

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.556 OF 1998**

Sandeep @ Sandesh Tanaji Ambre,
Aged about 26 years,
Resident of Khed, Dist. Ratnagiri ... Appellant
V/s.

The State of Maharashtra ... Respondent

Mr. Subir Sarkar, appointed Advocate for the Appellant.
Ms. M.M. Deshmukh, APP for the State.

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, JJ.**

JUDGMENT RESERVED ON : 10th FEBRUARY 2022.

JUDGMENT PRONOUNCED ON : 7th MARCH 2022.

JUDGMENT : (Per Sadhana S. Jadhav, J.)

1. The appellant is convicted for the offence punishable under section 302 read with section 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/- i.d. to suffer further R.I. for six months by the learned Sessions Judge, Ratnagiri vide Judgment and Order dated 5th June 1998 in Sessions Case No.69 of 1996. Hence, this appeal.

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

(i) On 15.4.1996, Rekha wife of Vijay Mirajkar lodged a report at Khed Police Station alleging therein that she was a business partner of Peter Alwaris. Her husband Vijay was working in the Police Department of the State of Maharashtra. He was serving as a Police Constable. They were blessed with two children namely son - Rushikesh who was 5 years old and daughter – Sonia who was 9 years old. Her maternal house is at village Dahiwali, Ramwadi, Taluka Khed, District Ratnagiri. She was studying in J.J. School of Arts. It was a love marriage. She was also into public relations and event management like fashion shows, stress relief, etc. Her husband had acted in T.V. serial 'Rajhans' produced by Peter Alwaris. The said serial was never released on any T.V. channel. It appears that a discordant note had struck between the husband and wife since Rekha was accompanying Peter on his business tours in his Mercedes car. Her husband had therefore suspected her chastity and fidelity and therefore, persistently insisted upon his wife to sever his ties with Peter. It appears that she was abused, assaulted and condemned for her profession and therefore, she was constrained to approach Advocate Shakuntala

Paranjape (PW.4) on 14.4.1996 and sought legal advice from her in respect of her marital discord and abusive behaviour of her husband. It was suggested to her that she should remain away from her husband for some time and explore the possibility of either reconciliation or divorce and for that she should stay at her maternal house.

(ii) On 13.4.1996, her husband had raised a quarrel with her since the food was not cooked at the right time and the cause was attributed to Peter. He had assaulted her and warned her not to accompany Peter in his Mercedes car.

(iii) On 14.4.1996 at about 3.15 pm she left her house along with Peter in his car as he was to drop her to her maternal house. On their way, they had stopped at the house of a friend. A friend of Peter i.e. Dinesh Joshi and Suresh Jadhav had accompanied them. They reached Dahiwali at about 5.00 am. At about 5.30 am, they noticed that the tyres of the car were punctured at the time when Peter and his friends were to return to Bombay. There was darkness. They noticed that someone had focused torch light on Peter. One person asked who is Peter and at that juncture Peter was assaulted by axe. In the torch light, she saw that the assailant was none other than her husband, she

was shocked as she never expected her husband to go to an extent of killing someone. Upon sustaining the first injury, Peter had fallen to the ground and thereafter, Vijay had inflicted two to three blows of axe on his person. She had identified her husband in the torch light and expressed her astonishment and thereafter, Peter had fled. Peter had succumbed to the injuries on 15.4.1996. On the basis of her report, Crime No.66 of 1996 was registered at Khed Police Station for the offence punishable under section 302 r/w 34 of IPC against Vijay Mirajkar and his driver Sandeep @ Sandesh Ambre. In the present case, despite several efforts, the prosecution could not secure the presence of the complainant and hence, her evidence was not recorded. The original accused no.1 is reported to be dead and hence, the appeal as against original accused no.1 stands abated. Therefore, in present appeal the case against accused no.2 needs to be discussed.

(iv) At the trial, the prosecution examined as many as 9 witnesses to bring home the guilt of the accused.

3. The prosecution has placed implicit reliance upon the evidence of Dinesh Govind Joshi – (PW.1), Suresh Jadhav (PW.2), Balkrishna Kadam (PW.3), Adv. Shakuntala Paranjape (PW.4), Vasant

Chavan (P.W.8) and Gajanan Juikar (P.W.9).

4. PW1 – Dinesh Joshi had accompanied the deceased Peter on the unfateful night of 14.4.1996 alongwith Rekha Mirajkar and Suresh Jadhav. According to him, he was a good friend of Peter who was producer of T.V. serials. In the intervening night of 14th and 15th April 1996, Peter had requested him to accompany them as P.W.1 was able to drive Mercedes car which was left hand drive. He was informed by Peter that Rekha is in distress as her husband had assaulted her on the previous night and therefore, she along with her children were to be dropped to her maternal house at Dahiwali. They all left for Dahiwali. They had dinner at Poladpur at midnight. They reached village Dahiwali at 3.00 am. The approach road to Dahiwali was rough, there were cobblestones on the road and therefore, they parked the car near to her maternal house. She borrowed lantern from a family which was acquainted with her and they walked to her maternal house. The neighbour who had accompanied them with a lantern had returned. They had tea at the house of her parents. They halted there for about one and half hour. Thereafter, they all proceeded towards the car as Peter and his friends were to return to Mumbai. Rekha along

with her father were carrying torches with them to show the road. They realised that the tyre of the car was punctured. Peter was examining the tyre. At that juncture, they saw two persons approaching them. One of them verified the identity of Peter. They saw Vijay in the torch light. Suddenly, Vijay had inflicted a blow of axe on the head of Peter. Rekha attempted to rescue him but failed. Thereafter, Vijay had inflicted two more blows. She expressed her astonishment upon seeing her husband. The friends had rushed to the house as they were afraid and then they saw that Vijay and his driver had fled in the jeep and information was given to the Police Patil by Rekha's father. They approached the police station and Rekha lodged the FIR. The person accompanying Vijay was his driver i.e. the present appellant. Both the accused were identified in the Court.

5. It is elicited in the cross-examination that the statement of P.W.1 was not recorded by the police at the time of lodging of the FIR although he was in the police station for an hour. They had returned to the scene of offence along with the police. The statement of Rekha was recorded on the basis of which the offence was registered. He had no personal knowledge about Rekha. P.W.1 admits that he had not seen any of the accused before the incident. He had been summoned for

Test Identification Parade but since there was an objection by accused no.1 it was delayed. P.W.1 is the eye-witness to the incident.

6. P.W.2 – Suresh Jadhav had accompanied Peter, Rekha and Dinesh (P.W.1) to Dahiwali on the unfateful night of 14th and 15th April 1996. His evidence is consistent with the evidence of P.W.1. He also claims that he was not acquainted with accused no.1 or 2 prior to the incident but had knowledge that Rekha was a business partner of Peter. He was introduced to Rekha just one and half month prior to the incident. His recitals of the incident have not been shattered in the cross-examination. He is an eye-witness to the incident.

7. P.W.3 – Balkrishna Kadam was running a shop near the scene of offence. Since he hailed from the same village, he was acquainted with Rekha and her family. On 15th April 1996, he had seen a white coloured trax- jeep racing from front of his shop. The husband of Rekha was in the jeep and the other person was driving. He had only seen accused no.1 when he had visited the maternal house of Rekha. There is an omission of the fact that he had disclosed to the police that he had seen the jeep racing from front of his shop at the relevant time.

8. The post-mortem notes are at **Exh.35**. The cause of death is “shock due to fracture of skull with brain injury”.

9. The prosecution has examined Adv. Ms. Shakuntala Paranjape - P.W.4 in order to establish that there were matrimonial disputes between the first informant and the accused no.1 and therefore, she had taken legal advice from P.W.4. According to her, the first informant had informed her that she had withdrawn from the house of her husband along with her children without any belongings as she was brutally beaten by her husband with a stick due to which she could not even walk properly. P.W.4 had in fact, noticed that she could not walk properly. She had even noticed weal marks on her body were blue and black in colour. She had advised her to approach a Doctor and obtain a certificate. She appeared to be in a state of confusion as she was a mother of two children. It is elicited in the cross-examination that she had referred deceased ‘Peter’ as her ‘lover’. The cause for the quarrel was that she had accompanied Peter, the Director of a T.V. serial to Delhi. P.W.4.

10. P.W.8 – Vasant Chavan was officiating as a police officer at

Khed Police Station. On 15.4.1996 he was informed by his colleague Salve who summoned him to the police station urgently as a murder has taken place at village Dahiwali. When he reached the police station he saw the police patil of Dahiwali along with P.W.1 and P.W.2. P.W.1 had refused to lodge a formal FIR and requested the police to accompany him to the scene of offence. They saw the dead body of Peter at the spot. Rekha had disclosed the incident to him. Thereafter, he had recorded the FIR and registered Crime No.66 of 1996 and had done initial investigation such as conducting of scene of offence panchanama (Exh.32). Upon enquiry with Bhandup Police Station he had learnt that accused no.1 had not attended the duties from 13th April 1996. He arrested accused no.2 on 17th April 1996 whereas accused no.1 was absconding. At the stage of hearing of the bail application, Rekha had not supported the prosecution and had filed an affidavit denying all allegations levelled against accused no.1. On 1.08.1996, accused no.1 suo-motu appeared before the police. He was nominally arrested. Accused no.1 was visiting the police station for 10 days and during that period he was interrogated. Charge-sheet was filed on 3rd August 1996.

11. P.W.9 – Gajanan Juikar was entrusted the investigation of

Crime No.66 of 1996 at Khed Police Station on 28th August 1996. On 21st April 1997 police custody of the accused was obtained. The Executive Magistrate, Ratnagiri was requested to hold Test Identification Parade. It is admitted in the cross-examination that the lacunas in the earlier part of the investigation was noticed by P.W.8 and therefore, P.W.9 was entrusted with the investigation. He had seized the cassette of the serial 'Rajhans' from the house of the deceased, however, the attempts to draw a transcription of the same had failed.

12. The learned counsel for the appellant i.e. original accused no.2 Sandeep Ambre has vehemently submitted that the prosecution has not recorded the evidence of the first informant and hence, the contents of the FIR have not been proved and therefore, the contents of the FIR are not admissible. It is further argued that the first informant was the only person who could identify accused no.2 as the driver of the vehicle at the time of incident and the appellant was unknown to P.W.1 and P.W.2. Moreover, it appears from the evidence of the witnesses that the T.I.P. was not held. There is no recovery at the instance of accused no.2. There was no motive on the part of the accused no.2 to eliminate the deceased. Hence, he deserves to be acquitted.

13. Per contra, the learned APP has supported the verdict of the trial court and has submitted that the appellant herein was working as a driver of the accused no.1. He had accompanied accused no.1 to Dahiwali. He had shown the torch light to the accused no.1 in order to identify the deceased as it was necessary at that juncture since there were two unknown people alongwith the deceased. That, the appellant has facilitated the assault by accused no.1 and therefore, he deserves to be convicted with the aid of section 34 of IPC.

14. We have gone through the records meticulously with the help of the respective counsel and perused the evidence adduced by the prosecution.

15. It is true that the prosecution has failed to examine the first informant i.e. Rekha the wife of accused no.1. However, it cannot be ignored that the law was set in motion at the instance of Rekha. As there is specific mention about Advocate Shakuntala Paranjape whom she had visited on 13th April 1996 and this fact was within the exclusive knowledge of the complainant.

16. The prosecution had realised that it would be futile to examine the first informant as she had resiled from her case at the stage of hearing of the anticipatory bail application itself.

17. The prosecution has examined two eye-witnesses i.e. P.W.1 and P.W.2 who had accompanied the first informant and the deceased to Dahiwali on the unfateful night and were helping the deceased to inspect the tyres of the car when he was assaulted by accused no.1.

18. There is clinching evidence against the original accused no.1 however, the appeal stands abated as against accused no.1. Hence, it would be necessary to examine the evidence against the present appellant who is originally accused no.2.

19. The substantive evidence of P.W.4 would establish that the matrimonial relations between the spouses was such that there was a possibility of irretrievable breakdown of their marriage and therefore, she had advised her to take some time to think as to whether she would reconcile or part ways. Hence, she had advised her to stay at her maternal house for some time. The weal marks on the body of Rekha would establish that the accused no.1 had brutally assaulted her. The accused no.1 was annoyed with his wife's association with Peter and therefore, he had a motive to eliminate Peter.

20. In view of this background, it cannot be said that the accused no.2 had any motive to eliminate Peter. The factum of his working with accused no.1 as a driver was only within the knowledge

of Rekha and the fact that she has not been examined would go to the root of the matter as far as his identification is concerned. This has to be read coupled with the fact that no test identification parade was made to ascertain as to whether the very involvement and arrest of the present appellant was leading the investigating agency in the right direction after ascertaining and determining the identity of the accused no.2.

21. Even if it is presumed that the present appellant was in service of the accused no.1 in the capacity of a Driver, there is no evidence on record worth its name to show that accused no.2 had any knowledge about the intention of the accused no.2 in visiting Dahiwali at such odd hours. No knowledge can be attributed to him as to whether the accused no.1 would assault the deceased with an axe. There is no evidence to show that he had any knowledge that the accused was carrying an axe in the car as the accused no.1 was the owner of the car. And even if he had knowledge, it would not establish that the accused no.1 would use the same to commit murder of Peter. It is doubtful as to whether he even knew about the relationship of the accused no.1 or his wife with Peter. There is no material to show that the accused no.2 had facilitated or aided the accused no.1 in

committing the murder of Peter. In view of this, it can be safely inferred that the prosecution has failed to adduce any evidence worth its name and establish that the accused no.2 had any role to play in the commission of the murder of Peter at the hands of accused no.1. There is absence of motive, intention and overt act which can be attributed to the accused no.2 i.e. the present appellant.

22. In cases such as the present one, in the absence of any cogent, consistent, convincing and admissible evidence, it would be difficult to record a conviction against the accused for the offence punishable under section 302 r/w 34 of IPC. There is no material to show that the present appellant in any manner had shared the common intention with accused no.1 nor there was time for common intention to develop at the spur of the moment and a conviction of such nature would be unjustified. The prosecution has failed the guilt of the accused no.2 beyond reasonable doubt.

23. The learned counsel appointed for the appellant has taken his best efforts to assist the Court. Hence, he is entitled for the professional fees to espouse the cause of the appellant.

24. Hence, we pass the following order:-

ORDER

- (i) The Criminal Appeal is allowed;
- (ii) The conviction and sentence imposed upon the appellant vide Judgment and Order dated 5th June 1998 passed by the learned Sessions Judge, Ratnagiri in Sessions Case No. 69 of 1996 is hereby quashed and set aside;
- (iii) The appellant is acquitted of all the charges levelled against him. Bail bonds stand cancelled;
- (iv) Fine amount, if paid, be refunded;
- (v) Appeal is disposed of accordingly.

(PRITHVIRAJ K. CHAVAN, J)

(SMT. SADHANA S. JADHAV, J)