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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL NO. 1260 OF 2013
WITH
CRIMINAL APPLICATION NO. 310 OF 2019**

- 1. Mr. Sakharam Parvati Gaikwad.**
Age: 35 years, Occ. Agriculture and Service,
R/at: Hatve (Bk) Tal. Bhor, Dist. Pune.
- 2. Mr. Santosh Parvati Gaikwad**
Age: 33 years, Occ. Agriculture and Service,
R/at: Hatve (Bk) Tal. Bhor, Dist. Pune.
- 3. Mr. Mahendra alias Pintya Pandharinath Avchare**
Age: 30 years, Occ. Agriculture,
R/at: Post, Bhivadi Tal. Purandar, Dist. Pune.
- 4. Mr. Amol *alias* Pappu Bhikaji Sonawane**
Age: 23 years, Occ. Agriculture,
R/at – At Post Jambli, Tal. Bhor, Dist. Pune. **.. Appellants.**
(Ori. Accused Nos.1 to 4)

Versus

The State of Maharashtra. **.. Respondent.**
(Ori. Complainant)

Mr. A.Z. Mookhtiar, Advocate for the Appellants.
Mr. H.J. Dedhia, APP for Respondent – State.

**CORAM : A.S. GADKARI &
MILIND N. JADHAV, JJ.**

**RESERVED ON : 24th August 2022.
PRONOUNCED ON : 13th September 2022.**

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

. The present Appeal challenges the legality of Judgment

and Order dated 22.08.2013 passed by learned Sessions Court, Pune, in Sessions Case No. 96 of 2011 convicting Appellant Nos.1 to 4 (Original Accused Nos.1 to 4) under:-

- (i) Section 302 read with section 34 of the Indian Penal Code, 1860 (for short “**IPC**”) sentencing them to suffer rigorous imprisonment for life and each to pay fine of Rs.300/- and in default thereof suffer further rigorous imprisonment of one month;
- (ii) Section 452 read with 34 IPC and are sentenced to suffer rigorous imprisonment for two years and each to pay fine of Rs.200/- and in default thereof to suffer suffer further rigorous imprisonment of one month;
- (iii) Section 324 read with 34 IPC and are sentenced to suffer rigorous imprisonment for one year and each to pay fine of Rs.100/- and in default thereof to suffer further rigorous imprisonment of one month; and
- (iv) Section 506 read with 34 IPC and are sentenced to suffer rigorous imprisonment for six months; all sentences to run concurrently.

2. Shorn of unnecessary details, the prosecution case which emerges from record is as under:-

2.1. That on 24.10.2010 at about 03:30 p.m. Rekha Gaikwad

lodged a non-cognizable complaint bearing N.C case No.162 of 2010 against Shivaji Gaikwad for eve teasing her; hence Shivaji was beaten by Parvati Gaikwad, Tanhubai Gaikwad and Rekha Gaikwad with hands and rope on his face, head and back; Shivaji lodged a cross complaint being NC. No.163 of 2010 against them.

2.2. On the same date, at about 09:30 p.m. PW-1 - Laxman Shankar Gaikwad, brother of Shivaji while going to the house of village Police Patil, Ankush Bhilare, near Laxmimata Temple in his village to inform him about the above complaints heard screams of his mother coming from the house of PW-3. At this time Shivaji was inside the house of PW-3.

2.3. According to prosecution, Shivaji teased Rekha Gaikwad, Appellant No.2's wife in the afternoon and therefore Appellants assaulted Shivaji with “औताचा खिळा” (a gadget used for bullock cart) and killed him inside the house of PW-3 and also assaulted PW-1 outside the house when he confronted them.

2.4. PW-1 saw Appellant Nos.1 and 2 exiting the house of PW-3 with the blood-stained weapon (औताचा खिळा) and iron rod; he was also assaulted by Appellants. Both Shivaji and PW-1 suffered bleeding injuries and were taken to Dr. Shinde's hospital at Nasrapur for treatment. Since Shivaji's condition was critical, he was referred to Sassoon hospital, Pune for further treatment. Appellant Nos.1 to 4

were arrested on 24.10.2010. Shivaji expired in Sassoon hospital on 31.10.2010.

2.5. PW-1 is the first informant; initially investigation was carried out by ASI – Sabale, who expired in a road accident in 2012 while on duty. ASI – Sabale recorded statement of witnesses, prepared spot panchanama vide Exhibit-65, prepared recovery and seizure panchanama of muddemal properties namely iron rod and “औताचा खिळा” used by Appellants vide Exhibits-60 and 63 respectively, prepared panchanama of seizure of blood-stained clothes of PW-1 vide Exhibit-70, prepared inquest panchanama vide Exhibit-67, collected relevant documentary evidence i.e. injury certificate of PW-1 vide Exhibit-76; he sent the seized weapons “औताचा खिळा” to C.A. vide letters marked as Exhibit-97 to 99, collected the postmortem (PM) report of deceased Shivaji vide Exhibit-82 and C.A. Reports vide Exhibits-97 to 99 and completed the investigation.

2.6. After completing investigation, chargesheet was filed before the Judicial Magistrate First Class (JMFC), Bhore. Since the offence under Section 302 is triable exclusively by the Court of Sessions, the learned JMFC, Bhore committed the case to the Sessions Court for trial.

2.7. Charge was framed against Appellants below Exhibit-12 under Sections 302, 326, 452 and 504 read with Section 34 IPC vide Exhibit-12. Charge was read over and explained to Appellants in

vernacular; Appellants denied the charges and claimed to be tried. To bring home the guilt of Appellants, prosecution has examined 17 witnesses.

3. According to prosecution, there are 3 eye witnesses to the actual incident of assault on Shivaji, viz; PW-2, PW-3, PW-4 whereas PW-9 saw Appellant Nos.1 and 2 alongwith two persons going towards the house of PW-3 and PW-10 has seen them exiting the said house with weapons in their hands. In so far as PW-1 is concerned he has seen Appellants exiting the house of PW-3 (spot of incident) after assaulting his elder brother Shivaji inside the house. He has also witnessed Appellants carrying weapons in their hands and confronted them, upon which Appellants injured him and left. PW-1 thereafter entered the house of Sitaram Gaikwad and saw Shivaji lying in a pool of blood.

4. As stated, incident occurred inside the house of PW-3 – Sitaram Gaikwad. Immediately before the incident, PW-3, PW-4 – Shashikala, and PW-4 – Sonali (daughter of Sitaram) were sitting outside the house and talking with Shivaji; at that time, Sonali went inside the house to make preparation for serving dinner and laid the plates; Shivaji followed Sonali inside the house for drinking water as he was thirsty. At that time, Appellants arrived at the doorstep of the house of PW-3 armed with the weapons i.e. iron rod and “औताचा खिळा”

searching for Shivaji. PW-3 in his deposition has specifically mentioned the names of Appellant Nos.1, 2 and 3, whereas he has not mentioned Appellant No.4. In his cross-examination, however PW-3 has not specifically recalled and named Appellant Nos.3 and 4. PW-3 confronted Appellants when they arrived but they pushed him aside and entered his house. Appellants were followed by PW-3, PW-4 and one Parvatibai (not examined by prosecution) inside the house anticipating trouble. PW-2 at that time was already inside the house. Appellants in the presence of PW-2, PW-3 and PW-4 attacked and assaulted Shivaji with the weapon “औताचा खिळा” and iron rod. After the assault, Appellants left the house, however while exiting they confronted PW-1 and injured him too. PW-4 in her deposition has named and identified Appellant Nos.1 and 2 alongwith two others. PW-2 - Sonali who was already present inside the house at the spot of incident however identified all four Appellants in her deposition.

5. It is further seen from the deposition of prosecution witnesses that when Shivaji fell to the ground his mother pleaded before Appellants not to assault Shivaji. Appellants took her aside and continued assaulting Shivaji, while he screamed “*Ayo, Ayo, Melo, Melo*”; at that time PW-2, PW-3, PW-4 all stood aside as they feared for their life; PW-3 even tried to intervene and stop the assault but was pushed aside.

6. In this context, evidence of two further witnesses is also relevant namely PW-9 and PW-11 who have deposed to have seen Appellants proceeding toward the house of Sitaram Gaikwad looking for Shivaji on the road leading from Laxmimata Temple.

On the date of incident, at about 09:30 p.m. PW-9 was washing utensils outside her house when she saw Appellants armed with iron rod and “औताचा खिळा” walking towards the house of PW-3. PW-9 followed them and witnessed Appellants pushing aside PW-3, PW-4, Parvatibai and one Fulabai and barging inside the house, she heard screams of Shivaji, “*Ayo, Ayo, Melo, Melo*” as also pleading by Parvatibai to stop assaulting Shivaji. PW-9 witnessed the assault on PW-1 while she was standing at the door of PW-3’s house.

PW-11 - Ujjwala Laxman Gaikwad is wife of PW-1 and sister-in-law of deceased Shivaji. She has deposed about the prelude to the incident and the dispute which had taken place earlier in the day between Shivaji and Rekha Gaikwad. She has deposed as under: that on 24.10.2010, at about 11:30 a.m. PW-1 and PW-11 went to their agricultural land where Shivaji was grazing his buffaloes; at about 03:30 p.m. Rekha Gaikwad (wife of Appellant No.1), Tanhubai Gaikwad and Parvati Gaikwad were passing through the field when Shivaji called out “ए म्हशे” ‘O buffalo’ to his buffaloes, but it was mistaken by assumed by Rekha that she was called names; hence she

assaulted Shivaji with hands and rope; pursuant to which Shivaji filed N.C. complaint against her in Nasrapur Police Station. She has further deposed that at about 09:00 – 09:30 p.m. she heard Appellants knocking on their door and calling out for Shivaji, “ए शिवा बाहेर ये”; she answered the door and told them that Shivaji was not at home and had gone out, after which they left towards PW-3’s house; she followed them and witnessed the incident of assault on PW-1 alongwith PW-9 from outside the house of PW-3.

7. PW-5 - Shankar Mahadeo Pawar is a pancha witness, who witnessed seizure of articles, viz; one iron rod (49 cm) and iron pipe (90 cm) which are marked in evidence as “Article Nos.-6 and 7” vide Exhibit-60. Clothes worn by all Appellants at the time of commission of crime are seized; Appellant No.1’s black colored pant and sky color full shirt is marked as “Article Nos.8 and 9”; Appellant No.2’s khaki color pant and white color full shirt is marked as “Article Nos.10 and 11”; Appellant No.3’s black colored pant and yellow colored full shirt is marked as “Article Nos.12 and 13” and Appellant No.4’s blue colored pant and blue colored full shirt marked as “Articles Nos.14 and 15”.

8. PW-12 - Pandurang Dyanu Shinde, Medical Officer treated Shivaji and PW-1 in P.H.C. - Nasrapur on the date of incident at about 10:35 p.m. when they were brought to the hospital; PW-12 noticed the following injuries on them:-

(i) *Shivaji had CLW over the skull vertex having size 5 cms x 1-1/2*

cms by bone deep. The injury was transversely placed with severe bleeding and wound was sutured; and

- (ii) *Laxman had CLW over right temporal parietal region with some bleeding 1-1/2 cm x 1/2 cm; wound was sutured.*

9. PW-14 - Dr. Amol Balwant Shinde is the Medical Officer who conducted postmortem examination on the dead body of Shivaji on 01.11.2010 at around 11:00 hrs. and noticed the following injuries:

(A) External Injuries:

- (i) *Stitched wound present over abdomen in mid-line vertical 18 stitches in situ, 19 cm in length, curving over right side of umbilicus, brownish;*
- (ii) *Contusion present over posterolateral of right arm and back on right side, 26 x 3cm bluish purple;*
- (iii) *Stitched wound present over left parietal region, 1 cm from mid-line, oblique anterior left, 5 cm in length, 5 stitches in situ, brownish;*
- (iv) *Contusion present over back on left side lower part, 12 x 8 cm, irregular, bluish purple;*
- (v) *Incised wound present over posteromedial of right leg, vertical 18 x 9 cm x muscle deep, brownish;*
- (vi) *Incised wound present over posteromedial of right leg, vertical 14 x 5 cm x muscle deep, brownish;*
- (vii) *Multiple abrasions present over left side of chest anterolaterally, 7 x 1 cm to 0.5 x 0.5 cm irregular brownish black.*

All aforementioned injuries were ante-mortem.

(B) Internal Injuries:

- (i) *Under scalp hamatoma present over left parietal region 10 x 8 cm irregular reddish;*
- (ii) *Skull was intact;*
- (iii) *Meninges Dura intact;*
- (iv) *Thin layer of Subarachnoid hemorrhage present over left cerebral hemisphere, reddish irregular. Brain was intact,*

congested and oedematous.

(C) *Thorax:*

Patchy consolidated in both lungs.

(D) *Abdomen:*

I noticed injury corresponding to external injury no.1 as mentioned under column No. 21.

Peritoneum and abdominal wall stitched in layers. About 100 ml blood and blood clots were present in peritoneal cavity.

(E) *Stomach:*

Stomach was intact 10 ml. yellowish brownish liquid material present. No abnormal smell perceived, mucous congested. Spleen was absent as there was history of septicemic.

9.1. After completing postmortem, PW-14 opined that Shivaji's death was caused due to complication following the aforementioned injuries; PM report is marked in evidence as Exhibit-82.

10. In this context, evidence given by PW-17 assumes significance; PW-17 is the doctor who treated Shivaji at Sassoon Hospital for his injuries upon his admission. He has produced the entire medical case history along with the original record before the Trial Court which bears his signature under Exhibit-102 and Exhibit-103. In the case papers the history was noted as assault with head injury. In his deposition PW-17 has narrated the entire line of treatment administered to Shivaji. He has also deposed that injuries suffered by Shivaji are probable with the weapons used by the Appellants i.e. iron bars and “औताचा खिळा”. In his cross examination he has stated that in the case papers it is noted that a combined injury

statement is given by injured Shivaji and Laxman Gaikwad (PW-1). He has reiterated that case history was given by Shivaji and not by PW-1. This evidence shows that Shivaji was conscious and oriented when he was admitted to the hospital.

11. Mr. A. Z. Mookhtair, learned Advocate appearing for Appellant Nos.1 to 4 vehemently submitted that, prosecution has failed to prove its case beyond reasonable doubt; deposition of eyewitnesses cannot be considered because they are interested and partisan eye witnesses and there was also delay in recording their testimony; that there are improvements in the deposition of PW-1 which contradict his previous statement given at the time of substantive evidence; that injuries suffered by Shivaji were not serious as he expired seven days after the incident. Hence he has prayed for allowing the Appeal and setting aside of the impugned Judgment & Order.

12. **PER CONTRA**, Mr. H. J. Dedhia, learned APP appearing for State has taken us through the deposition of prosecution witnesses and with his able assistance we have perused the entire record. He has submitted that prosecution has proved its case beyond reasonable doubt on the basis of direct eye-witnesses' evidence i.e. ocular evidence of PW-2, PW-3, PW-4, PW-9 and PW-10 about the presence of Appellants at the scene of crime and commission of crime by Appellants; that Appellant No.1 had a strong motive to kill Shivaji; that

evidence of eye-witnesses cannot be discarded, that this evidence is corroborated by the Medical evidence given by PW-12, PW-14 and PW-17 and further supported by recovery and seizure evidence of articles. Hence, he has prayed for the dismissal of the Appeal.

13. In the present case, it is seen that the substantive evidence of PW-1 and PW-2 refers to the presence of all four Appellants, whereas substantive evidence of PW-3 and PW-4 does not refer to the presence of Appellant Nos.3 and 4. It is further seen that PW-9, neighbour of PW-3 has categorically deposed that she saw Appellant Nos.1 and 2 proceeding towards PW-3's house immediately before the incident, hence, she followed them from a distance and thereafter when she neared the house of PW-3, she saw Appellant Nos.1 and 2 exiting from the house; thereafter she witnessed the assault by Appellant Nos.1 and 2 on PW-1 (Laxman – injured witness and brother of deceased Shivaji). This evidence of PW-9 supports and corroborates the deposition of the eye-witnesses.

14. From a conjoint reading of the evidence of eye witnesses relied upon by prosecution, presence of Appellant Nos.1 and 2 at the scene of crime stands proved; there is direct evidence of eye witnesses having seen them assaulting Shivaji with the weapon; however, presence of Appellant Nos.3 and 4 has not been proved by the prosecution beyond reasonable doubt and hence their presence at the scene of offence seems doubtful. The inconsistency in the deposition

of the substantive evidence given by the eye witnesses examined by prosecution in so far as ascertaining presence of Appellant Nos.3 and 4 at the scene of crime is not corroborated and there is a discrepancy. It is further ascertained that in so far as Appellant Nos.1 and 2 are concerned, they had a strong motive in view of the prelude before the actual incident. Since Rekha Gaikwad, wife of Appellant No.2 was allegedly teased by Shivaji, Appellant No.2 assisted Appellant No. 1 in the offence. Medical evidence given by PW-17 – Dr. Dhondage reveals that Shivaji was conscious and he gave the case history to PW-17; medical case papers placed on record in evidence by prosecution clearly show that Shivaji was conscious and oriented. Cause of death opined by PW-17 is due to multi organ failure and due to severe blood loss. Weapons i.e. “औताचा खिळा” alongwith iron rod used by Appellant Nos.1 and 2 for assaulting Shivaji have been recovered and seized in presence of PW-5 (pancha witness) and marked as Exhibit-59. Though, human blood on clothes of Appellants has been discovered and also seized in presence of PW-5 (pancha witness), C.A. Report Exhibit-99 relied upon by prosecution however is inconclusive in respect of ascertaining the blood group of the blood found on the seized clothes.

15. In view of the above, in so far as Appellant Nos.1 and 2 are concerned, evidence of prosecution witnesses proves their presence at the scene of crime and commission of crime beyond all reasonable

doubts. We do not find any infirmity with the Judgment and Order dated 22.08.2013 passed by the learned Trial Court and do not deem it fit to interfere with the same qua Appellant Nos. 1 and 2. However, as far as Appellant No. 3 and No. 4 are concerned, we are of the considered opinion that due to the material inconsistency in the substantive deposition of eye-witnesses about their presence, it is doubtful whether they were present at the scene of crime and most importantly no role of assault has been attributed by any of the witnesses to them. Hence they are entitled for benefit of doubt and is accordingly given and they stand acquitted.

16. In view of the above discussion and findings and evidence adduced by prosecution, Criminal Appeal No. 1260 of 2013 is partly allowed in the above terms.

17. Hence following Order:-

- (i) Criminal Appeal No. 1260 of 2013 in so far as Appellant Nos. 1 and 2 are concerned is dismissed;
- (ii) Appellant Nos. 3 and 4 in Criminal Appeal No. 1260 of 2013 are acquitted;
- (iii) We are informed that by order dated 05.03.2015 passed by this Court in Criminal Application No. 1551 of 2014, Appellant Nos. 3 and 4 have been released on bail, their P.R. Bonds and sureties shall stand cancelled;
- (iv) All the concerned to act on authenticated copy of this

Judgment and Order.

18. In view of disposal of Criminal Appeal, Criminal Application No.310 of 2019 filed therein does not survive and is accordingly disposed off.

19. Before parting with the Judgment, we would like to place on record appreciation for the efforts put in by Mr. A. Z. Mookhtiar, learned Advocate appointed by High Court Legal Services Committee, Mumbai for espousing the cause of Appellants; he was thoroughly prepared in the matter and rendered proper and able assistance to the Court.

[MILIND N. JADHAV, J.]

[A.S. GADKARI, J.]

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