the Judgment was full of inconsistencies that followed reasoning. The High Court, in revision directing retrial by setting aside the acquittal, would be justified. To bolster his arguments, he relied upon the case of Ayodhya Dube and others vs. Ram Sumer Singh, A.I.R. 1981 SC 1415. Both learned counsels, for the petitioner and respondents, have relied upon the case of K. Chinnaswamy V State of A.P. and another, A.I.R. 1962 SC 1788. Relying on the said

case, they have argued that where the private parties prefer the revision against the Judgment of acquittal, it is open to the High Court in revision to set aside the order of acquittal. The High Court has a limited power to set aside the finding of acquittal in revision, and such powers should be exercised only in exceptional cases.

7. Learned counsel for the petitioner would rely on the case of Kaptan Singh and others v State of M.P. and others, (1997) 6 SCC 185. This Judgment is again on the revisional jurisdiction of the High Court under Section 401 of the Criminal Procedure Code invoked by a private complainant against the order of acquittal. The Hon'ble Supreme Court has laid down the law that the High Court should not interfere with the order of acquittal unless there is manifest illegality or grave miscarriage of justice.

8. Per contra, learned counsel for the respondents has vehemently argued that the High Court, under revisional jurisdiction under Section 401 of Cr.P.C., has no power to direct the retrial. Suppose the Court concludes that the order of acquittal is manifestly illegal and requires interference, then at the most; in that case, the High Court reversing the Judgment of acquittal can remit the case back for rewriting the Judgment. Relying on the case of K. Chinnaswamy (cited supra), State of Orissa v Nakalu Sahu and others, 1979 SC 663, Vimal Singh v Khuman Singh and another, 1988 SC 3380, Sheetala Prasad and Ors. V Shrikant and Anr., A.I.R. 2010 SC 1140,

the learned counsel for respondents, would argue that the revisional jurisdiction of the High Court is to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error on the point of law which has resulted in flagrant miscarriage of justice. The High Court is not expected to act as it hears an appeal.

9. The ratio laid in the above case laws is explicit that unless there is a manifest error in Judgment of acquittal, there are glaring defects in procedural law, and that results in flagrant miscarriage of justice, the High Court under section 401 of Cr.P.C. should slow in interfering with such Judgment.

10. The backbone of the argument of the learned counsel for the petitioner is that the learned additional sessions Judge erroneously appreciated the evidence of the eyewitnesses and did not test the veracity of their testimony on the touchstone of their probable presence on the spot of the incident. They have been mislabeled as chance witnesses. The learned judge has completely ignored the spot and time of the incident, which has a great significance on the testimony of the eyewitnesses. Since the testimony of the eyewitnesses has been doubted, the corroborative evidence, in consequence, has lost its credence. The way of appreciating evidence is erroneous and against the settled principles of law.

11. Learned counsel for the petitioner would further submit that PW-10, Firoz, the brother of the deceased was with the deceased when taken to the hospital. The deceased narrated the incident to him. However, the learned Additional Sessions Judge ignored this evidence, erroneously observing that this PW-10 Firoz changed the spot of the incident. It has also been incorrectly observed that his statement shows that the deceased was kept in the autorickshaw in an unconscious state. The non-examination of the autorickshaw driver had been considered a glaring mistake. The Additional Sessions Judge has also erroneously discarded the oral dying declaration given to the complainant for the reason that he stated that Dr. Jilani did not depose that the deceased made a detailed statement before him. These are the erroneous observation recorded by the trial court.

12. As far as evidence of oral dying declaration is concerned, the learned Additional Sessions Judge erroneously appreciated the evidence led by the prosecution and found a contradiction in their evidence. PW-11 Dr. Jilani has also been disbelieved, observing that PW-4 Syed Jameel, who claimed to be present till the death of the deceased, did not talk with the deceased nor deposed that the deceased had a dialog with Dr. Jilani PW-11 and PW-5 Abdul Gani. The learned trial court has also erroneously observed that the witnesses were all the while present near the injured and the injured spoke some words, then it was natural that they at least say that there

was some talk with Quavi, Dr. Jilani and his father, but no such evidence is coming forward.

13. The next limb of the argument of learned counsel for the applicant is that the learned Additional Sessions Judge erroneously discarded the evidence of eye witness merely on the ground of omission to state witnessing one person coming from the Fire brigade station side and two persons from labour colony. PW-4 Syed Jameel has been erroneously disbelieved because PW-3 and PW-8 deposed that they did not know where the assailants had gone after the incident. Those witnesses were trying to state the presence of other witnesses with the intention of providing substance to the story of the prosecution. If that was so, then it was natural for them to state those facts before the Police at an early opportunity. The trial court also erroneously observed that one accused had a defence of alibi, but there was no evidence to prove the same.

14. Referring to the spot of the incident (Exhibit-22), he would argue that the spot of the incident was the same as deposed by the witnesses. The eyewitnesses have proved the presence of the accused on the spot of the incident. However, the learned Additional Sessions Judge incorrectly observed that the prosecution planted the witnesses. The learned Additional Sessions Judge did not consider the weapon recovery at the instance of accused no.4(Exhibit-37). In a nutshell, he has the argument that the learned Additional Sessions Judge failed to

appreciate the evidence of eyewitnesses supported with recovery panchnama, C.A. reports and the circumstances. The accused had no case of enmity. He would also argue that the examination of each witness is not essential. The Court must appreciate the material the prosecution produced in the trial.

15. Per contra, learned counsel for respondents nos.2 and 4, Mr. Anil Gaikwad, has vehemently argued that the witnesses examined by the prosecution were interested and not local. Considering the time of the incident, it was not the time people used to go through the road or nearby spot of the incident. The oral dying declaration to PW-10 Firoz is inadmissible. It was by way of improvement. The deceased did not name the accused when he allegedly narrated the history of the assault to the doctor. The learned Sessions Judge has correctly appreciated the evidence. The evidence led by the prosecution was full of contradictions and omissions. Hence the impugned Judgment and order do not warrant interference.

16. Learned counsel for respondents nos.5 and 6 advanced the same argument that the witnesses were inconsistent. The petitioner has no case to interfere with the impugned Judgment.

17. The prosecution case is two-fold, firstly rests upon the ocular evidence and, secondly, the oral statement of the deceased as to the cause of his death to his father and brother.

18. The natural conduct, instinct, station of the witness in society, his interest to see the accused behind the bar, previous enmity, the possible and natural presence of the eyewitness on the spot of the incident, along with corroboration in some cases and probability of the incident are the test to appreciate the evidence. Bearing in mind the above rules of appreciation of evidence, let us examine the merits of the case.

19. In the case at hand, the incident happened on 14.02.1988 at about 8.30 pm, near Labour colony Nanded. Shops and residential localities surrounded the spot of the incident. After the assault, as per the medical paper dated 14.02.1988, the deceased, was brought to the hospital in the auto rickshaw at about 9.30 p. m. and died at 11.45 pm. It is evident that the incident happened in the street in front of the Sagar Tailoring shop. The panchanama of the scene of occurrence (Ex.22) establishes that at the time of the incident, public lamppost on the scene of occurrence was in order.

20. PW.3 deposed that at about 8.30 pm, he was going through the Fire brigade road to see his friend Abdul Gani (not P.W. 5) in a labour colony. PW. 4 reached the spot as he, with his friend Azaz, was standing near the shop of Pasha Jagirdar (Accused no.3) at about 7 to 7.15 pm. He testified that at that time, there was a quarrel between the deceased and accused no. 4 Sk. Alim in front of the shop of Pasha Jagirdar. He and his friend Azaz separated their quarrel. Then the

deceased and accused no. 4 went to their homes. Again, at about 8 pm, he and his friend Azaz went towards I.T.I. Colony to have tea. That time they witnessed the incident. P.W. 8 testified that at about 8 pm, he alighted from the city bus near the I.T.I. Colony to see his friend Yunus, who was residing in the labour colony. At that time, the ocular witnesses witnessed the incident.

21. The learned Sessions Judge, discarded the presence of the above three eyewitnesses assigning the reasons (paragraph no.19 of the Judgment) that the sources introduced for remaining present must be established. P.W.3 Sayyad Jamil deposed that he was sitting on the steps of the school. He and his friend Azaz were going to have tea. There was no witness who saw them sitting on the steps of the school and going towards I.T.I. Abdul Gani, the Agriculture Officer, a friend of P.W.3 Moinuddin and Yunus, the Municipal Councilor, a friend of P.W. 8 Altaf Hussain, have not examined to say that these witnesses were usually going to them as they were familiar with them. The spot of the incident was in a thick locality. However, no witness is coming forward, at least to say that at the relevant time, they saw these accused persons and witnesses going along the road. It is not the case of P.W.4 Sayyad Jamil that he was returning with the deceased from his home. After the first incident, there is no evidence that the accused knew that Quavi (deceased) would go by that road at about 8 to 8.30 pm. There is no evidence that accused no.1 to 6

were seen together going towards the house of Quavi for assaulting him with the intent to teach him a lesson.

22. The learned Sessions Judge appreciated the evidence of the ocular witnesses labelling them as chance witnesses.

23. A chance witness is one who happens to be at the place of occurrence of an offence by chance and, therefore, not as a matter of course. In other words, he is not expected to be in the said place. A person who, by coincidence or chance, is present on the scene of occurrence or passing by the scene of the crime is a chance witness. A person may be a "chance witness" in his own house. For example, if a person leaves home daily for his job in the morning, returns in the evening, suddenly come back home to collect the office key and notices an offence, he may also be a "Chance witness. The chance witness has to explain under what circumstances he was present at the scene of the crime.

24. In Sacchye Lal Tiwari v State of U.P. (2004) 11 SCC 410, the Hon'ble Supreme Court while considering the evidentiary value of the chance witness in a case of murder which had taken place in a street and a passerby deposed that he had witnessed the incident, observed that,

"13. If the offence is committed in a street, only a passerby will be the witness. His evidence cannot be brushed aside lightly or viewed with suspicion on the ground that he was a mere

chance witness. However, there must be an explanation for his presence there."

25. In the case of *State of A.P. V K. Shrinivasulu Reddy (2003) 12 660* in paragraph no. 13, the Hon'ble Supreme Court, observed thus;

"13..... In a murder trial by describing the independent witness as" chance witnesses," it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to the witnesses, soliciting their presence. If a murder is committed in a dwelling house, the inmates of the house are natural witnesses. If a murder is committed in a street, only passersby will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere chance witnesses. The expression "Chance Witness" is borrowed from countries where every man's home is considered his castle, and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite unsuitable an expression in a country where people are less formal and more casual, at any rate in the matter explaining their presence."

26. The spot of incident and the local habits of the residents, in the case of a chance witness, also has significance in assessing the probable presence of the witness on the scene of occurrence.

27. In a Country Like India, people are less formal and more casual. They reside in a thick locality surrounded by shops on the main street. The Indians have the common habit of frequently and casually visiting friends' and relatives' houses. Normally, they do not intimate in advance to the person whose house they wish to go. Many streets are

full of people. People move easily in the markets. Visiting the market and meeting friends and relatives till late hours is very common.

28. The testimony of a chance witness may be doubted if his animosity toward the witness with the accused has been proved. The accused may impeach the testimony of such witness suggesting animosity with them and his presence impossible on the scene of occurrence. The accused have no case of animosity.

29. Applying the test of "Chance witness" with the evidence, in this case, the Court is of the view that the presence of the eyewitness on the spot of the incident was not impossible.

30. The learned Sessions Court also discarded the eyewitness for want of corroboration.

31. In Ramesh Krishna Madhusudan Nayar v State of Maharashtra A.I.R. 2008, SC 927, it has been held that corroboration is not the rule of law but one of caution and may be resorted to as an assurance. The occasion for the presence of the witness at the time of occurrence, the opportunity to witness it, normally the conduct of the witness after the incident, the nearness of the witness to the victim, and his predisposition towards the accused are some of the circumstances which are to be kept in mind to weigh and accept the ocular evidence of a wit-

ness. It is not the quantum of the evidence but the quality and credibility of the witness that lends assurance to the Court of acceptance.

32. In this case, the incident happened in the street. It was a free-access road surrounded by some shops and a residential locality. No one had a restriction to walk on that street. It may not be possible for every passerby to know every person walking on the road. If such a test for corroborating the presence of the witness is applied, the prosecution would have to keep examining witnesses one after the other, and the examination of witnesses would never end. In such a situation, it would be inappropriate to expect evidence from the other passersby to corroborate the presence of the eyewitnesses on the scene of occurrence. If the other persons were present there, they would have been the ocular witnesses. Hence, the Court is of the opinion that the reason for discarding the evidence of these witnesses that there was no evidence of other witnesses that they saw these witnesses present on the scene of occurrence, appears incorrect.

33. The post-incident conduct of the witnesses also has a bearing on the case. P.W.3 immediately went to the house of the deceased to intimate the incident to his family. P.Ws. 4 and 8 went to the hospital soon after sending the deceased to the hospital. The Police recorded the statements of these witnesses promptly. This evidence led to the conclusion that they had no occasion to cook up a false story. The wit-

nesses have denied the suggestions that they did not witness the incident. P.W. 8 also denied the suggestion that he is a relative of the deceased. It is a law that the suggestion denied is no evidence. Therefore, the suggestions to the witnesses would not help the accused disbelieve the witnesses.

34. The learned additional Sessions Judge also disbelieved the eye-witnesses as the local witnesses did not come forward.

35. Evaluating the evidence on record is a rule of appreciation of evidence. The Court can not travel beyond the record. Therefore, Court cannot search for evidence that was not on the record. The Court has to decide the matter on the basis of evidence the prosecution has adduced before it and conclude whether the guilt of the accused is proved beyond a reasonable doubt. The Court must match the existing law, how old it is, with changing social structure and mindset. The crime has touched the pick. An ordinary man is scared. The threats to the witness's life have impressed the insecurity to life, property and reputation. Lack of security to the witness, doubt-based Policing, and harassing the witness by repeatedly calling in the Court are the general reasons that developed a tendency to avoid coming forward. The Court was supposed to bear in mind such changes in society. The learned Sessions Judge appears to have erred in not believing the evi-

dence of the above ocular witnesses because the witnesses from the locality did not come forward.

36. The reasons to discard the evidence of ocular evidence for the reason that they are deposing stereotypes also appear incorrect. Since they had witnessed the same incident, they would narrate the same story. On the contrary, their evidence must be considered consistent. Such consistent evidence is the requirement of the law to inspire confidence in the witnesses.

37. Since the learned Additional Sessions Judge disbelieved the presence of the ocular evidence, the corroborative evidence, like recovery of incriminating evidence at the instance of the accused, Chemical Analyziser's report, etc., have lost its credence. Since this Court believed the presence of the ocular witnesses on the spot of the incident, the learned Sessions Judge would have to appreciate the evidence of weapon recovery under section 27 of the Indian Evidence Act and other corroborative evidence afresh. Whether the evidence of the ocular witnesses stands on the test of reliability, probability, and possibility, be appreciated afresh in the circumstances of believing the presence of the ocular witnesses on the spot of the incident. If the evidence of the ocular witness inspires confidence, whether corroboration is required or not is also a matter of appreciation of the evidence. The approach of the learned additional sessions judge, appreciating

the evidence, appears contrary to the rule of appreciation of the evidence.

38. As far as the oral dying declaration is concerned, the prosecution relied on the evidence of P.W. 5 Abdul Gani (father of the deceased) and P.W. 10 the Firoz (brother of the deceased). It is evident that P.W. 10 reached the spot of the incident when the deceased was lying in front of the Fire brigade station. He deposed that with the help of P.W.4 and P.W. 8, he took the deceased to the hospital in the auto-rickshaw. While going to the hospital, he asked the deceased about the incident. P.W. 5 Abdul Bashir led the evidence that he learnt about the incident. Hence, he went to the hospital at about 9 to 9.30 pm Firoz, Jamil, and Azaz were present there. The deceased was moaning. The deceased told him about the incident. The learned Additional Sessions Judge discarded the oral dying declarations giving the reasons that P.W. 10 Firoz deposed that when the deceased reached the hospital, the deceased was unconscious.

39. P.W. 11 Dr. Jeelani, Jamil and Altaf did not corroborate the evidence of P.W. 5 Abdul Gani about disclosing the incident to him. There is a material discrepancy in the evidence of P.W. 1 Dr. Mohite and P.W. 11 Dr. Jeelani about the admission of the deceased. The name of the doctor on the admission papers is scratched, and the name of Dr. Jeelani was written there. There was no signature below

the name scratched. P.W. 1 Dr. Mohite was the medical officer. He attended to the deceased first and gave a call to P.W. 11 Dr. Jeelani. After going through the above evidence, who had admitted the deceased to the hospital is doubtful. The injuries suffered by the deceased do not inspire the confidence that the deceased was conscious. In view of the material on oral dying declarations, it appears that the learned Sessions Judge has correctly assigned the reasons to disbelieve the oral dying declarations.

40. The Court has gone through the impugned Judgment and order, examined the relevant material on record, and concluded that the approach of the impugned Judgment and order is erroneous, incorrect, and improper resulting in a miscarriage of justice. Hence, it warrants interference. The Court now proceeds to pass the order.

ORDER

- (1) The revision application is allowed.
- (2) The findings in the impugned Judgment and order of Additional Sessions Judge Nanded, dated 27th day of September 1989, passed in Sessions Case no. 106/ 1988, have been reversed.
- (3) The case is remitted to the learned Additional Sessions Judge, Nanded, for deciding the matter and rewriting a judgment afresh on merit, on appreciating the same

evidence without examining any witness and allowing both sides to argue.

- (4) The orders cancelling the bail of the respondents/ accused after acquittal, if any, stands restored until passing a fresh judgment.
- (5) The accused have to appear before the learned Additional Sessions Judge, Nanded, on 23rd January 2023.
- (6) Record and proceeding be returned to the trial Court forthwith.
- (7) Rule made absolute in above terms.

(S.G. MEHARE, J.)