

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 666 of 1998

1. Laxman Pilaji Ovalekar

age 54 years, Occ: Agriculturist

2. Manohar Laxman Ovalekar

age 28 years, both resident of
village Targhar, Taluq. Panvel,
District Raigad
(At present in custody)

.. Appellants

Versus

The State of Maharashtra

(Inspector of Police, Panvel
Town Police Station)

.. Respondent

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- Mr. A.P.Mundargi, Senior Advocate a/w. Niranjan Mundargi a/w. Mr. S.B.Shetye and Ms. Keral Mehta for Appellants
 - Ms. M.M.Deshmukh, APP for the State
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**CORAM : SMT. SADHANA S. JADHAV &
MILIND N. JADHAV, J.**

RESERVED ON : APRIL 21, 2022.

PRONOUNCED ON : MAY 06, 2022.

JUDGMENT: (PER MILIND N. JADHAV, J.)

1. This is an Appeal against conviction filed by the Appellants under Section 374 of the Code of Criminal Procedure, 1973 (for short "**Cr.PC**") against the judgment and order of conviction dated 10.08.1998 passed by the learned Sessions Judge, Raigad – Alibag (**‘Trial court’**) in Sessions Case No. 23 of 1991. Appellant No.1 (accused No.1) - Laxman Pilaji Ovalekar expired on 14.01.2018 during the pendency of the present appeal; hence the appeal in

respect of Appellant No.1 stands abated. Appellant No.2 (accused No.2) - Manohar Laxman Ovalekar, son of Appellant No.1 is the sole Appellant in the present appeal. For the sake of convenience, Appellant No.1 shall be referred to as Laxman (accused No.1). Before the Trial court 12 accused were tried; however the Trial court held that the prosecution could not prove beyond reasonable doubt that accused Nos. 3 to 12 had formed an unlawful assembly to cause the death of the deceased and assaulted him and hence were entitled to acquittal for the offence with which they were charged. The Trial court convicted and sentenced Accused No.1 and 2 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (for short "**IPC**") and sentenced them to suffer rigorous imprisonment for life and to pay a fine of Rs.2,000/- each and in default thereof to suffer further rigorous imprisonment for six months.

2. The Appellants have been convicted for killing Mohan Kashinath Mokul, the deceased (hereinafter referred to as "**Mohan**").

3. Before we advert to the submissions made by the respective advocates and to the reappraisal of evidence on record, it will be apposite to refer to the relevant facts briefly:-

3.1. The incident occurred in the intervening night of 2nd /3rd , May, 1990 at village Targhar outside the house of Babu Mokul. Gangabai (PW-2)

daughter of Babu Mokal was to get married on 03.05.1990. On the previous night i.e. 02.05.1990, the 'Haldi ceremony' of Gangabai was being celebrated by her family members. Gangabai is the maternal aunt of Mohan. Kashinath Mokal is the father of Mohan. Gangabai, Kashinath, Manohar (PW-4) and Usha (PW-5) are siblings and children of Babu Mokal.

3.2. On 02.05.1990 around midnight, members from the family of Babu Mokal were celebrating and dancing in the marriage pandal which was erected in front of the house of Babu Mokal and Manohar Mokal. Mohan was also amongst the relatives. Since he was tired, he sat down near one of the pandal pole.

3.3. According to the prosecution, Appellant No.1 entered the pandal and assaulted Mohan with a spear ('bhala') by inflicting a blow on the right side of his chest. The other accused followed the Appellant No.1 in the pandal with sticks and inflicted stick blows on Mohan. After the assault all accused left the scene of crime. Mohan was taken into the house by Gangabai, Manohar and Usha. Bhargav (PW-1), nephew of Gangabai and the first informant rushed to Panvel Town Police Station to inform about the incident. The police arrived at the scene of crime and removed Mohan to Panvel Municipal dispensary wherein the treating doctor (PW-9) - Dr. Ramrao Kendre examined Mohan at about 3.05 a.m., however since his condition was critical, he was referred to Sion hospital, Mumbai for further

treatment.

3.4. The report filed by Bhargav (PW-1) was treated as the First Information Report (F.I.R.) and offence was registered as C.R.No. I-97/1900 under Sections 147,148,149, 326,504 read with Section 34 IPC at 2.35 a.m. with Panvel Town Police Station. The Investigating Officer (I.O.), Shahaji Kisan Ghadge (PW 10) visited the scene of crime, drew the panchanama and collected the plain soil and soil stained with blood. It is pertinent to note that blood stained clothes of Gangabai, Manohar and Usha who carried Mohan inside the house after the assault were not seized by the I.O.

3.5. According to the prosecution, the I.O. thereafter directed Suresh Vishram Chavan, Head Constable, Batch No. 2089 (PW-6) to visit Sion hospital and record the statement of Mohan. PW-6 recorded the statement of Mohan which is placed at Exhibit - '62', on which we shall comment later. The injured Mohan expired in Sion hospital on 05.05.1990 at 7:00 a.m. and therefore the offence was converted into Section 302 IPC from Section 326 IPC.

3.6. The investigation was carried out by PW-10 Shahaji Kisan Ghadage, P.S.I. and thereafter charge was handed over to PW-11 Vijaysinha Jadhav, A.C.P. Panvel. On 20.05.1990, the I.O. recorded supplementary statement of PW-4 Manohar Mokal and one Manjulabai Khot and thereafter

arrested the accused. After completing the investigation, I.O. filed charge sheet against all 12 accused in the court of Judicial Magistrate First Class, Panvel. As the offence was punishable under Section 302 IPC and exclusively triable by the court of Sessions, the learned Judicial Magistrate committed the case to the court of Sessions under the provisions of Section 209 of the Cr.P.C. Charges were framed against the accused and were read out in vernacular language. All 12 accused denied their complicity in the offence by claiming total denial and claimed to be tried. The prosecution examined 12 witness in all. PW-1 – Bhargav Gharat is the first informant and nephew of the deceased, Mohan. PW-1 turned hostile. PW-3 and PW-7 are pancha witnesses. PW-2, PW-4 and PW-5 are the eyewitnesses, according to the prosecution to the incident. PW-9 and PW-12 are the medical witnesses doctors who treated Mohan and performed the postmortem on his dead body. PW-6 is the police constable who recorded the dying declaration of Mohan in Sion hospital. PW-8 is the police head constable who recorded the F.I.R. PW-10 and PW-11 are the two Investigating Officers. No witnesses were produced before the Trial court by the defence.

4. The entire case of the prosecution is based on the following three limbs:-

- (i) dying declaration statement of Mohan recorded by PW-6 (Exhibit - '62');

- (ii) direct evidence of the eye witnesses to the incident, namely PW-3, PW-4 and PW-5 and
- (iii) recovery of weapons namely the spear and sticks by the I.O.

5. In so far as the dying declaration is concerned, it is the prosecution's case that the same was recorded by PW-6, Suresh Vishram Chavan, Head Constable when injured Mohan was admitted to Sion hospital. We have perused the dying declaration at Exhibit No. '62' wherein statement has been recorded in the form of a narration and not in question and answer form which is normally the case. In the dying declaration, Mohan has stated the full names of Accused Nos. 1,2,4,5,7,9 and 12 whereas names of Accused Nos. 3,6,8,10 and 11 have not been mentioned. It is further stated that the 7 accused who are named came to the pandal armed with sticks (lathia & kathia), swords, spears and 'barachi' and attacked him due to an old rivalry between two groups in the village. Surprisingly the endorsement of the doctor on duty in Sion hospital that injured Mohan was in a fit condition to make the statement is absent. So also the starting time and completion time of the recording of the statement is not endorsed and put by the witness and certified by the doctor and the said statement is not endorsed by any witness. Moreover the medical evidence placed on record pertaining to the injury caused by infliction of the spear blow shows that the said blow was fatal and led to severe loss of blood. Hence, it is improbable that Mohan would have remained conscious and in a fit condition to narrate

the statement as recorded and produced by the prosecution. We shall be dealing with the injury in greater detail to relate to the fitness of Mohan to record the dying declaration. In view of the infirmities observed by us, the statement placed on record is not a sustainable piece of evidence in accordance with the provisions of the Indian Evidence Act, 1872 and cannot be relied upon for indicting the Appellant herein.

6. The main thrust of the prosecution's case is based on the testimony of Gangabai Babu Mokal (PW-2), PW-4 Manohar @ Madhukar Babu Mokal (PW-4) and Usha Dharma Patil (PW-5) in the present case. It is the prosecution's case that the testimony of these witnesses is corroborated by the medical evidence given by Dr. Ramrao Tukaram Kendre (PW-9), the first treating doctor in Panvel Municipal Dispensary and Dr. Vidya Anant Narayan (PW-12), who conducted the postmortem of the dead body.

7. We have heard Mr. A.P. Mundargi, learned Senior Advocate appearing for the Appellant and Ms. M.M. Deshmukh, learned APP for the prosecution at length and with their help perused the evidence of the prosecution witnesses and the relevant exhibits. The submissions made by the learned Advocates are on pleaded lines.

8. PW-2, PW-4 and PW-5 have deposed that Laxman (accused No.1) inflicted a fatal spear blow on the chest of Mohan due to which Mohan fell down near the pole where he was sitting. All 3 witnesses have stated that the

other accused inflicted stick blows all over the body of Mohan. However, the medical evidence does not support the testimony of these witnesses in so far as the stick blows inflicted by the other accused are concerned. The medical evidence does corroborate the injury caused to Mohan from the alleged stick blows all over his body which have been described by these 3 witnesses.

9. PW-2 has deposed that some family members were dancing and celebrating in the marriage pandal and Mohan was also amongst them. At that time Mohan sat near one of the pole of the marriage pandal as he was tired, when Laxman (accused No.1) entered into the marriage pandal and he was alone. At that time he was having a *Bhala* (spear) with him and he inflicted a blow of the spear on the right side of the chest of Mohan. Thereafter the Appellant and other accused entered the pandal and inflicted stick blows on Mohan. However in her cross examination she has stated that due to the spear blow inflicted by Laxman, Mohan fell down and thereafter the other accused inflicted stick blows all over his body. She has stated that blood was coming out from his injury until the police arrived, however she and other family members lifted Mohan and took him inside the house. She has also stated about the enmity between two groups in the village viz. Keshav Madhavi group and their family and that Mohan was having friendly relations with Keshav Madhavi, though the relations of the entire family were strained.

10. PW-4 has deposed that Laxman (accused No.1) entered into the marriage pandal and inflicted a blow of the *bhala* on the right side of the chest of Mohan after which Mohan fell down facing towards the earth. He has stated that thereafter the other accused arrived and inflicted stick blows to Mohan on his legs and hands when he was lying there and they left the spot within two minutes thereafter.

11. PW-5 has deposed that Laxman (accused No.1) entered the marriage pandal and inflicted a blow by the *bhala (spear)* on Mohan's stomach due to which he fell down. She has stated that thereafter the Appellant came there and inflicted stick blows on Mohan whereas the other accused inflicted stick blows on Mohan's hands and legs. In her cross examination she has stated that after Mohan fell down due to the assault by the spear, the other accused inflicted stick blows all over his body. She has also stated that the clothes of the family members were not stained with blood when the family members lifted Mohan from the scene of crime and took him inside the house.

12. Next we turn to the medical evidence on record. Dr. Ramrao Kendre (PW-9) was the medical officer who first saw and treated Mohan on his admission at Panvel Municipal Dispensary at 3.05 a.m. on the night of the incident. He has deposed that on examination he found two injuries on Mohan i.e. (i) stab injury over the right chest back just lateral to the spine

with sharp margins and fresh bleeding having a cavity depth of 1 & 1/2” and (ii) C.L.W. (contused lacerated wound) over the right parietal area just behind the line of the ear having depth of 2” X 1/4”. He has stated that injury No. (i) was caused by a sharp object and injury No. (ii) was caused by a blunt object. He has further stated that injury No. (i) was such that it was sufficient to cause the death and accordingly, he issued the certificate at Exhibit ‘69’ stating therein the details of the injuries and status of the patient. In his cross-examination he has however clarified that though he has stated the nature of the injuries as simple in the certificate, in reality it was not so; that injury No. (i) was a fatal injury with a weapon and sufficient to cause the death in the ordinary course of nature. He has further stated that he observed crepitations in the right chest back and he suspected rupture of the liver and the lungs of the patient due to the sharp object penetrating the chest cavity and rupturing the lungs leading to crepitations. He has specifically clarified that injury No. (i) was sufficient to cause the death of the patient.

13. PW-12, Dr. Vidya Anant Narayan conducted the postmortem on the dead body of Mohan. She has described the following injuries:-

- (i) Sutured wound on right side of occipital region 4x1 cm. galea deep;
- (ii) Contused lacerated wound 3x1.5 cm seen on the right side between 8 to 10 intercostal space, sutured;

- (iii) Five abrasions seen on right side 6 cm deep;
- (iv) Right lateral portion of knee showed an open wound, substaneous in dimension;
- (v) Intercostal drainage wound seen at 7th intercostal space on the left side.

14. PW-12 has testified that the cause of death of Mohan was due to shock following hemoperitoneum and hemothorax because of the penetrating wound in the abdomen cavity which led to severe blood loss and hemorrhage and this was sufficient to cause the death of Mohan. Hemoperitoneum is intra-abdominal hemorrhage i.e. a type of internal bleeding in which blood gathers in the peritoneal cavity due to rupture of organ or blood vessels. Hemothorax is the collection of blood in the space between the chest and the lungs. Hemorrhage due to hemoperitoneum and hemothorax is rapidly fatal. This evidence is extremely crucial because it directly proves that the death of Mohan was caused due to the spear blow inflicted by Laxman (Accused No.1). Therefore, in that view of the matter, the evidence pertaining to the gravity of the stick blows inflicted by the other accused including the present Appellant on Mohan is now required to be appraised.

15. We have perused the panchanama pertaining to the discovery of the weapons used in the offence i.e the spear and 7 sticks . Admittedly it has been brought on record by the prosecution that the sticks are of *Velu* (small and hollow bamboo) sticks. As such, admittedly inflicting blows by these

sticks without the intention to cause the death of the victim cannot be a reason to indict an accused of intending to cause the death and offence punishable under Section 302. The evidence of PW-4 and PW-5 has corroborated PW-2's testimony that the other accused i.e. original accused Nos. 2 to 12 followed Laxman (Accused No.1) in the marriage pandal.

16. From the deposition of the eye witnesses there is consistency only in so far as infliction of the blow by the spear by Laxman (accused No.1) is concerned, however the version of events narrated thereafter in relation to the other accused and their role in the crime is inconsistent. The blow inflicted by Laxman (accused No.1) with the spear on the chest of Mohan stands corroborated with the medical evidence. However the testimony of the above prosecution witnesses pertaining to the role of the other accused including that of the Appellant is inconsistent with the medical evidence. The medical evidence placed on record clearly suggests that there was track of 16 cm in length from the entry wound to the exit wound corresponding to the external injury which was a contused lacerated wound having dimension of 3 x 1.5 cms and the cause of death was due to shock following haemoperitonum and hemothorax; that the penetrating wound in the abdominal cavity was a grievous injury leading to severe blood lost and hemorrhage sufficient to cause the death. In simple terms, it was an injury wherein the spear had pierced the chest and come out on the other side, in the process, damaging the vital organs inside the body. This clearly shows

that Mohan got fatally injured due to the infliction of the spear blow by Laxman (accused No.1) and his death was due to shock following haemoperitonum and hemothorax. The entire medical evidence has opined the cause of the death of Mohan due to the aforesaid injury. That apart in so far as external injuries due to the stick blows are concerned, the evidence of PW-12 states that there were 5 abrasions on the right side of the body, but most importantly there is no evidence of the fracture of the skull. PW-4 has stated that accused No.2 (Appellant herein) had inflicted a stick blow on the head of Mohan when he was lying down; however even assuming that the stick blow was inflicted by accused No.2, the medical evidence suggests that such a blow could not be the cause of death of Mohan. Hence to merely rely on the testimony of PW-2 that the stick blow dealt by the Appellant on the head of Mohan has practically remained unchallenged and is consistent with the medical evidence is erroneous and incorrect on the face of the material available on record. The prosecution has failed to bring material evidence on record to show that the cause of Mohan's death was due to the singular stick blow inflicted by Mohan. It is extremely pertinent to note that the deposition of PW-2, Gangabai is that accused No.2 and accused No.3 (Kishore) both inflicted a blow with the stick on the head of Mohan, hence without considering this material evidence, only indicting accused No.2 i.e. the Appellant herein alongwith and in conjunction with the act of Laxman (accused No.1) is contrary to the evidence on record. In so far as the version

of events pertaining to the role of Laxman (accused No.1) is concerned, the same is consistent as gathered from the testimony of PW-2, PW-4 and PW-5 and the same is corroborated by the medical evidence given by PW-12. However, there is clear inconsistency and discrepancy pertaining to the role of the other accused including the Appellant in so far as the version of these witnesses is concerned.

17. We have perused the recorded evidence of PW-2, Gangabai wherein she has clearly stated that the original accused No.2 (present Appellant) and accused No.3 (Kishore) inflicted stick blows on Mohan. Hence If that be the case, there is no reason to indict only the Appellant alongwith Laxman (accused No.1) under the provisions of Section 302 IPC for causing death of Mohan, if all the other accused stand exonerated by the Trial court. It is also pertinent to note that there is no CA report of the spear and the sticks seized by the I.O. to prove that the said weapons were actually used in the crime.

18. We have noted that the incident took place at a time when there were several persons enjoying and celebrating on the eve of the wedding of Gangabai (PW-2), as such there could not have been a case that there were no persons present at the scene of crime other than the family members and close relatives of Mohan who have been examined by the prosecution. The prosecution did not examine any independent witness other than the close

relatives of Mohan i.e. PW-2, PW-4 and PW-5 on whose testimony the entire case of the prosecution stands rested.

19. As seen, the medical evidence states that there was no fracture on the skull of Mohan, hence assuming that Mohan was indeed attacked with the stick by the Appellant, it is not proved beyond reasonable doubt that the said stick blow caused an injury leading to the death of Mohan. The prosecution's evidence as discussed does not show that the blow inflicted by the Appellant has proved fatal to the life of Mohan. No material is brought on record to infer the common intention of Laxman (accused No. 1) nor has any prosecution witness given evidence to that effect. It is beyond doubt that the evidence placed on record by the prosecution clearly shows that the spear blow inflicted by Laxman (accused No.1) to the chest of Mohan caused a penetrating wound in the abdominal cavity, ruptured his vital organs resulting in severe blood loss and hemorrhage which has proved fatal; however in so far as the stick blow inflicted by the Appellant is concerned, it is not proved to be fatal and therefore the Appellant herein deserves to be given the benefit of doubt.

20. Mr. A. P. Mundargi, learned Senior Advocate appearing on behalf of the Appellant has in support of the Appellant's case referred to and relied upon the following judgments.

- (i) *Stalin v/s. State Represented by the Inspector of Police* ¹
- (ii) *Jagrup Singh v/s. State of Haryana* ²
- (iii) *Lallu Manjhi and Anr. v/s. State of Jharkhand* ³
- (iv) *Kusti Mallaiah v/s. State of Andhra Pradesh* ⁴
- (v) *Chanan Singh son of Kartar Singh v/s. State of Haryana* ⁵
- (vi) *Kamaljit Singh v/s. State of Punjab* ⁶
- (vii) *Shivappa Buddappa Kolkar v/s. State of Karnataka and Ors.* ⁷

20.1. In the case of *Stalin vs. State (supra)*, the Supreme Court has held that it cannot be laid down as an universal application that whenever the death occurs on account of a single blow, Section 302 IPC is ruled out. The Apex Court held that the situation is to be considered in each case and the events which preceded also have a bearing on the issue whether the act by which the death was caused was done with an intention of causing death or knowledge or that it is likely to cause death but without intention to cause death. The Court held that from the various decisions of the Supreme Court it has emerged that there is no hard and fast rule that in the case of a single injury, Section 302 IPC would not be attracted; however it depended upon the facts and circumstances of each case, the nature of injury, the part of the body where it is caused, the weapon used in causing such injury and the

1 (2020) 9 SCC 524

2 (1981) 3 SCC 616

3 2003) 2 SCC 401

4 (2013) 12 SCC 680

5 1971 (3) SCC 466

6 (2003) 12 SCC 155

7 (2004) 13 SCC 168

totality of the circumstances which have to be considered to indicate whether the accused caused the death of the deceased with an intention of causing death or otherwise. In that case the death of the victim was caused due to a single knife blow by the accused. Conviction of the accused under Section 302 was upheld by the High Court as testimony of the eye witnesses was found credible. The Apex court held that in the facts and circumstances of that case, Section 302 was not found attracted as the single fatal knife blow was occasioned due to the scuffle and occurrence of sudden and grave provocation.

21. However, in the present case the single blow inflicted by Laxman has certainly caused the death of Mohan. It is seen that the motive was not being apparent and also not being proved by any of the prosecution witnesses by any definite and cogent evidence. In any event the role of the Appellant herein at the highest is proven only to the extent of the stick blow and nothing more. The death of Mohan in the present case had occurred with the fatal spear blow delivered by Laxman (accused No.1) which stands corroborated by the medical evidence as alluded to hereinabove. Hence to attribute the cause of death and infer common intention only of the Appellant is highly erroneous, without any cogent material on record and contrary to the evidence placed on record by the prosecution. Hence it is held that in the present case the Appellant cannot be held responsible for any other injury other than the stick blow inflicted on the head of Mohan and further it is not

proved that the stick blow was sufficient in the ordinary course of nature to cause death of Mohan in the present case. At the highest the direct evidence of PW-2 leads us to the conclusion that the act of the Appellant is on parity with that of accused No.3 (Kishore), as specifically deposed by PW-2 in her evidence. By virtue of doctrine of parity the case of the Appellant needs to be considered on same footing. Hence the Appellant deserves to be given the benefit of doubt.

22. To summarize the position, the evidence on the point of dying declaration does not inspire any confidence so as to place implicit reliance on it. There is no reliable evidence to satisfy the judicial mind that the deceased Mohan was conscious and mentally fit at the time of giving the statement rather, the medical evidence of the spear injury caused to Mohan clearly shows that it was of such a grievous nature, that due to severe loss of blood, the consciousness of Mohan to narrate an elaborate dying declaration was doubtful. A dying declaration has to be necessarily voluntary and truthful and thereto inspire the confidence of the Court.

23. In the aforesaid facts and circumstances, we find and hold that the prosecution has utterly and miserably failed to substantiate the charge of Section 302 levelled against the Appellant beyond all reasonable doubt. The evidence adduced by the prosecution is neither consistent nor cogent and hence not reliable. So the Appellant is entitled to benefit of doubt.

24. The Appellant is also acquitted of the offences punishable under Sections 147, 148, 302, 504, 506 read with Section 149 of the IPC.

25. Hence we pass the following order:-

- (i) The appeal is allowed;
- (ii) The conviction of the Appellant i.e. accused No.2 under Section 302 IPC read with Section 34 IPC and sentence imposed by the learned Sessions Judge Raigad, Alibag by Judgment and Order dated 10.08.1998 passed in Sessions case No. 23 of 1991 is quashed and set aside;
- (iii) The Appellant is acquitted of all the charges levelled against him. Fine if any paid, be refunded;
- (iv) The Appellant be released forthwith, if not required in any other offence. Bail bond of the Appellant stands cancelled.

26. Criminal Appeal No. 666 of 1998 stands disposed of in the above terms.

[MILIND N. JADHAV, J.] [SMT. SADHANA S. JADHAV, J.]

RAVINDRA
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AMBERKAR

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