

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 270 OF 2017

1. Saifan Kondaji Abdul Kurne,
Age: 36 years, Occ. Agri.,
R/o: Nilegaon, Taluka Tuljapur,
District Osmanabad.
2. Asif @ Ashapak Sahanawaj Patel,
Age: 21 years, Occ. Labour,
R/o: Nilegaon, Taluka Tuljapur,
District Osmanabad.

... Appellants
[Orig. Accused Nos. 2 and 3]

Versus

The State of Maharashtra
Through Police Station Officer,
Naldurg, Taluka Tuljapur,
District Osmanabad.

... Respondent

**WITH
CRIMINAL APPLICATION NO. 3241 OF 2022
IN
CRIMINAL APPEAL NO. 270 OF 2017**

Asif @ Ashapak Sahanawaj Patel,
S/o Shaikh Hasan
Age: 24 years, Occ. Education,
Taluka Tuljapur, Nilegaon,
District Osmanabad.

... Applicant

Versus

The State of Maharashtra

... Respondent

**WITH
CRIMINAL APPEAL NO. 703 OF 2018**

The State of Maharashtra
Through Police Station,
Naldurg, Taluka Tuljapur,
District Osmanabad.

... Appellant

Versus

Kondaji Abdul Karim Kurne,
Age 70 years, Occu. Agril.,
R/o Nilegaon, Taluka Tuljapur,
District Osmanabad.

... Respondents
[Orig. Accused No. 1]

.....

Mr. Nilesh S. Ghanekar, Advocate for the Appellants in Criminal Appeal No. 270 of 2017 and Respondent in Criminal Appeal No. 703 of 2018.

Mrs. V. S. Choudhari, APP for State.

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**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

Reserved on : 28.11.2023

Pronounced on : 04.12.2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Convicts as well as State is challenging the judgment and order of conviction of accused nos. 2 and 3 and acquittal of accused nos. 1 and 4 respectively, dated 31.05.2017 passed by learned Additional Sessions Judge, Osmanabad in Session Case No. 24 of 2016. As both appeals are heard on the same day, both are decided by way this common judgment.

PROSECUTION STORY UNFOLDED IS AS UNDER

2. Deceased Mashak and accused no.1 Kondaji are brothers. Deceased Mashak had sought partition and share in the property which angered accused Kondaji, his two sons and grandson. According to prosecution, on 11.12.2015 around 8.30 p.m., all accused persons visited house of deceased, dragged him towards their house and there he was assaulted by means of stone, sticks and sickle. Mashak sustained fatal bleeding injuries and succumbed to the same and hence his son PW3 Ramjan lodged a report on the basis of which, crime was registered and investigated and accused were duly chargesheeted and tried by learned Additional Sessions Judge and on appreciating both, oral and documentary evidence, learned trial Judge passed the following order:

- “1. The accused no.2 Saifan Kondaji Kurne and accused no.3 Asif @ Aspak Shahanawaj Patel, both R/o Nilegaon, Tq. Tuljapur Dist. Osmanabad are found guilty for the offence punishable under Section 302 and 323 read with 34 of Indian Penal Code vide Section 235 (2) of Code of Criminal Procedure.
2. The accused no.2 Saifan Kondaji Kurne and accused no.3 Asif @ Aspak Shahanawaj Patel, both R/o Nilegaon Tq. Tuljapur Dist. Osmanabad are convicted for the offence

punishable under Section 302 read with 34 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life and pay fine of Rs.1,000/- (In words Rs. One Thousand only) each. In default, they shall undergo rigorous imprisonment for Three (3) months each.

3. The period of inquiry, investigation and trial undergone by the accused no.2 Saifan Kondaji Kurne accused no.3 Asif @ Aspak Shahanawaj Patel, since 12.12.2015 up till now be set off vide Section 428 of Code of Criminal Procedure respectively.
4. The accused no.1 Kondaji Abdul Karim Kurne and accused no.4 Sadik Kondaji Kurne, both R/o Nilegaon Tq. Tuljapur Dist. Osmanabad are acquitted of the offence punishable under sections 302, 323 and 504 read with 34 of the Indian Penal Code Act, vide Section 235 (1) of Criminal Procedure Code. The accused no.1 Kondaji Abdul Karim Kurne and accused no.4 Sadik Kondaji Kurne shall execute the bail bond of Rs.15,000/- (Rs. Fifteen Thousand only) each with a surety of like amount to appear before the appellate Court as and when the court issued notice in respect of appeal or petition against the judgment vide Section 437A of Code of Criminal Procedure, 1973.
5. The accused no.2 Saifan Kondaji Kurne accused no.3 Asif @ Aspak Shahanawaj Patel are acquitted of the offence punishable under section 504 read with 34 of the Indian Penal Code Act, vide Section 235 (1) of Criminal Procedure Code.

6. The muddemal articles being worthless be destroyed after the appeal period is over or subject to finality of the appeal.
7. A copy of the Judgment be given to the accused in gratis and forwarded to District Magistrate, Osmanabad vide Section 353(4) and 365 of the Code of Criminal Procedure respectively.
8. The accused are appraised of provision of appeal.
9. Pronounced in the open Court.”

3. At the outset, it is to be noted that vide order dated 12.09.2018 passed in Criminal Application No. 5428 of 2017, leave was granted to the State to file appeal only against acquittal of accused no.1 Kondaji and the application to file appeal against acquittal of accused no.4 Sadik was rejected. During pendency of Criminal Appeal No. 703 of 2018, respondent-accused no.1 Kondaji is reported to be dead and therefore Criminal Appeal No. 270 of 2017 by accused nos. 2 Saifan and 3 Asif only remains for consideration.

SUBMISSIONS

4. Learned counsel for appellants Saifan and Asif would submit that case has not been proved against appellants beyond reasonable doubt. Secondly, there is no independent witness and only family

members i.e. informant son and his close friend are examined. Even their evidence is full of material omissions and contradictions. Learned counsel pointed out that evidence of informant is apparently improvised. That, there was a cross complaint. That, on the same set of evidence, learned trial court has acquitted accused nos. 1 Kondaji and 4 Sadik from all charges but remaining accused nos. 2 and 3 i.e. present appellants are convicted who allegedly used stick and sickle. He submitted that no role is attributed to appellant-accused no.3 Asif. The genesis of occurrence has not come on record. However, learned trial court has accepted the story of prosecution and passed the impugned order.

5. In answer to above, learned APP would submit that there is direct eye witness account of informant son and his friend Rajesh, who were party to the occurrence. Even independent witness like PW5 Wajioddin has also deposed about the role played by each of the appellants. Therefore, there is direct, cogent and reliable eye witness account. Medical expert has already confirmed death of deceased Mashak to be homicidal one. That deceased has suffered as many as 23 injuries. Motive was dispute for demanding share in the property and therefore, it is her submission that, even motive is proved by prosecution. That, learned trial court has correctly appreciated the

available evidence and has committed no error whatsoever in convicting present appellants and therefore she prays for dismissal of the appeal filed by the accused.

EVIDENCE BEFORE THE TRIAL COURT

6. To bring home the charge, prosecution has examined in all 8 witnesses. Their role and status can be summarized as under:

PW1 Dr. Sharda Wagatkar examined injured Ramjan and issued injury certificate Exhibit 38 which she identified in court. She has also conducted postmortem over the dead body of Mashak and issued postmortem report, provisional death certificate and final cause of death Exhibits 42 to 44 respectively, which she identified.

PW2 Kishor acted as pancha to inquest panchanama Exhibit 50 as well as spot panchanama Exhibit 51.

PW3 Ramjan is son of deceased who claims to be an injured eye witness.

PW4 Rajesh is friend of PW3. He also claims to have eye-witnessed the incident.

PW5 Wajioddin is resident of the same locality. He is also an eye witness who claims to have tried to pacify the quarrel.

PW6 Nagnath is pancha to memorandum of disclosure and recovery of weapons katti, sickle and sticks at the instance of accused no.2 Saifan (Exhibits 73 and 74).

PW7 Sadik is also a resident of the same locality. He turned hostile and was cross-examined by APP itself.

PW8 API Mengale is the Investigating Officer.

7. As Section 374 of Cr.P.C. is invoked, we are required to re-appreciate, re-examine and re-analyze the entire oral and documentary evidence adduced by prosecution in the trial court.

8. Hear, while hearing appeal, learned counsel for the appellants fairly conceded that there is no serious dispute about the manner and mode of death to be homicidal one. Therefore, we do not wish to enter into that issue. We move further to ascertain whether, as held by learned trial Judge, there is direct, reliable, trustworthy eye witness account.

9. On re-appreciation and re-analysis, in our opinion, evidence of **PW3** son of deceased, his friend **PW4** Rajesh and **PW5** Wajioddin is of vital importance and therefore we wish to reproduce their testimonies to the extent of occurrence.

10. **PW3** Ramjan is the informant and son of deceased Mashak. He is the injured eye witness. He, in his evidence at Exhibit 60, has deposed about he along with his friend Rajesh (PW4) coming to his native to reside with his father, on 08.12.2015 his father asking accused no.1 Kondaji for partition and share in the property, accused no.1 Kondaji having a tussle with his father over it, and all accused getting enraged.

11. On the occurrence, he has deposed that on 11.12.2015 around 8.30 p.m., when he himself, his father and Rajesh were cleaning the courtyard of his house, all accused came there and questioned his father for demanding partition and share in the property. This witness has further stated about accused having scuffle with his father and taking him to their house, accused no.2 Saifan inflicting blows of stick on the head of his father, accused no.3 Asif inflicting blows of sickle on the face and nose of his father, accused no.4 Sadik assaulting his father with stick and accused no.1 Kondaji beating his father with stones. This witness has further deposed that when he and his friend tried to rescue his father, accused no.2 Saifan gave beating to him with stick blows and out of fear, he and his friend Rajesh hid in darkness. He has further deposed that on hearing commotion, the

locals Wajioddin Inamdar and Sadam Patel reached there and tried to intervene, upon which this witness and his friend Rajesh again came to the spot and found his father lying in pool of blood. This witness claims that at that time he had seen accused no.1 Kondaji holding a katti (sickle). He states that his father had died on the spot. He further deposed about lodging report Exhibit 61 which he identified in the court.

12. **PW4** Rajesh is friend of PW3 Ramjan. In his evidence at Exhibit 68, he has deposed that when he and PW3 had been to village Nilegaon, all accused were enraged due to deceased Mashak's demand for partition. Regarding the occurrence, he has deposed that when he along with PW3 Ramjan and his father Mashak were cleaning the premises of their house, all accused started abusing Mashak on the ground of demand for partition and dragged him towards their house. He has further stated that accused no.2 Saifan and accused no.4 Sadik assaulted Mashak by sticks, accused no.1 Kondaji assaulted him by stone and brick and accused no.3 Asif inflicted blow of sickle on the person of Mashak. He has stated that when he and PW3 Ramjan tried to rescue Mashak, accused started assaulting them, upon which they both left the spot and hid themselves. This witness has also stated that on hearing hue and cry,

villagers Wajioddin Inamdar and Saddam Patel intervened the quarrel and on seeing them arrive, this witness and PW3 Ramjan came to the spot and found Mashak lying dead in pool of blood in front of the house of accused.

13. **PW5** Wajioddin has also narrated the incident in his evidence at Exhibit 70. He has stated that on 11.12.2015 around 8.00 p.m., he was in front of his house and on hearing commotion from the house of accused, he rushed there and saw fighting going on amongst accused and Mashak. This witness claims that he himself and Saddam Patel tried to pacify the quarrel but it was in vain. According to this witness, accused no.1 Kondaji inflicted blow of katti on Mashak, accused no.2 Saifan and accused no.4 Sadik assaulted him with sticks and accused no.3 Asif gave blow of sickle to Mashak. He further deposed that when he separated Mashak from accused, PW3 Ramjan and PW4 Rajesh came to the spot and they all tried to raise Mashak, who was lying in pool of blood, however he was dead.

14. Keeping in mind the ratio regarding appreciation of ocular evidence laid down in ***Balu Sudam Khalde and another v. The State of Maharashtra*** [Criminal Appeal No. 1910 of 2010] ; ***2023 SCC OnLine SC 355*** and law on the point of evidentiary value of injured

witness as dealt in celebrated cases of *Jarnail Singh v. State of Punjab*; (2009) 9 SCC 179 and *Balraje @ Trimbak v. State of Maharashtra*; (2010) 6 SCC 673, when we visit the the cross faced by all these witnesses, it is pertinent to note that nothing damaging has been brought in their cross-examination. In fact, there is very little or no cross on the actual occurrence of assault. There is no serious dispute about motive also. Therefore, evidence of all above three witnesses, which has remained intact, clearly goes to show that on the night of 11.12.2015 deceased Mashak, his son Rajman and son's friend Rajesh were cleaning the premises and at that time, accused persons, who were immediate neighbours, initially came and abused deceased for asserting share in the property and they took him towards their house and there, assault was mounted. PW3 Ramjan and PW4 Rajesh also have accompanied deceased and they have narrated whatever they saw. They have also described the weapons held by each of the appellants and thereby spelt out the role played by each of the appellants.

15. No doubt, in cross, omissions are brought regarding not informing in FIR about assault being carried out on face and nose. However, informant is son of deceased who has eye-witnessed the assault on his father and he has lodged report. FIR is not an

encyclopedia to carry all details. Contradictions, in our opinion, are minor in nature as the core of prosecution case has remained virtually unchallenged and unshaken.

16. Here, medical evidence confirms the substantive evidence of PW3 Ramjan. Deceased has suffered as many as 23 injuries. The injuries are caused by sharp weapon and therefore, offence under Section 302 of IPC has been rightly attracted against appellants/accused nos. 2 Saifan and accused no.3 Asif. Coupled with above direct witness, there is recovery of weapons. In presence of pancha PW6 Nagnath, memorandum was allegedly given by all four accused and thereafter, at the instance of accused no. 2 Saifan, recovery has been caused. Evidence of recovery pancha has also remained intact in cross. Nothing doubtful has been brought therein. Therefore, here, alongwith motive, occurrence has been clearly established. Evidence, more particularly cross of Investigating Officer PW8 API Mengale shows that in para 24 he has admitted that deceased convict Kondaji had lodged complaint against PW3 Ramjan, his friend as well as deceased father, suggesting cross case. Here also, cross case being set up by accused side, even their presence gets confirmed. Available evidence has been rightly appreciated by learned trial Judge. We also concur with the conclusion drawn from the

available evidence. No fault can be found in the appreciation or the conclusion drawn by learned trial court. No perversity is brought to our notice. Hence, we proceed to pass the following order:

ORDER

- I. Criminal Appeal No. 270 of 2017 stands dismissed.
- II. Criminal Appeal No. 703 of 2018 stands abated and disposed of as the respondent accused no.1 Kondaji is reported to be dead during pendency of appeal.
- III. In view of dismissal of Criminal Appeal No. 270 of 2017, Criminal Application No. 3241 of 2022 also stands dismissed.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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