

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

**CRIMINAL APPEAL NO. 435 OF 2016  
WITH  
CRIMINAL APPLICATION NO. 3200 OF 2022**

1. Shaikh Naser @ Nasir @ Chunnu s/o Shaikh Hasan  
Age : 23 years, Occu. : Labour,  
R/o. Misawadi, Aurangabad.
2. Shaikh Hasan s/o Shaikh Amin,  
Age : 50 years, Occu. : Labour,  
R/o. Misawadi, Aurangabad.
3. Shaikh Ashfak s/o Shaikh Hasan  
Age : 30 years, Occu. : Labour,  
R/o. Misawadi, Aurangabad.
4. Naimkhan s/o Mahemoodkhan  
Age : 23 years, Occu. : Labour,
5. Amjadkhan s/o Mahemoodkhan  
Age : 20 years, Occu. : Labour  
R/o. Misawadi, Aurangabad.

... APPELLANTS  
(Orig. accused)

**VERSUS**

The State of Maharashtra

... RESPONDENT

...

Mr. N. S. Ghanekar, Advocate for the appellant Nos. 1,2,4 and 5  
Mrs. Bharati Gunjal, Advocate for appellant No. 3  
Mr. S. P. Deshmukh, APP for the respondent/State

**CORAM : R. G. AVACHAT &  
R. M. JOSHI, JJ.**

**RESERVED ON : 02<sup>nd</sup> DECEMBER, 2022  
PRONOUNCED ON: 13<sup>th</sup> DECEMBER, 2022**

## **JUDGMENT (PER- R. M. JOSHI, J.):-**

1. Appellants/accused being aggrieved by the judgment and order of conviction passed in Sessions Case No. 18 of 2012 convicting them for the offences punishable under Sections 143, 147, 148 and 302 read with Section 149 of the Indian Penal Code have preferred this appeal under Section 374 of the Code of Criminal Procedure.

2. On 12<sup>th</sup> September, 2011 at about 11.40 pm Afsarkhan gave report to the CIDCO Police Station, Aurangabad stating that on that day at about 9.15 pm he received a phone call from his nephew Harun who informed him about Khalilkhan, brother of the informant having received injuries in the quarrel near Ashirwd building, Misarwadi. He, therefore, immediately went to the spot and found that Khalilkhan was seriously injured and lying in the pond. His mother was present at the spot. Thereafter he along with his nephew and others took injured in the police vehicle to Ghati hospital where on admission he was declared dead at about 10.00 pm. It is learnt by the informant that his brother was to receive certain amount from Shaikh

Chunnu towards centering work done by him and when Khalilkhan went to ask for the said money the amount was not paid and on the contrary said Shaikh Chunnu and others assaulted Khalilkhan with axe and knife. On the said report of informant offence came to be registered against the accused vide Crime No. I-348 of 2011.

3. During the course of investigation accused came to be arrested in the same night. Police visited the spot panchnama was done. Clothes of the accused were seized in the police station under panchnama. Pursuant to the memorandum statements made by the accused weapons were seized. Enitre muddemal was sent to Chemical Analyzer. Statements of witnesses were recorded. On conclusion of investigation, charge-sheet came to be filed and the case was committed for trial to the Additional Sessions Judge, Aurangabad.

4. Charge was framed vide Exhibit 29 and as the accused abjured the said charge they were tried. Prosecution in order to prove in guilt of the the accused placed reliance on

testimony of nine (09) witnesses and other documentary evidence.

5. Learned counsel for appellant Nos. 1, 2, 4 and 5 submitted that alleged eye witnesses are interested witnesses and on their testimonies conviction can not be recorded. It is submitted that neither Harun (PW-2) refers to Anwar (PW-3) to have seen each other at the spot and this according to him creates doubt about their presence at spot at relevant time. It is further pointed out that their statements came to be recorded belatedly and thereby those statements have lost its evidentiary value and became prone to concoction. Furthermore it is submitted that when independent eye witnesses were present at the spot, their non examination proves fatal to prosecution case. With regard to seizure of clothes, it is submitted that the panch witness has admitted that the clothes were kept on the table in the police station at the time of its seizure and which rules out its recovery at the instance of the accused or from their person. As far as the alleged recovery of weapon is concerned, testimony of Investigating Officer is pointed out which according

to him shows that Investigating Officer has never visited the house of the accused and hence the correct distance is not given. He submitted that deceased had number of criminal cases against him and hence the possibility of deceased being killed by someone else and accused herein falsely implicated in the incident of assault on deceased cannot be ruled out. On behalf of appellant No. 3 Ashpak it is argued that role attributed to him is clearly distinguishable from other accused. In addition to above submissions it is submitted that stick is allegedly used by this accused and medical evidence does not support its use in assault. She placed reliance on ***The State of Maharashtra Vs. Vinod Pandurang Jadhav and Anr.***, reported in ***2020 All MR (Cri)2360***.

6. Learned APP submitted that there is no law that the testimony of relatives cannot be considered for recording conviction. It is submitted that presence of these witnesses who hail from the same area is natural at time of incident at spot and hence there is no reason to discard their testimony with regard to the occurrence of incident. According to him once the

incident in question indicates that all accused had common object in their mind which is reflected from the number of injuries inflicted upon the deceased and the utterances made thus it is not relevant to see as to which accused caused what injury to the deceased. By referring to the evidence of panch witnesses seizure of weapons as well as clothes of accused are proved. CA report is submitted referred to show that weapons and clothes were stained with the blood of deceased. Thus, according to him there is no reason of justification to cause any interference in the present judgment of conviction.

7. Accused herein are charged of forming unlawful assembly in order to commit murder of Khalilkhan. Section 141 of the IPC contemplates an assembly of five or more person as unlawful assembly if the common object of the person is to commit any offence by means of use of criminal force. Prosecution cannot be expected to lead positive evidence in order to establish the common object of the persons part of such unlawful assembly and the same has to be deduced from the evidence and from the facts and circumstances proved on

records. If the prosecution succeeds in proving that the accused herein were members of unlawful assembly with common object then as contemplated by Section 149 any act done by one accused is binding on another. In the present case the prosecution seeks to place reliance on ocular version of eye witnesses in respect of occurrence of incident in which deceased died. In addition thereto evidence about incriminating recovery of blood stained clothes and weapons is taken support of.

8. Afsarkhan (PW-1) is brother of deceased. He learnt at about 09.15 pm from his nephew Harun about incident in which Khalilkhan suffered injuries in a quarrel near Ashirwad building. He, therefore, went on the motorcycle to the spot and found Khalilkhan lying in the pond in injured condition. He along with others with a help of police took Khalilkhan to Ghati hospital where he was declared dead at around 10.00 pm. Record shows that at about 11.40 pm report came to be lodged vide Exhibit 41 with the concerned police station. Thus, the report in respect of the incident in question has been lodged immediately without unnecessary delay wherein the reason for the assault is also

mentioned. Lodging of immediate report has its own importance and as the same rules of the possibility of concoction and false implication.

9. Harun (PW-2) who was aged about 16 years at the relevant time was studying in 11 standard. He is resident of the same area where the incident of assault has occurred. According to him at about 08.45 pm he was in the house and heard clamour. His brother Ferozkhan went out and came back immediately stating that quarrel has taken place near Ashirwad building. He along with his grandmother rushed to the spot and found Khalilkhan lying in the pond and accused assaulting him with weapons. He also deposed about they uttering "साले को जिंदा मत छोड़ो पुरा खतम करो" while causing assault. This witness has testified about specific role of the accused persons in the said assault and according to him accused Hasan inflicted axe blow on the head of Khalilkhan whereas accused Nasar and Naimkhan gave blows of knife on the chest and back of the deceased. He further claimed to have seen Ashfak and Amjadkhan beating Khalil with sticks. Thus, this witness gives the complete account of the

incident in which deceased sustained injuries.

10. At the stage it is relevant to consider the cause of death of the deceased. Dr. Nitin Ninal (PW-7) attached to the Medical Hospital as a Resident Doctor is one of Medical Officers who conducted autopsy on the dead body of Khalilkhan with three other Medical Officers. They conducted the post-mortem between 09.30 am to 11.15 am on 13<sup>th</sup> September, 2011. They noticed in all 19 external injuries on the person of the deceased which have been specifically recorded in column No. 17 of the PM notes (Exhibit 109). Those injuries are Lacerated wounds, contusions, stab wound, incised wounds, abrasions. Medical Officers also found internal injuries corresponding to the external injuries and the same were recorded therein in column 19 to 21. According to the Medical Officer the cause of death of the deceased is "shock and haemorrhage due to vital organs following multiple injuries". Considering the nature of injuries there is no reason to discard the said opinion of the Medical Officer as to the cause of death. It also indicates that different types of injuries were found which could be caused by different

nature of weapons. From evidence on record the conclusion is inevitable that Khalil died homicidal death.

11. Coming back to the appreciation of ocular evidence Harun (PW-2) wherein has given specific account of the incident in question and merely because his statement is recorded after two days it cannot be held that he is a planted witness. It is not in dispute that Harun (PW-2) is the resident of same area where in the incident in question has occurred. Considering the time of incident i.e. at about 08.45 pm and as the witness was a student, his presence at the house is absolutely normal. He specifically states that his brother Firoz informed him about the quarrel and thereafter he along with his grandmother rushed to the spot. In the cross-examination of this witness it has come on record that the house of accused No. 1 is after 4-5 houses from the spot. All accused herein are members of one family and therefore, there is reason to believe that the accused persons were well-known to the witness and so he could specify their respective role in the assault and identify them.

12. Testimony of Harun (PW-2) gets corroboration from evidence of Anwar (PW-3) who has specifically stated about deceased involved in centering work for accused No.1 and about owing of money from him. This witness has acquaintance with the accused for 5 to 6 years since prior to occurrence of incident. With regard to the incident in question at about 8.30 pm he saw deceased demanding money due towards the centering work from accused No.1 and quarrel occurred between them at the spot. He also stated about accused assaulting deceased together with axe, knife and sickle. He further claimed that after occurrence of the incident he went to call Jafarkhan. From this witness also it is brought on record that the accused No.1 is the resident of same area. There is no suggestion to this witness that he did not know any accused person before the occurrence of the incident. Since it is a matter of record that the accused persons hail from the same area, their identity by witnesses cannot be disputed.

13. It is sought to be argued by relying upon the statement of Investigating Officer that when he reached the spot

at that time there was power cut. The said statement, however, does not go to show that at the time of actual occurrence of incident also there was no electric supply at the spot. Even if it is so it is not impossible for witnesses to recognize the known persons. The identity of the accused by these witnesses therefore is duly proved so also their respective and specific role in the incident of assault on deceased.

14. No doubt defence was able to bring it on record by cross-examination of the witnesses that the spot of the incident is a busy place surrounded by shops and residential premises. Two questions fall for consideration of this court are as to whether to prove occurrence of any incident examination of independent witness is mandatory and secondly whether testimony of relative should always be kept out of consideration on that sole ground of being related to deceased. It is settled position of law that the testimony of the relative of the deceased cannot be discarded on that ground alone if otherwise his evidence is reliable and worthy of credence. Section 134 of Evidence Act, mandates no specific number of persons being

required to prove any particular fact. Similarly examination of independent witness is rule of caution and not mandate of law. We find their evidence wholly reliable and hence non examination of independent witness is not fatal to the case. The testimonies of these witnesses are sought to be challenged also on the ground that Harun did not disclose about he having witnessed the incident to the Police Officers who visited the spot or to the police personnel at hospital. It is necessary to take note of the fact that the witness was only aged 15 to 16 years at the time of incident and considering the nature of incident in which his maternal uncle died and also in view of the fact that the police after reaching the spot obviously must have given preference to take injured to the hospital first, non disclosure of the witness to the concerned Police Officer about the incident in question therefore can not be considered fatal to the case of prosecution. It is further accepted position of law that every delay caused in recording of the statement is not fatal to the case of prosecution but if testimony of such witness is found not wholly reliable then such evidence shall be subjected to more closure scrutiny. In instant case we find absolutely no reason for

the witnesses to the name accused as assailants and thereby to let go real culprits scot free.

15. Apart from the ocular evidence the prosecution has further relied upon testimony of Sanjay Shinde (PW-6) in whose presence the clothes of the accused were seized under panchnama (Exhibits 75, 76, 96 and 101). Admission of this witness about the clothes having been kept on the table in the police station by itself is not sufficient to discard his evidence about seizure of clothes of accused in police station. It is, pertinent to note that the said recovery is done on 14<sup>th</sup> September, 2011 and the accused were taken in the custody late in the night of 12<sup>th</sup> September, 2011 itself i.e. in short time of occurrence of incident. Moreover, from the evidence of arrest panchnamas of the accused it is clear that clothes on their person recorded therein were only seized by the police. In the circumstances, merely for want of specific statement about the clothes of the accused being removed from their person, the said recovery does not deserve disbelief. The clothes of accused Ashfak, Naimkhan and Amjadkhan were stained with blood of

the group of deceased as indicated by CA report (Exhibit 127). The case of prosecution gets further strengthened by recovery of blood stained weapons at instance of accused. There is recovery of axe, knife and stick. Not only that there is evidence to show weapons being stained with blood of group 'B' i.e. group of deceased but opinion of Medical Officer about causing of injury Nos. 1,2,3 and 19 by hard and blunt object like axe and injury Nos. 4 to 8, 10, 11, 14 and 17 by pointed knife and injury Nos. 9, 12, 13, 15, 16 and 18 by sharp knife. Thus, prosecution was successful in establishing use of these weapons in causing assault on deceased and injuries caused to him led to his death.

16. There is additional circumstance against accused, Naimkhan showing his presence at the time of incident and his involvement in assault. Accused Naim was found to have sustained fresh injury as recorded in his arrest panchanama (Exhibit 118). Considering the fact that number of weapons were being used to assault deceased by number of persons in that case the possibility of causing of the injury while committing assault is not ruled out completely.

17. The aforesaid evidence led by the prosecution on record shows that accused were armed with weapons and number of injuries were caused to the deceased which are indicating of the intention as well as knowledge of the accused to kill him. The obstruction by the accused to the witnesses for interference therein and utterances not to spare and kill the accused are additional facts more than sufficient to conclude that all accused persons herein were part of unlawful assembly which had a common object of committing murder of deceased Khalilkhan. Once such conclusion is drawn it is immaterial as to which accused inflicted which injury on the deceased and hence those accused who used stick in assault can not be given separate treatment as, all accused are responsible for the acts of each other in the assault.

17. On careful consideration of material evidence on record we find no reason to disbelieve testimonies of eye witnesses who have given detailed and consistent evidence of the occurrence of incident. Thus have record no hesitation to hold that prosecution has proved guilt of accused beyond

shadow of any reasonable doubt. In the result, appeal must fail.

Hence the following order:

**ORDER**

- (i) Criminal Appeal No. 435 of 2016 is dismissed.
- (ii) Pending application, if any, stands disposed of.

**(R. M. JOSHI, J.)**

**(R. G. AVACHAT, J.)**

ssp