

Satish Sangar

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 130 OF 2014

1. Kailas Haribhau Warhe
Aged About – 45 Years,
Occu.- Agriculture / Service,
Presently Resident of Dhairy,
Raikar Chawl, Originally Resident of
Mazgaon, Tehsil Velha, Distt. Pune.
(Presently in the Yervada Jail,
District - Pune)
... Appellant No.1
(Original Accused
No.1)
2. Naresh Ramchandra Warhe
(Chavan), Aged About – 32Years,
Occu. - Agriculture, Resident of
Mazgaon, Tehsil Velha, Distt. Pune.
(Presently in the Yervada Jail,
District - Pune)
... Appellant No.2
(Original Accused
No.2)
3. Bajirao Kondiba Warhe
Aged About – 38 Years,
Occu.- Agriculture, Resident of
Mazgaon, Tehsil Velha, Distt. Pune.
(Presently in the Yervada Jail,
District - Pune)
... Appellant No.3
(Original Accused
No.3)
4. Eknath Balu Warhe
Aged About – 38 Years,
Occu.- Agriculture, Resident of
Mazgaon, Tehsil Velha, Distt. Pune.
(Presently in the Yervada Jail,
District - Pune)
... Appellant No.4
(Original Accused
No.4)

Versus

State of Maharashtra
At the instance of Sr. Inspector of
Police, Velhe Police Station,
District – Pune (M.S.)
...Respondent/
Complainant

Mr. Daulat Khamkar, Advocate *for Appellant.*

Ms. P.P. Shinde, APP *for Respondent-State.*

**CORAM: M.S. SONAK &
N.R. BORKAR, JJ.
DATED : 15th September
2022**

JUDGMENT(PER M.S. SONAK, J)

1. Heard Mr Daulat Khamkar for the Appellants, and Ms P.P.Shinde learned APP for the State.

2. The Appellants question the judgment and order dated 6-6-2013 in Sessions Case No. 107 of 2011 made by the learned Sessions Judge, Pune convicting the Appellants for offences under Sections 302, 427, 435, 452 read with Section 34 of the Indian Penal Code and sentencing them to suffer, *inter alia* life imprisonment.

3. The Sessions Court, on 6-9-2012, framed the charges against the Appellants alleging that on 18-10-2010 between 8.45 a.m. and 9.00 a.m. and between 10.30 a.m. and 11.15 a.m., they, in pursuance of a criminal conspiracy and having common intention, murdered Vitthal Krishna Warhe and his son Sunil Vitthal

Warhe. The Appellants were also charged for other offences like house-trespass. The charge alleged that the Appellants used a sickle and sticks to murder Vitthal and Sunil.

4. The Prosecution examined ten witnesses, including PW-1 and PW-2 and PW-3 – eyewitnesses. The Appellants were offered an opportunity in terms of Section 313 of the Cr.P.C. The Appellants, having availed of this opportunity, even stated that they would examine one defence witness. However, a praecipe was ultimately filed stating that they do not wish to examine any defence witnesses. After considering the evidence on record and appreciating the contentions raised on behalf of the Appellants and the Prosecution, the Sessions Judge has made the impugned judgment and order convicting and sentencing of the Appellants. Hence, this Appeal.

5. Mr Khamkar, learned Counsel for the Appellants, assails the impugned conviction by pointing out that the Prosecution version is inherently improbable. He points out that the testimonies of none of the eyewitnesses inspire confidence because they are riddled with

contradictions and omissions. He submitted that there is no consistency between the version deposed to by the three alleged eyewitnesses. He offered that these witnesses are interested because they are closely related to the deceased persons. He, therefore, submits that the testimony of these so-called eyewitnesses deserves to be excluded from consideration. Upon such exclusion, he submits that there is no legal evidence to sustain the conviction.

6. Mr Khamkar points out that PW-3, a child witness, deposed to witnessing some of the Appellants assaulting Vitthal on his neck. However, the medical evidence rules out any injuries on the neck. He submits that even otherwise, the testimony of PW-3 is quite vague and not specific. He submits that PW-1 does not refer to the presence of PW-3 at the time of the incident. He referred to the omissions marked in the testimony of PW-3 and submitted that these are material omissions. For all these reasons, Mr Khamkar submitted that the testimony of PW-3 must be entirely excluded from consideration.

7. Mr Khamkar submitted that the testimonies of PW-1 and PW-2 are vague. They refer vaguely to having witnessed the allegedly murderous assault. However, they give no details about which Appellant held that particular weapon. They also do not depose about the Appellants giving blows to any specific part of the deceased's body. He points out some of the omissions in the testimony of PW-2 on the aspect of sickle and wooden log. Based upon all these, he submits that the learned Sessions Judge erred in convicting the Appellants in this matter.

8. Mr Khamkar submits that if the Prosecution's version about villagers' gathering at the site is to be accepted, then there is no explanation why the Prosecution examined no independent witnesses. Furthermore, he points out that there was almost three hours of delay in recording the FIR, and this delay casts doubt on the Prosecution's version.

9. Mr Khamkar submits that the Prosecution never examined Ashok, who was riding pillion with the deceased Sunil. This is despite the Prosecution's version that the Appellants even assaulted Ashok, who suffered injuries

due to the assault. He submits that the testimony of an injured witness is always treated on a higher pedestal. Thus, the non-examination of this witness casts doubt on the Prosecution's version in this matter.

10. Mr Khamkar pointed out that the recoveries in this matter are entirely stage-managed. He submits that sticks and sickles are ordinary articles freely available. He points out that no proper evidence links these articles to the alleged crime. He, therefore, submits that the learned Sessions Judge erred in relying upon these circumstances to convict the Appellants.

11. Mr Khamkar finally submits that the Prosecution has failed to prove the motive in this case. He points out the cross-examination of the so-called eyewitnesses and submits that the motive suggested by the Prosecution has been entirely demolished. Accordingly, he submits that conviction should not be sustained in this matter without any motive. He urged that at least a benefit of the doubt is due to the Appellants.

12. Ms P. P. Shinde learned APP defends the conviction and sentence based on the reasoning reflected in the

impugned judgment and order. She submits that the evidence of the three eyewitnesses is clear and compelling. She submits that some minor contradictions or omissions are hardly relevant to discard their otherwise clear and compelling testimonies. She submits that motive is not relevant in a case of direct evidence. She submits that the Prosecution has established the motive by leading cogent evidence. She submits that the non-examination of Ashok makes no dent in the Prosecution version. She points out that there was no delay in registering the FIR, and even the recoveries were in accord with the law. Based on all these, Ms Shinde submits that this Appeal may be dismissed and the Appellants' conviction for double murder may be maintained.

13. The rival contentions now fall for our determination.

14. The Prosecution, in this case, relied upon direct evidence of Heerabai (PW-1), Anil (PW-2) and Bharat (PW-3). Therefore, the issue of motive is not very much relevant. Though, in this case, we must say that the

Prosecution has established the motive through the testimonies of its witnesses.

15. In *State of A.P. V/s. Bogam Chandriah and Another, A.I.R. 1986 S.C. 1899*, the Hon'ble Supreme Court has held that the High Court was in error to interfere with the conviction because prosecution had failed to prove the adequate motive for the commission of the offence. The Hon'ble Supreme Court pointed out that it was a well-settled rule that when there was direct evidence of an acceptable nature regarding the commission of an offence, the question of motive loses relevance to a great extent.

16. Therefore, in this case, we will have to evaluate the evidence of PW-1 and PW-2 and PW-3, the eyewitnesses, to determine whether the Appellants' conviction must be sustained or set aside.

17. Heerabai (PW-1) is the widow of deceased Vitthal and the mother of deceased Sunil, who were murdered on 18-10-2010. She deposed that on this date, about 8.45 a.m. to 9.00 a.m., her husband Vitthal, who had taken the cattle for grazing, returned wounded and shouting loudly.

She deposed that Vitthal had sustained injuries on his hands, legs and head. Moreover, she deposed that blood was oozing out from Vitthal's body. On inquiries about who had assaulted him, Vitthal named the Appellants and stated that they attacked him by accusing him of indulging in black magic (karni and dev lavne). They alleged that Vitthal was responsible for the death of several of their family members.

18. PW-1 deposed Vitthal informing her that the Appellants were referring to black magic killing the family members. The Appellants threatened that they would not keep any members of his family alive. PW-1 deposed to her panic and how she sent her son Anil (PW-2) to arrange for a vehicle to take Vithal to the hospital. PW-1 then deposed about the Appellants coming to the spot near the streamlet where Vitthal was seated. She deposed about the Appellants Kailas holding a sickle and the other Appellants holding sticks.

19. PW-1 finally deposed about the Appellants assaulting Vitthal and killing him. She spoke about the injuries sustained on his head, hand and other parts. She spoke

about how she stood at some distance with apprehension. She spoke about her son Anil standing with her, again with apprehension.

20. PW-1 deposed that as all this was unfolding before her eyes, her other son Sunil came on a motorcycle from the Pune side. One Ashok was riding pillion. She spoke about how the Appellants caught hold of Sunil, dragged him from the motorcycle and brutally assaulted him. She spoke about how Sunil was thrown away in the streamlet, and his motorcycle was set on fire.

21. In the cross-examination, there was no serious dent to the core part of her testimony. She stated that no villagers were present when Vitthal came running from the pasture land (hadkiche raan) situated about 30 feet from their house. She denied the suggestion that there was any quarrel between her husband Vitthal and her son Sunil about not providing sufficient money to her other son Anil. She denied the suggestion that Sunil had assaulted her husband, Vitthal. Finally, she denied the suggestion that the Appellants Bajirao and Eknath were not present in the village on the date of the incident.

22. Thus, on the crucial aspects, there was no dent in the testimony of PW-1. The contention about PW-1 not giving the particulars about the role of each of the Appellants or the precise part of the body they assaulted is not a good ground to discard her testimony. The witness has deposed to the incident in sufficient detail, and the precise and intricate details as suggested by the learned Counsel for the Appellants is hardly expected. In any case, the lack of such intricate details can hardly be a ground to reject a witness's otherwise clearly compelling testimony.

23. PW-2 has also deposed to the incident in substantially similar terms to those deposed by PW-1. The fact that the testimonies of these two witnesses are not identical is undoubtedly not a ground to style their testimonies contradictory or otherwise unworthy of belief. Some variances between the two testimonies are pretty natural, and such variances lend greater credibility. The variances are on trivial aspects. On the core or crucial aspect, there is consistency between the versions deposed by PW-1 and PW-2. Therefore, based upon some minor or trivial variances, there is no case to discard the testimonies of either PW-1 or PW-2. Both these witnesses

have clearly and compellingly deposed to the Appellants brutally assaulting Vitthal and Sunil. These witnesses have also deposed to the Appellants entering their house and damaging the property therein. There is no case to discard these two testimonies on the grounds alleged by Mr.Khamkar or otherwise.

24. PW-3 Bharat was about 12 to 13 years old at the time of the incident. He was about 15 at the time he deposed before the Court. Again, he too deposed about witnessing the first assault on his father at the pasture land. He deposed about how he too came running at home and, from a close distance, saw the second assault on his father, Vitthal. He has also deposed to the assault on his brother Sunil. Again, on crucial aspects, his testimony is consistent with the testimonies of PW-1 and PW-2.

25. PW-3 claimed that he had informed the Police about the assault by the sickle, but he could not assign any reason why this was not recorded in his statement. He also claimed to have informed the Police about the assault on Ashok's leg and about some of the Appellants

assaulting Sunil and Vitthal with sticks. But, again, he could not explain why this was not recorded in his statement. Therefore, these aspects were marked as omissions.

26. Mr Khamkar submitted that Bharat was not a credible witness based on the above omissions. In our judgment, no such inference can be drawn because the omissions cannot be said to be material. In any case, Bharat, both in his statement and in his deposition before the Court, was quite clear about his witnessing the assault on Vitthal and Sunil, due to which the two succumbed and died. In material aspects, therefore, the testimony of even Bharat is clear and compelling.

27. Bharat (PW-3) did refer to witnessing some of the Appellants assaulting Vitthal on the head, neck and legs. The medical evidence, indeed, does not suggest any injury to the neck. However, this is hardly a ground to discard Bharat's otherwise clear and cogent testimony. Bharat was a boy of hardly 12 to 13 years and must have been traumatized by witnessing the murderous assault. Therefore, his testimony can neither be doubted nor

discarded merely because he refers to some assault on the neck, and the medical evidence does not show any injuries on the neck. There is overwhelming medical evidence about the head, arms and other injuries. Thus, the medical evidence substantially corroborates the testimony of the eyewitnesses.

28. In ***C. Muniappan and Ors. V/s. State of Tamil Nadu, A.I.R. 2010 S.C. 3718***, the Hon'ble Supreme Court has explained that omissions, contradictions and discrepancies in the evidence of the witnesses are not to be given undue importance unless they shake the basic version of the witnesses. In this case, there are hardly any contradictions or discrepancies. The omissions are also not on material aspects. In any case, even the so-called contradictions, discrepancies and omissions make no dent in the basic version of the three eyewitnesses. Their deposition on the crucial aspects of the incident is entirely consistent and has remained unshaken in cross-examination.

29. There is some evidence about the villagers slowly gathering to the spot of the assault. However, there is no

clear evidence about the villagers actually witnessing the assaults. Therefore, the contention about the non-examination of independent witnesses or the argument about PW-1 and PW-2 and PW-3 being interested witnesses does not appeal to us. Merely because the eyewitnesses were related to Vitthal and Sunil, there is no reason to disbelieve or discard their testimonies.

30. In ***Piara Singh and Others V/s. State of Punjab, A.I.R. 1977 S.C. 2274***, the Hon'ble Supreme Court has made it clear that such evidence cannot be rejected unless other circumstances render reliance unsafe. In this case, the Court also observed that it might be difficult to get a witness from the village when an assault of this type suddenly occurs in the deceased's house. The three eyewitnesses are natural witnesses; therefore, their testimonies cannot be rejected on the ground urged by Mr.Khamkar or otherwise.

31. The learned Sessions Judge has adequately evaluated the evidence of the eyewitnesses and relied upon the same after that. Even though we have independently assessed and evaluated the evidence of

the three eyewitnesses, we see no reason to take a different view. The testimonies of the three eyewitnesses are clear and compelling in core aspects. Considering this direct evidence brought on record by the Prosecution, we think that no case is made out to interfere with the Appellants' conviction in this matter.

32. The Prosecution could have examined Ashok since he was an injured witness. The record bears out that Ashok's statement was recorded, but ultimately, he was not examined during the trial. Although his examination was advisable, his non-examination is not fatal to the Prosecution version, particularly considering the clear and convincing testimonies of the three eyewitnesses. It is possible that the prosecutor before the Sessions Court may not have thought it necessary to burden the Court's record after having examined three eyewitnesses. Therefore, we do not feel the non-examination of Ashok is a good ground to overturn the conviction based on clear and convincing direct evidence of the eyewitnesses.

33. Insofar as the recoveries are concerned, the statement leading to the recovery of the sickle was

admissible in evidence considering the provisions of Section 27 of the Evidence Act. However, the statements that led to the sticks' recovery could be excluded from consideration. The statements are not quite clear; further, the sticks in question are ordinary articles available anywhere. There is no clear evidence about these very sticks being used in the assault. However, even if the statement which led to the discovery of the sticks is excluded from consideration, there is no case made out to interfere with the conviction considering not only the direct evidence of the eyewitnesses but also the portion of the statement leading to the discovery of the sickle. Besides, the admissible evidence is substantially corroborated by the medical evidence on record.

34. The medical evidence on record corroborates the oral evidence tendered by the three eyewitnesses. Minor discrepancies here and there are not very relevant. Broadly, the medical evidence substantially supports the assaults described by the three eyewitnesses. Dr Madhav Bhaware's (PW-8) evidence is also quite clear on the subject.

35. Mr Bhaware (PW-8), who conducted the post-mortem of Vitthal and Sunil, deposed to the following injuries on Vitthal's body:

“1. He was having C.L.W. on scalp occipit, dimension was 3 cm. in length and 2 cm. in deep, the skull was broken, oval sharp incise wound was there and blood clot was accumulated at the wound face.

2. Left arm 3 cm. below the shoulder to elbow having injury which was in dimension 15 cm. x 3 cm., deep incise wound.

3. On thigh right side just below waist C.L.W. admeasuring 9 cm. x 2 cm. deep incise.”

36. In addition to the above injuries, PW-8 deposed to head internal and thorax internal injuries. He deposed that the injuries were fresh and caused by a sharp weapon like sword or ‘C’ shape sickle. He opined that the cause of death may be due to contusion brain (hematoma and fracture occipit skull) and hypovolemic shock due to multiple sharp incised injuries leading to cardio respiratory arrest.

37. PW-8 was shown the weapons of assault, and he opined that the various injuries deposed to him were possible with the weapons of assault shown to him.

38. PW-8 also deposed to finding the following injuries on Sunil's body:

"1. Injury on scalp occipit admeasuring 3cm. x 2 cm. deep, oval shape, C.L.W. sharp incised.

2. Left pinna 2 cm. incise wound, lower part of pinna was separated from ear attached to the body.

3. Over abdomen 10 cm. x ½ cm. contusion over chest, right 5 cm. x ½ cm. three injuries of same size. Contusion over rib 5, 6, 7."

4. Over back - from shoulder to lumber spine all body contusion.

5. Contusion - left leg below knee anterior admeasuring 3 cm. x 2 cm."

39. PW-8 also deposed to head internal injuries and thorax internal injuries. He also deposed explicitly to the fractured ribs. Again, he opined that the death was due to contusion brain (hematoma at occipit skull) and multiple blow injuries over chest, abdomen, back and head by hard wooden stick like object leading to cardio respiratory arrest.

40. PW-8 was shown the assault weapons, and he deposed to the co-relation between the weapons and specific injuries, as in the case of Vitthal.

41. Mr Khamkar, however, submitted that PW-8 had opined that the injuries sustained by both the victims might be homicidal or accidental but not suicidal. From this, Mr Khamkar submitted that the possibility of the injuries being accidental could not be ruled out. In our judgment, this argument cannot be accepted. The Appellants did not suggest to any of the Prosecution witnesses the possibility of the injuries being accidental. Instead, the suggestions were that there was a dispute between Sunil and Vitthal, resulting in a scuffle in which both died. PW8's evidence has to be evaluated in its entirety. The evidence has to be assessed in correlation with the evidence of the three eyewitnesses. There is no scope for reading a line de hors its context and then urging the benefit of the doubt. It is not any and every doubt that qualifies a benefit.

42. In ***State of U.P. V/s. Iftikhar Khan & Ors., 1973 SCC (1) 512***, the Hon'ble Supreme Court has explained that if evidence really raises a reasonable doubt in the mind of the Court regarding the complicity of the accused persons in the crime, then, that doubt must be resolved in favour of the accused persons. However, the doubt must

be one which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy-though unwittingly it may be-or is afraid of the logical consequences, if that benefit was not given; or as one great Judge said it is not the doubt of a vacillating mind that has not the moral courage to decide but shelters itself in a vain and idle scepticism.

43. In ***State of Madhya Pradesh V/s. Sardar, 2001 6 SCC 433***, the Hon'ble Supreme Court has held that omissions and contradictions in evidence of eye witnesses, if they affect the basic structure of the prosecution case, would entitle the accused to benefit of doubt. However, where accused persons went to the house of the witnesses and assaulted them and the deceased, their complicity in the crime stood proved beyond reasonable doubt. Mere contradictions in naming the accused persons did not affect the basic structure of the Prosecution case or entitle the accused persons to the benefit of a reasonable doubt. The principle of benefit of doubt cannot be extended on fanciful or remote possibilities that can always be imagined in matters of

this nature. The doubt must be real and founded upon cogent reasons.

44. Mr Khamkar also referred to PW-8's deposition about certain injuries like fractures being possible where a person falls from a height of 22 to 25 feet in a stream or over rocks. Now, as deposed to by the eye witnesses, the Prosecution version is indeed that Sunil was assaulted and thrown in a streamlet after that. Therefore, the injuries are consistent with the Prosecution version and based upon the same, none of the Appellants can derive the benefit of the doubt.

45. There is no delay whatsoever in registering the FIR. The first incident occurred around 9.00 a.m., and the second at about 10.30 a.m. The FIR was lodged at around 2.00 p.m. on the same date. The family members were naturally involved in shifting the injured to the hospital and trying to save their lives. Therefore, there was no delay whatsoever in lodging the FIR.

46. In this case, the learned Sessions Judge has correctly analyzed the evidence on the aspect of invocation of Section 34 of the Indian Penal Code. The approach of the

learned Sessions Judge is consistent with law in ***Nagaraja V/s. State of Karnataka, (2008) 17 Supreme Court Cases 277***. In the Appeal, there was not even challenge on this aspect.

47. Similarly, we notice that all the Appellants had attempted to introduce a plea of *alibi*. However, despite an opportunity, this plea was never made good by such Appellants. We have also considered the answers of the Appellants in the course of record of Section 313 of Cr.P.C. statement. The Appellants have offered no explanation nor laid any foundation for defence. Thus, upon cumulative consideration of all these aspects, we do not think that any case is made to interfere with the conviction.

48. Thus, the evidence on record proves beyond reasonable doubt the complicity of the Appellants in crimes for which they were charged. Based on the contentions raised on behalf of the Appellants or even otherwise, no case is made to reverse the Appellants' conviction. This is a case of direct evidence substantially corroborated by medical evidence. Therefore, this Appeal is liable to be dismissed.

49. Accordingly, this Appeal is dismissed.

50. There shall be no order as to costs.

N.R. BORKAR, J.

M. S. SONAK, J.