

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**CRIMINAL APPEAL NO.22 OF 2016
WITH
CRIMINAL APPLICATION NO.3940 OF 2022**

Subhash s/o. Bhaidas Barela,
Age : 38 years, Occ. Nil,
r/o. Dahiwad, Tq. Amalner,
Dist. Jalgaon
(Appellant is undergoing sentence
at Nashik Central Prison and his
convict/prisoner No.C-10368)

..Appellant

Vs.

The State of Maharashtra,
Through Police Inspector,
Police Station, Kasoda,
Tq. Erandol, Dist. Jalgaon

..Respondents

Mr.P.M.Nagargoje, Advocate (appointed) for appellant
Mr.S.P.Sonpawale, APP for respondent

**CORAM : R.G. AVACHAT,
R.M. JOSHI, JJ.
RESERVED ON : DECEMBER 06, 2022
PRONOUNCED ON : APRIL 21, 2023**

JUDGMENT :-

The challenge in this appeal is to the order of conviction and sentence dated 18.12.2015 passed by the Court of learned Addl. Sessions Judge, Jalgaon, in Sessions Case No.144 of 2012. Vide the impugned judgment and order, the appellant has been convicted for

the offences punishable under Sections 302 and 307 of Indian Penal Code and therefore, sentenced to suffer life imprisonment and to pay fine of Rs.5,000/-; and rigorous imprisonment for 10 years and to pay fine of Rs.1,000/-, respectively, with default stipulation. Both the sentences have been directed to run consecutively.

2. The facts, giving rise to the present appeal are as follows:-

Utran is a village in Taluka Erandol, District Jalgaon. It was the month of May, 2012. Being summer, most of the inhabitants of village Utran were sleeping outside their respective residences. The appellant herein entered the village on the intervening night of 21st and 22nd May, 2012. Some of the villagers noticed him at the bus stand. The appellant being a stranger and unknown to the villagers, some of the villagers took him on the motorbike so as to drop him at some other village. It is the case of the prosecution that the appellant still returned to the village.

3. Variam Pathan (deceased) was sleeping on the wooden cot just outside his room. The appellant first smashed his head with a stone. Variam Pathan died on the spot. He then

assaulted Nilesh Mahajan and Hiranman Mahajan, son and father of PW 5 – Gopichand, with the very stone. Both Nilesh and Hiranman were also sleeping in front of their house. Both of them were rushed to the hospital. Nilesh succumbed to the injuries. Hiranman lost his speech. The appellant even, thereafter, assaulted one Pranjal Patil, who too was sleeping outside her residence. Sachin Patil (PW 7) and Subhash Chaudhari (PW 8) too were assaulted. Because of the hue and cry in the village, most of the villagers woke up. The appellant was required to be chased. He even pelted stones at the villagers, who were running after him. The appellant could, however, successfully be overpowered. He was tied with a rope. PW 1 – Siddique, nephew of the deceased Variam Pathan, lodged the FIR (Exh.19).

4. Based on the FIR lodged by PW 1 - Siddique, crime vide C.R. No.13 of 2012 came to be registered. Panchnamas of the scenes of offence were drawn. Statements of the persons acquainted with the facts and circumstances of the case were recorded. The appellant was arrested. He was subjected to medical examination. The dead bodies of both Variam Pathan and Nilesh Mahajan were subjected to post mortem examination. The injured

were admitted to hospital. Their injury certificates were obtained. On completion of the investigation, the appellant was proceeded against by filing charge sheet. The case came to be committed to the Court of Session. Learned Sessions Judge framed Charge (Exh.7). The appellant pleaded not guilty. His defence was of false implication.

5. The prosecution examined fourteen witnesses and produced in evidence various documents to establish the Charge. Learned Addl. Sessions Judge, on appreciation of the evidence in the case, convicted the appellant, as stated above.

6. Learned counsel for the appellant would submit that the appellant was unknown to the villagers. It was dark in the night. Someone else had committed the offences. The appellant was arrested on suspicion. On his arrest, no test identification parade was conducted. Learned counsel would, alternatively, submit that the offences allegedly committed by the appellant would indicate that it was not an act of sane person. In those days, news of the incidents were published in various newspapers. A culprit was described as "माथेफिरू (mad)" in all those news items. According to learned counsel, even though no defence of insanity appears to have been raised on behalf of the appellant in the trial Court, this Court

can very well give a finding in that regard based on the evidence on record. The appellant can make out his case on preponderance of probabilities. He is not required to lead any positive evidence. From the evidence of the prosecution itself, the defence of culprit/appellant could be made out. Benefit thereof needs to be given to the appellant. Learned counsel relied on the following authorities:-

(i) Devidas Loka Rathod Vs. State of Maharashtra, (2018)7 SCC 718;

(ii) State of Maharashtra, Through P.P. High Court Vs. Sheshrao, 2017 SCC OnLine Bom 9402;

(iii) Ramchandra Vs. State of Maharashtra, 2020 SCC OnLine Bom. 4340;

(iv) Rahul Vs. State of Delhi, Ministry of Home Affairs and anr., 2022 SCC OnLine 1532;

(v) Pandit Vs. State of Maharashtra, 2021 SCC OnLine Bom 2922

7. Learned APP would, on the other hand, submit that neither during the cross-examination of any of the prosecution witnesses nor in the appellant's examination under Section 313 of the Code of Criminal Procedure, whisper has been made as to

mental status of the appellant at the relevant time. There is record to indicate that the appellant was medically examined. He was found to be fit to stand trial. Learned APP took us through the evidence on record, to ultimately urge for dismissal of the appeal. According to him, it was, in fact, a case for sending the appellant to gallows. The State has, however, not preferred any appeal for enhancement of the sentence.

8. Considered the submissions advanced. Perused the entire evidence on record. The post mortem examination reports of both the deceased and the injury certificates of the injured have been specifically admitted by the defence. Exhibit 53 is the post mortem examination report of Nilesh Mahajan. He died of cardio-respiratory arrest due to shock due to intracranial hemorrhage. Exhibit 54 is the injury certificate of PW 8 – Subhash. He suffered two abrasions, simple in nature. Injury certificate (Exh.56) of Sachin Patil (PW 7) indicates that he suffered large C.L.W. on parietal region; an abrasion on right parietal region; and a small abrasion. Injury certificate (Exh.57) of Hiranman indicates that he suffered C.L.W. over forehead starting from right eyebrow to frontal portion of head and edema over left eye-lid or orbital edema.

Exhibit Exh.57-A is the injury certificate of Pranjal Patil (PW 6). Exhibit- 75 is post mortem report of Variam Pathan, the same suggests that he died due to cardio-respiratory arrest due to hemorrhagic and neurological shock due to head injury.

9. PW 1 – Siddique was nephew of the deceased Variam Pathan. It is in his evidence that he hailed from the State of Rajasthan. Before 30-35 years, he had come to Maharashtra to earn his living. His uncle, deceased Variam Pathan, would reside along with him. Both of them were serving as security guards in Thenga Society. On 21.05.2012, he had been on duty as a guard in the agricultural land of one Deelip Sheth Marwadi. The uncle Variam Pathan was alone in the room. In the early morning of 22.05.2012, he received phone call asking him to come to his room. He, therefore, rushed to his room to find that the head and face of his uncle Variam Pathan had been smashed with stone. Variam Pathan was lying dead on the cot. This witness was informed that it was the appellant, who killed the deceased Variam Pathan. PW 1, therefore, lodged the FIR (Exh.19) against the appellant herein. Evidence of this witness is not of much assistance to hold the appellant to be the author of murder of PW 1's uncle (Variam Pathan), since he (PW 1)

is not an eye witness. Suffice it to say that based on the FIR (Exh.19), criminal law was set in motion.

10. PW 2 – Mohd. Harun is the witness to the inquest panchnama (Exh.21) of the deceased Mariam Pathan. He is also witness to the scene of offence panchnama (Exh.22). His evidence indicates that a rough stone of 4 kgs. was seized from the scene of offence. The stone had many blood stains. This witness was categoric to deny that the panchnama was drawn at the police station and he signed the ready-made panchnama.

11. PW 3 – Nilesh is a witness to the panchnama of the scene of offence (Exh.24), whereat Hiranman and Nilesh Mahajan were assaulted. This witness too denied the suggestion to have signed the ready-made panchnama at the police station.

12. PW 4 – Kantilal is the witness to seizure of clothes of the victims and the appellant as well. In his presence, number of panchnamas were drawn. Panchnama (Exh.26) pertains to the seizure of clothes of the deceased Variam. Panchnama (Exh.27) pertains to seizure of clothes of the appellant. The clothes namely, shirt and trouser of the appellant were seized thereunder. The

panchnama (Exh.28) pertains to the seizure of clothes of injured – Hiranman Mahajan. Exhibit 29 is panchnama of seizure of clothes of the injured Sachin. Panchnamas (Exhs.30 and 31) pertain to seizure of clothes of deceased – Nilesh and injured Pranjali Patil, respectively, while panchnama (Exh.32) pertains to panchnama of arrest of the appellant. It is true that the Investigating Officer ought not to have availed the services of this witness for all those panchnamas. Moreover, this witness has admitted in cross-examination that he is resident of a nearby village. He had good relations with the police. The police would avail his service whenever required. Had this person been a witness to any other material evidence, such as disclosure statement and the recovery pursuant thereto, this Court would not have relied on his evidence. Since he being witness to the panchnamas, whereunder the clothes either of the deceased or the injured came to be seized and that due to the assaults, two have lost their lives and many were injured being an admitted fact, the evidence of this witness is relied on.

13. PW 5 – Gopichand testified that his son Nilesh and father - Hiranman were sleeping in the front yard of his residence. By 03.00 to 04.00 a.m., he heard their shouts. He came out of his house and

saw that an unknown person was assaulting his father with stone. That person gave 4-6 blows on the head of his father. He (PW 5) found his son Nilesh to have been already assaulted on his head. He, therefore, raised shouts. The persons from neighborhood gathered. That unknown person ran towards the village. The persons gathered, chased him. That person pelted stones on the persons following him. One of the stones hit on the head of Dattatray Mahajan. Both Nilesh and Hiranman were rushed to the hospital at Jalgaon. Nilesh succumbed to the head injury. Hiranman lost his speech.

14. It is further in the evidence of PW 5 – Gopichand that on the previous night by 09.00 p.m., he had seen an unknown person at the bus stand. The villagers namely, Vishnu Thakur and Bapu Mahajan took him on motorbike so that he would not remain in the village. The unknown person, however, returned to the village. This witness identified the appellant as an unknown person, before the Court. During his cross-examination, it has come on record that it was dark in the night. There was no electric post nearby his residence. When he came out of the house, the assailant was already proceeding towards the village. He could not see the face of

the assailant. The assailant disappeared in the dark. As such, the evidence of this witness fell short to identify the appellant as the assailant of his son and the father.

15. PW 6 – Pranjal Patil was another injured witness. It is in her evidence that she too was sleeping outside her residence. While she was in slumber. Due to the assault, she became conscious. On regaining consciousness, she found herself in the hospital of Dr.Subhash Choudhari. As such, the evidence of this witness also does not attribute anything incriminating against the appellant.

16. PW 7 – Sachin Patil testified that on the intervening night of 21-22.05.2012, he was sleeping in the courtyard of his residence. His neighbour Kashinath Chaudhari was also sleeping on the cot in front of his residence. He woke up by little past 03.00 a.m. to answer nature's call. When he came back to his bed, he was assaulted on his head with stone. He raised shouts. He saw that the appellant was assaulting Kashinath also. Thereafter, he became unconscious. He was admitted to Om Critical Centre, Jalgaon. This witness identified the appellant before the Court as one who assaulted him and Kashinath. He was confronted with his statement

to the police, to bring on record omission to have had not informed to the police to have seen the appellant assaulting Kashinath.

17. PW 8 – Subhash testified that he was driver by profession. He got up by little past 04.00 a.m. on 22.05.2012. A person armed with stone, came towards him and assaulted on his left hand. He shouted. Prakash Mahajan and Raghunath Mahajan came to the spot. The assailant ran away. He saw the assailant hit Variam Pathan with stone. He (PW 8), Prakash and Raghunath chased and caught the assailant. The assailant still gave them slip. Again, after 10-15 minutes, the very person came back to their society. Some of the villagers were following him. As there were number of villagers, the assailant could be overpowered. He was none other than the appellant herein. It is further in his evidence that on inquiry with him, he gave his name as Subhash Barela (appellant). He was then handed over to the police. This witness identified the appellant before the trial Court.

During cross-examination of this witness, it has come on record that there was compound wall to the society. According to this witness, the height of the compound wall was 3 ft. He denied to have not chased the appellant and overpowered him. It is in his

evidence that since he did not suffer serious injury, he was not issued injury certificate. Learned counsel for the appellant has, therefore, reason to contend that this witness is a got up witness. He was not the victim of the assault.

18. PW 9 – Ramesh testified that on hearing hue and cry in the village, he got up. He went in the direction from which, the noise was emanating. He saw one person assaulting Subhash Choudhari. He tried to catch that person, but was unsuccessful. The assailant went in the village. He assaulted Mariam Pathan. PW 9 - Ramesh and other villagers chased the appellant and overpowered him. Prashant Mahajan and Subhash Chaudhari tied the hands of the assailant, who disclosed his name as Subhash Barela, i.e. the appellant herein. He was then handed over to the police.

This witness too was subjected to searching cross-examination. He admitted that the police did not draw arrest panchnama in his presence, when the appellant was handed over to the police. He admitted that on the say of the villagers and the police, he identified the appellant as the assailant. He had not seen the appellant assaulting anybody.

19. PW 10 – Dattatraya testified that by 11.00 p.m. on 21.05.2012, he went to sleep on a cot outside his residence. His son was sleeping by his side on another cot. By 04.00 a.m., he heard shouts of Kashinath Chaudhari. He woke up to see the appellant standing by the side of his cot. He was armed with stone. He asked him to throw away the stone. He did not listen. The appellant pelted stone at him and ran away. The stone fell on his forehead. He was rushed to the hospital of Dr.Biyani. He identified the appellant as one, who assaulted him with stone.

During his cross-examination, he admitted to have not stated in his statement to the police that the appellant was standing with stone by the side of his bed. He had also not stated to the police that he had asked the appellant to throw away the stone.

20. PW 11 – Vishnu's evidence is to the effect that he and some of the villagers had seen the appellant at bus stand. They inquired him about his name and address. He did not answer. His behaviour and appearance was suspicious. He and Babu Mahajan took him on motorbike to Kasoda Police Station. On the way, that fellow jumped from the motorbike and disappeared in the darkness. It is further in his evidence that he woke up at 04.00 a.m. by

22.05.2012 on hearing shouts of the villagers. He went towards Vivek Society. Some of the villagers had caught the assailant. He identified the assailant to be the very person, who was seen at the bus stop. On inquiry, that person gave his name as Subhash Barela (appellant). He was then handed over to the police. The questions in the nature of suggestions disputing his evidence in examination-in-chief, were put to him during the cross-examination. He denied each and every suggestion.

21. PW 12 – Pankaj was a professional photographer. He was also resident of the very village, Utran. On hearing shouts, he went to Vivek society. He saw that watchman – Mariam was lying dead. He snapped photographs of the dead body, blood stained stone and the assailant. He identified the photographs (Exhs.70 to 72). In his cross-examination, he admitted to have not provided negatives of the photographs.

22. PW 13 – Madhukar was Police Constable attached to Kasoda Police Station during the relevant days. He carried the seized articles to C.F.S.L. His evidence is not of much assistance to the prosecution.

23. PW 14 – Ramdas was the Investigating Officer. It is in his evidence that on registration of the crime, he was entrusted with the investigation. He, therefore, paid visit to the village. He prepared scene of offences panchnamas, seized clothes of the deceased and injured persons. He also seized blood stained stone and arrested the appellant, seized his clothes as well under panchnama. This witness referred to the panchnamas, which have been admitted in evidence in view of testimony of PW 4 - Kantilal.

24. It is true that the assailant was unknown to the villagers. He was overpowered in the village itself. He was seen assaulting some of the villagers. The appellant was seen running helter-skelter in the village itself. Some of the villagers chased him and overpowered. He was even tied with rope. On inquiry, he disclosed his name as Subhash Barela. We, therefore, find that non-holding of T.I. parade would not be fatal to the prosecution. None of the prosecution witnesses has any reason to falsely implicate the appellant. Nothing has been brought to our notice to disbelieve the evidence of any of the prosecution witnesses. In our view, the trial Court has rightly reached the conclusion that it was the appellant

who committed murder of two persons and attempted to commit murder of one or two others and voluntarily caused hurt and grievous hurt to others.

25. It is true, the incidents had received wide coverage in the print media. The assailant was described therein as "माथेफिरू (mad)". Those newspapers clippings would, however, be of no assistance to the appellant to make out the defence of insanity in terms of Section 84 of Indian Penal Code. In view of Section 105 of the Evidence Act, burden of proving the case of accused comes within exception is upon him and the Court shall presume absence of such circumstances. Admittedly, the appellant did not produce any evidence either documentary or oral to make out the case of insanity at the relevant time. We are very much conscious of the fact that an accused can make out his defence on preponderance of probabilities. It was the trial Court, which was in the control of the case, to find whether, on appearance of the appellant, he was seen mentally unstable. No such finding or observation is forthcoming. Nothing in that regard was also solicited by the defence.

26. There can be no dispute over what has been observed in the authorities relied on by learned counsel for the appellant. The

defence of insanity is a question of fact. Same can be answered on the basis of the evidence in the case. The record indicates that the appellant gave rational answers to all the questions put to him in his examination-in-chief under Section 313 of Cr.P.C. It is true that considering the manner in which the offences have been committed by the appellant, a thought may come to one's mind, whether the culprit was insane. The medical examination report of the appellant suggests him to be mentally fit. He was medically examined just before his arrest. The medical report dated 22.05.2012 on record, indicate him to be physical fit to arrest.

27. There are also documents on record to indicate the appellant to have made number of communications to the trial Court to expedite hearing of the case since his wife left the matrimonial home, leaving behind his minor children. True, it appears that those communications were written by someone else, since the appellant simply put his thumb impression below the same. There is record to indicate that the appellant, vide communication dated 25.09.2012, was referred for medical examination. The appellant's health screening report suggests that he has history of insomnia and nothing more.

28. The trial Court has imposed sentence of life imprisonment for the offence under Section 302 of I.P.C. and ten years' rigorous imprisonment for the offence of attempt to commit murder and directed both the sentences to run consecutively. In our view, the trial Court, however, has erred in directing both the sentences to run consecutively. If we interpret the order of the trial Court, it would suggest that the appellant shall first undergo the life sentence and thereafter, the term of sentence of 10 years. It needs no mention that the sentence of life imprisonment is presumed to be until end of the natural life of the convict. Learned Addl. Sessions Judge would have been justified if she had directed that first, the term of sentence of 10 years', shall be undergone by the appellant and thereafter, the life sentence to commence. So are not the directions herein (reference:Muthuramalingam and ors. Vs. State Rep. By Insp. of Police, AIR 2016 SC 3340). Section 427(2) of the Code of Criminal Procedure reads :-

“(2) When a person already undergoing a sentence of imprisonment for life is sentenced on a subsequent conviction to imprisonment for a term or imprisonment for life, the subsequent sentence shall run concurrently with such previous sentence.”

29. In view of the above, the appeal stands dismissed but with the following change in the impugned operative order:-

“The substantive sentences imposed against the appellant shall run concurrently”.

30. In view of dismissal of the appeal, Criminal Application No.3940 of 2022 does not survive and stands disposed of.

31. Fee of learned counsel appointed to represent the appellant, is quantified at Rs.20,000/- (Rupees Twenty Thousand).

[R.M. JOSHI, J.]

[R.G. AVACHAT, J.]

KBP