

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

CRIMINAL APPEAL NO.765 OF 2021

Sadanand Vinayak Sathe
Aged 45 years, Occupation-Nil
R/o N-31/A-1/23/5 Vijay Nagar
Cidco Nasik
At present – Convict No.8754
Nasik Jail

.... Appellant
(Orig. Accused)

versus

1. The State of Maharashtra
Through Ambad Police Station
in Cr.No.I-35/2010

2. Smt.Nutun Vilas Kulkarni
Aged 45 years,
R/o Uttamnagar, Nasik and
Police Station, Ambad, Nasik

... Respondents

.....

- Mr. Swapnil Ovalekar, Appointed Advocate for Appellant .
- Ms.G.P. Mulekar, APP for State/Respondent.

**CORAM : S. S. SHINDE &
SARANG V. KOTWAL, JJ.**

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**RESERVED ON : 16th MARCH, 2022
PRONOUNCED ON : 23rd MARCH, 2022**

JUDGMENT (PER : SARANG V. KOTWAL, J.)

1. The Appellant has challenged the Judgment and Order dated 29/04/2011 passed by the Additional Sessions Judge, Nasik, in Sessions Case No.70 of 2010. By the impugned Judgment and Order the Appellant was convicted for commission of offence punishable under section 302 of the Indian Penal Code and was sentenced to suffer imprisonment for life and to pay a fine of Rs.5,000/- and in default to suffer simple imprisonment of three months. The Appellant was granted benefit of set off under section 428 of Cr.PC. The Appellant's mother, who was the accused No.2, was acquitted.

2. Heard Mr.Swapnil Ovalekar, learned counsel for the Appellant and Ms.G.P. Mulekar, learned APP for the State.

3. The prosecution case in brief is as follows:

The prosecution case is that, previously, the Appellant was married to one Manisha. She was maternal cousin of one Vilas (the deceased in this case). There was divorce between the

Appellant and Manisha. The Appellant was blaming Vilas for divorce between the Appellant and Manisha. The divorce had taken place about 20 years prior to the incident. The incident took place on 19/01/2010. It is the prosecution case that, at about 04.30 p.m., the deceased Vilas had gone towards the house of the Appellant to question him, as on the same day some time ago, the Appellant had told Vilas's mother that he would murder Vilas. According to the prosecution case, when Vilas reached near the house of the Appellant, both the accused i.e. the Appellant and his mother assaulted the deceased. The Appellant assaulted him with the knife and accused No.2 assaulted Vilas with iron rod. A crowd gathered there. Somebody informed the police. The police reached the spot. The Appellant was standing there with the knife in his hand. The deceased was lying on the road in injured condition. The Appellant was taken to Ambad Police Station, which was about less than a kilometer from the spot. The beat marshal, who took the Appellant to police station, came back to the spot and then shifted Vilas to Civil Hospital. After that, he was taken to another hospital and ultimately he succumbed to his injuries.

Initially the FIR was lodged by the wife of the deceased u/s 307 of the IPC and subsequently after death the deceased, section 302 of IPC was added. The FIR was lodged at Ambad Police Station vide C.R.No.I-35/2010.

4. In support of its case, the prosecution has examined 9 witnesses. The defence of the Appellant and the co-accused was of total denial. There was no eyewitness to the actual assault, but there were witnesses who had seen the Appellant standing near the injured with a blood stained knife in his hand. At the conclusion of the trial, the learned Judge acquitted the co-accused/mother; but convicted the Appellant as mentioned earlier. The learned Judge mainly relied on the evidence of those witnesses who had reached the spot. There were two Rikshaw drivers, who have deposed that the Appellant was standing there with a knife in his hand. There was a beat marshal who had reached the spot and had taken the Appellant to the police station. The evidence against the accused No.2 was not found sufficient and benefit of doubt was given to that accused.

5. Learned counsel for the Appellant submitted that there are important discrepancies between the evidence of the witnesses who had reached the spot and had allegedly seen the Appellant standing near the injured. He submitted that those witnesses were chance witnesses. The statements of neighbours and other persons from the crowd of about 70 people, was not recorded by the police. The FIR was not immediately lodged. There is no arrest panchanama on record. Therefore there is nothing to show that the Appellant was arrested immediately as claimed by the prosecution. The C.A. reports are not on record. The seizure of knife at the instance of the Appellant is extremely doubtful and there is no connecting piece of evidence with that knife in the form of the C.A. Report. The fact that the benefit of doubt was given to accused No.2 shows that the prosecution case was not free from doubt and benefit of the same should also be given to the Appellant.

6. Learned APP on the other hand submitted that the evidence of the witnesses who had reached the spot is sufficient to prove the case against the Appellant. They were independent

witnesses and they had no enmity towards the Appellant. The Appellant was caught at the spot and therefore it was a very strong circumstance against him.

7. To appreciate the rival contentions it is necessary to refer to the evidence brought on record. PW.9 Dr. Deepak Rajput, the Medical Officer, had conducted the post-mortem examination. He had found two CLW's on each arm, one CLW over left scapula bone, one incised wound on the head, one incised wound on the mouth and one incised wound from right mandible to left occipital bone. The cause of death was mentioned as 'due to hemorrhagic shock due to head injury and poly trauma'.

8. Thus there is no doubt that the deceased Vilas had died a homicidal death. It was a result of attack on him caused by sharp weapon. The incident had occurred in a crowded locality, as about 70 people had gathered at the spot. Therefore it was important for the prosecution to have carefully produced the incriminating material against the Appellant on record. After consideration of the evidence, we are of the opinion that the prosecution has

miserably failed in its duty. The evidence on material aspect is lacking. The evidence on record is not free from doubt.

9. Before discussing the evidence of the main witnesses, who had reached the spot, we may refer to the evidence of the family member of the deceased. PW.1 Nutan Kulkarni, was wife of the deceased. She has stated about the dispute between the Appellant and the deceased on the ground of Appellant's divorce with Manisha, which had taken place about 20 years ago from the date of incident. According to her, the Appellant was holding grudge against Vilas. On 19/01/2010, at about 04.00 p.m., her mother-in-law Pushpabai and her mother Lilabai were in the house. The Appellant came to PW.1's house. PW.1 and Vilas were not in the house. The Appellant asked for Vilas and said that he would murder Vilas on that day. Pushpabai immediately made a phone call to PW.1 and told her about this threat. On being informed thus, the PW.1 and the deceased went home. Vilas told others that he would go to the Appellant's house and question him. PW.1 and Vilas first went to the house of Vilas's maternal

uncle. From there, Vilas alone went ahead at about 04.30 p.m. on 19/01/2010 towards the house of the Appellant, which was located about 5 minutes distance from that place. After sometime, some women from the area were saying that the Appellant had assaulted one person. PW.1 rushed there. She saw that there was blood at the spot and Vilas's footwear was lying at the spot. She was informed that Vilas was taken to the Civil Hospital, Nasik. She came to know that Vilas was assaulted by the Appellant with a knife and the Appellant's mother with an iron bar. PW.1 then went to the Civil Hospital. He was not in a position to speak. He then was shifted to Suyash Hospital and was kept in ICU. After this, she went to Ambad police station and lodged her FIR at about 10.30 p.m. On 21/01/2010 at about 04.30 a.m., the deceased died in Suyash Hospital. Her evidence is in respect of the strained relationship between the Appellant and the deceased. She had not seen the incident. However, one important fact from her evidence is that she was the one who had lodged her FIR. The FIR is produced on record at Ex.20. It shows that the FIR was lodged at Ambad Police Station at 10.45 p.m. on 19/01/2010. The incident

had occurred at about 04.30 p.m. on that day. There was a gap of about five hours in lodging the FIR. In the context of the facts of the present case, this assumes importance.

10. PW.6 Pushpavati Kulkarni was mother-in-law of PW.1. she has narrated about the incident when the Appellant had allegedly came to their house and had uttered threatening words against the deceased. PW.6 had then called PW.1. In her cross-examination, PW.6 admitted that she had not told the police in her police statement that she had informed PW.1 about the incident. Therefore to that extent PW.1's evidence does not get corroboration from PW.6 because of this omission.

11. The most important witnesses in this case are PW.4 Ankush Yeshwant Deore, PW.5 Pravin Govinda Mahale and PW.7 Pahulu Rajaram Deore. PW.4 Ankush Deore was a Rikshaw driver. He has deposed that he was proceeding from the road where the incident had taken place. He saw a crowd. He went there. He saw that one person was standing there with a blood stained knife in his hand. The other person was lying injured on the ground with

injuries on his throat and neck. The person holding the knife was threatening others. After that, within about 15-20 minutes police reached there and took away the person who was holding knife. P.W.4 has identified the person with the knife as the accused before the Court. P.W.4 had taken the injured in his Rikshaw to the Civil Hospital, Nasik. In the cross-examination he has stated that Pravin had come to the spot after him. He had not seen the actual assault on the deceased. He has deposed that after the police had taken the Appellant to the police station, the police again came to the spot after 5 minutes. He has deposed that after about ½ hour on reaching the spot, he had taken the injured to the hospital.

12. P.W.5 Pravin Mahale was another Rikshaw driver. He has stated that at about 05.45 p.m. he was present near Vijaynagar bus stand. He saw a crowd at the spot of incident. He went there. He saw one person was lying on the ground in injured condition and one person was standing with knife in his hand. He has deposed that there was one old woman standing at the spot, holding an iron bar. P.W.5 has deposed that he caught hold of the person with

knife. The old woman standing nearby tried to intervene and gave a blow of iron bar on this witness's right hand. He has deposed that he made a phone call to Ambad Police Station and gave information about the incident. He then sent the injured to the hospital in Autorikshaw of P.W.4. He himself waited there at the spot. He identified both the accused before the Court. He identified the knife and the iron bar. In the cross-examination he had stated that he was present at the spot when the police took away the accused. According to him police had taken away both the accused at the same time. Significantly he has further denied the suggestion that when the police took away the accused, the injured was lying at the spot; meaning thereby that, the injured was taken to hospital first and then the accused was arrested by the police. He specifically denied that the police had taken the accused first to the police station and then came back at the spot and then they took the injured to the hospital. This version is materially different from the prosecution case and in particular from the deposition of the beat marshal who had allegedly caught the accused at the spot.

13. From their evidence it is clear enough that both P.W.4 and P.W.5 are chance witnesses. They were not knowing the Appellant and therefore it was necessary for the Investigating Officer to have held test identification parade to enable these witnesses to identify the Appellant. The necessity of identification parade could have been dispensed with in this case if the prosecution had proved beyond reasonable doubt that the Appellant was caught at the spot. Therefore we have examined the prosecution evidence from that angle very carefully. In that behalf, evidence of P.W.7 Pahulu Deore is very important. He was working as a constable in Ambad Police Station. On the date of incident he was posted on duty of beat marshal. He has deposed that he was on duty with Police Naik Nikam. This Nikam is not examined by the prosecution. P.W.7 has deposed that both of them were on patrolling duty in that area when one person told them about some incident that was going on in that area. They went to the spot. They saw that one person having blood stained knife in his hand was standing there and one person was lying on the ground

in injured condition. He further deposed that, they then took that person in their custody and took him to the police station on motorcycle. On enquiry, the person gave his name as Sadanand Sathe. It is the name of the Appellant. According to the prosecution case, thus the Appellant was caught at the spot. P.W.7 has further categorically deposed that they had given the Appellant in custody of the police station officer. After that, they came back to the spot again and then sent the injured in an Autorikshaw to the hospital. They came back from the police station within 5-6 minutes.

14. In the cross-examination he has stated that, about 70 people had gathered at the spot. Ambad police station was about three quarters of a kilometer from the spot. There is one very important omission from his police statement. He could not explain why his police statement did not mention that the Appellant was standing there. This omission is proved through the evidence of P.W.8 API Prabhakar Patole, who had recorded his statement. P.W.7 has admitted that he himself did not lodge any complaint in

respect of this incident. He specifically gave the number of the Rikshaw as MH-15-Z-7856 belonging to one Yeole. He made no reference to P.W.4 Ankush Deore, who had taken the injured to the hospital. He explained that since the police station was near, they had first taken the accused to the police station and then had come back to the spot and had taken the injured to the hospital.

15. We find that the evidence of this witness is not free from doubt. According to him there were two police officers including himself who had reached the spot. He does not speak about the presence of accused No.2 at the spot. He has not mentioned about the fact in his police statement that the Appellant was standing at the spot. He first takes the Appellant to the police station, leaving the injured in precarious condition at the spot itself. We find it difficult to accept. There were two police officers. At least one of them could have made immediate arrangement to take the injured to the hospital. As we have discussed further, the arrest of the accused is shrouded with suspicion in respect of date and time of his arrest. This witness had not lodged his FIR, though he had

gone to the police station after having seen that the injured was lying at the spot having suffered injuries with sharp weapon. Obviously cognizable offence was committed and yet no immediate FIR was lodged either by him or his colleague. He had made arrangement to send the injured to the hospital. Even after that neither of these two police officers went back to the police station, which was very near, to lodge their FIR.

16. The investigation carried out in this case includes various Panchanamas and the timing of those Panchanamas are very important. As mentioned earlier, the FIR was lodged at 10.45 p.m. P.W.8 API Prabhakar Sadanand Patole had taken over investigation on the next day i.e. on 20/01/2010 at 10.00 a.m. According to him, PSI Akram had arrested the Appellant at about 35 minutes past midnight on 20/01/2010. According to the prosecution case, P.W.7 had already taken the Appellant to the police station at about 04.30 to 05.00 p.m. on 19/01/2010 and yet he was shown arrested only in the midnight at about 35 minutes past midnight on 20/01/2010. Even then no Arrest Panchanama was prepared,

at least no Arrest Panchanama is produced on record.

17. PW.2 Amit Prabhakar Honrao was a Pancha in whose presence Spot Panchanama was conducted and knife was seized from the Appellant. The Spot Panchanama was produced on record at Ex.22. It was conducted between 11.00 p.m. to 11.45 p.m. on 19/01/2010. An iron rod and the deceased's footwear were seized from the spot. After that, another Panchanama was carried out in the presence of PW.2 between 12.15 to 01.00 a.m. in the midnight on 20/01/2010. This Panchanama is important. This was the Panchanama recording that the Appellant had produced the blood stained knife at that time. There is also reference to blood stained clothes i.e. shirt, a banian and a pant having been seized at the same time. The prosecution case has not led any evidence to show whose clothes those were. These could not be clothes of the Appellant because there is another Panchanama of seizure of clothes which he was wearing. There is no connecting evidence to show that those clothes were those of the deceased. The significance of his Panchanama is that it was carried out at

about midnight on 20/01/2010. Thus, according to the prosecution case, the Appellant was taken to the police station at about 05.00 p.m. and till midnight the knife remained with the Appellant which itself is unbelievable. This only shows that this Panchanama was only a paper work and no serious steps were taken to immediately arrest the Appellant or to seize the weapon. Therefore the prosecution case becomes doubtful as to whether the Appellant was caught at the spot at about 05.00 p.m. i.e. at the time of incident. No police officer is examined to explain this discrepancy. PW.8 has taken over the investigation on the next date about 10.00 a.m. The Panchanama for seizure of knife is produced on record at Ex.23.

18. PW.3 Santosh Anandrao Diwte was the Pancha in whose presence clothes of the Appellant were seized. That Panchanama was carried out between 05.30 to 06.00 p.m. on 20/01/2010. Here again there is inordinate delay in conducting this Panchanama. For about 24 hours the Appellant was in custody of the police wearing same clothes and in between the knife was

seized from him, but not his clothes. This again is a suspicious circumstance against the prosecution case.

19. More importantly though articles were sent to C.A., the prosecution has not produced the C.A. Report in respect of any of the articles i.e. the clothes and the knife and therefore it is difficult to connect these articles with the crime.

20. In this background, as we have mentioned that the prosecution has not even conducted the test identification parade to enable those two Rikshaw drivers to identify the Appellant who was a stranger to them. All these factors have raised serious doubt over the prosecution. Learned Trial Judge himself had acquitted the accused No.2 disbelieving the prosecution evidence. Therefore in the light of these extremely doubtful circumstances, the prosecution has failed to prove its case beyond reasonable doubt against the present Appellant. This itself is quite surprising as the incident had taken place in a crowded locality in broad day light and yet prosecution has miserably failed to prove all these circumstances against the present Appellant beyond reasonable

doubt. The prosecution has failed to prove that the Appellant was at the spot and from there he was arrested. The timing of the FIR and all the aforementioned Panchanamas speak for themselves. The prosecution has not explained the significance of timings of these Panchanamas. The motive alleged against the Appellant is also difficult to believe because the divorce between the Appellant and Manisha had taken place 20 years prior to the date of incident. None from the neighbourhood was examined by the prosecution. All the witnesses are chance witnesses. The beat marshal's evidence does not inspire confidence. Therefore we do not feel it safe to accept this evidence to sustain conviction and sentence imposed against the Appellant. The Appellant deserves benefit of doubt.

21. Hence, the following order :

ORDER

(i) The Appeal is allowed.

(ii) The Judgment and Order dated 29/04/2011

passed by the Additional Sessions Judge, Nasik, in Sessions Case No.70 of 2010 is set aside.

- (iii) The Appellant is acquitted of all the charges.
- (iv) The Appellant is in custody. He shall be released forthwith, if not required in any other case.
- (v) Appeal is disposed of.

(SARANG V. KOTWAL, J.)

(S. S. SHINDE, J.)