

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

CRIMINAL APPEAL NO. 586 OF 2015

WITH

CRIMINAL APPEAL NO. 734 OF 2019

1. Somnath Sudhakar Khude,
Age 28 years, Occ.-Labour,
R/at Near Old S. T. Stand,
Alandi Devachi, Taluka-Khed,
District-Pune.

2. Rahul Sandip Chavan,
Age 19 years, Occ.-Labour,
R/at Nagarpalika Square,
Alandi Devachi, Taluka-Khed,
District-Pune.

Appellants/Orig.
...Accused Nos. 9 & 7

V/s.

The State of Maharashtra
through Alandi Police Station.

...Respondent

WITH

CRIMINAL APPEAL NO. 717 OF 2015

Virbhadra @ Deva Raghunath Devadnya,
Age 19 years, Occ.-Labour,
R/at Tarangan Vastigruh, Dhaykarwadi,
Dudulgaon, Taluka-Haveli,
District-Pune.

Appellant/Orig.
...Accused No. 8

V/s.

The State of Maharashtra
through Alandi Police Station.

...Respondent

Ram Mahadu Bhokare, Age 19 years, Occ.-Labour, R/at Indrayaninagar, Alandi Devachi, Taluka-Khed, District-Pune.	Appellant/Orig. ...Accused No. 10
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The State of Maharashtra
through Alandi Police Station. ...Respondent

Prashant @ Pintu Murlidhar Chavan,	
Age 27 years, Occ.-Labour,	
R/at Charholi Bk.,	Appellant/Orig.
Taluka-Haveli, District-Pune.	...Accused No. 5

The State of Maharashtra
through Alandi Police Station. ...Respondent

**WITH
CRIMINAL APPEAL NO. 829 OF 2015**

Shivaji Baburao Bhendekar,
Age 22 years, Occ.-Labour,
R/at Padmavati Zopadpatti,
Alandi Devachi, Taluka-Khed,
District-Pune.

Appellant/Orig.
...Accused No. 3

V/s.

The State of Maharashtra
through Alandi Police Station.

...Respondent

**WITH
CRIMINAL APPEAL NO. 896 OF 2015
WITH
CRIMINAL APPLICATION NO. 1359 OF 2018
IN
CRIMINAL APPEAL NO. 896 OF 2015**

Dnyaneshwar Siddharth Badage,
Age 19 years, Occ.-Labour,
R/at Padmavati Zopadpatti,
Alandi Devachi, Taluka-Khed,
District-Pune.

Appellant/Orig.
...Accused No. 6

V/s.

The State of Maharashtra
through Alandi Police Station.

...Respondent

**WITH
CRIMINAL APPEAL NO. 969 OF 2017**

Mayur Eknath Mankar,
Age 19 years, Occ.-Labour,
R/at Padmavati Zopadpatti,
Alandi Devachi, Taluka-Khed,
District-Pune.

Appellant/Orig.
...Accused No. 4

V/s.

The State of Maharashtra
through Alandi Police Station.

...Respondent

Adv. Mr. Satyavrat Joshi for Appellant in APEAL/734/2015.

Adv. Dr. Yug Mohit Chaudhary for the Appellants in APEAL/586/2015, APEAL/717/2015, APEAL/788/2015, APEAL/759/2015, APEAL/829/2015, APEAL/896/2015 & APEAL/969/2017 and Applicants in IA/709/2020 in APEAL/788/2015, APPA/1223/2016 in APEAL/759/2015, APPA/1359/2018 in APEAL/896/2015.

Adv. Ms. Narseen Ayubi, appointed for the Appellant in APEAL/829/2015 discharged.

APP Mr. A. R. Kapadnis for the State/Respondent.

**CORAM : SUNIL B. SHUKRE &
ABHAY S. WAGHWASE, JJ**

RESERVED ON : 13th MARCH, 2023

PRONOUNCED ON : 20th MARCH, 2023

JUDGMENT :- (PER - ABHAY S. WAGHWASE, J)

Original accused nos. 3 to 10 have invoked provisions under Section 374 of the Criminal Procedure Code, 1973 (for short “**Cr.P.C.**”), questioning the legality and maintainability of judgment and order of conviction, passed by the learned Additional Sessions Judge, Khed-Rajgurunagar, District-Pune dated 23/03/2015 in Sessions Case No. 169/2014, thereby convicting appellants for offence under Sections 302, 143, 147, 148 read with 149 of the Indian Penal Code, 1860 (for short “**IPC**”).

2. Facts giving rise to the Sessions Case are as under :-

Deceased Gangadhar Gadage, who is the brother of complainant (PW-4), had strained relations with accused persons. Two years prior to the incident in question, accused persons had forced their entry in the house of deceased Gangadhar and had beaten him.

On 08/06/2012 around 9.30 p.m., deceased Gangadhar left the house on motor-cycle along with Gajanan Navghare. As Gangadhar did not return home, complainant (PW-4) went with one Avinash Dhanave to search for Gangadhar. While they were in the vicinity of Padmavati Zopadpatti around 11.30 p.m., they saw the motor-cycle of Gangadhar lying on the road and at the short distance, Gangadhar and Gajanan were lying on the road. Complainant (PW-4) claims to have seen accused persons assaulting Gangadhar and Gajanan with sickle and stones and thereafter, fleeing away from the spot. Gajanan, who was seriously injured, was shifted to YCM Hospital and complainant (PW-4) approached Alandi Police Station and lodged the report. On the strength of complaint, FIR (Exhibit-86) came to be drawn. Gangadhar had died on the spot, whereas Gajanan also succumbed to the grievous injuries at later point of time.

3. PW-5, who was then posted at Alandi Police Station, took over investigation, completed the same and chare-sheeted accused persons for above offence.

Case being exclusively sessions triable, it was committed to the Court of learned Additional Sessions Judge, Khed-Rajgurunagar, District-Pune, who conducted trial and on appreciating the evidence

adduced by the prosecution, reached to a finding that the prosecution has succeeded in establishing charges i.e. under Sections 302, 143, 147, 148 read with 149 of IPC. Accused persons were consequently sentenced to suffer imprisonment as spelt out in the Operative Part of the judgment and order.

It is the above judgment and order of conviction and sentence, which is now taken exception to before this Court by accused nos. 3 to 10 by filing various appeals, which are heard together and are hence, decided by way of common judgment and order.

SUBMISSIONS

4. Accused nos. 3 to 9 & 10 are being represented by learned Counsel Dr. Yug Mohit Chaudhary and accused no. 7 is being represented by learned Counsel Mr. Satyavrat Joshi. Both learned Counsels were heard simultaneously but, on the same day and the common grounds and principle objections raised before us by them, could be summarized as under :-

- *Firstly*, prosecution failed to establish very motive behind the occurrence;
- *Secondly*, complainant (PW-4) is not at all an Eye Witness and rather he is a got up witness and related witness;
- *Thirdly*, testimony of complainant (PW-4) is non-specific and full of an omnibus allegations;
- *Fourthly*, from the evidence of prosecution itself, parallel theory of deceased meeting with road traffic accident is

emerging;

- Fifthly, ocular account materially differs from medical account and
- Lastly, prosecution withholding important witnesses like Avinash Dhanave and Police Personnel Mr. More.

On all above grounds, it is their contention that the case of prosecution is rendered doubtful and therefore, impugned judgment and order under challenge, cannot sustain.

5. Countering the above submissions, learned Counsel for the State would submit that there is an Eye Witness account of the incident, who is infact real brother of one of the deceased viz. Gangadhar. The Medical Expert has opined about double murder to be homicidal one. Ocular account is supported by medical evidence. Theory of road traffic accident has no foundation. Complainant (PW-4) is trustworthy, reliable and has remained unshaken on core issues of assault while under cross-examination. There is recovery at the instance of accused and therefore, it is submitted that no error whatsoever has been committed by learned Additional Sessions Judge in recording the finding of guilt of the accused persons for the offences, which they are charge-sheeted.

ANALYSIS

6. Here from the record placed before learned Trial Court, it is emerging that in support of its case, the prosecution has examined five witnesses. Their roles and status are as under :-

PW-1 seems to be Panch to the memorandum and recovery at the hands of accused i.e. recovery of sickle. However, he does not seem to have supported prosecution and has denied about acting as a Panch or about accused giving any memorandum in his presence and thereafter any recovery at the instance of accused being caused.

PW-2, mother of deceased, has also surprisingly resailed from her earlier version and has not supported the prosecution and was therefore, required to be cross-examined by the State itself.

PW-3 is the Autopsy Doctor, who has occasion to examine and conduct post-mortems on dead-bodies of Gajanan Navghare and Gangadhar Gadade. After narrating the external and internal injuries noticed by him during autopsy, he has opined that the deceased Gajanan died due to traumatic and haemorrhagic shock due to fracture on skull and injury to brain by sharp weapon (homicidal death), whereas in his opinion, Gangadhar also died due to haemorrhagic shock due to fracture on skull and injury to brain by sharp weapon (homicidal death).

PW-4 is the brother of deceased Gangadhar and he has lodged the complaint and FIR and he identified to be at Exhibit-86. In short, it is version in the Witness-box that on said night, his brother went with Gajanan, but did not return and so went to look for him and then he saw both Gajanan and Gangadhar being assaulted by accused persons.

PW-5 is the Investigating Officer, who testified about all steps taken by him during investigation till filing of charge-sheet.

7. In the above conspectus, it is to be seen whether conviction recorded by learned Trial Court is just, legal and proper.

8. While exercising powers under Section 374 of Cr.P.C., this Court is expected to re-assess, re-examine, re-analyse and re-evaluate the prosecution evidence to test the merits of appeal.

As stated above, though there is a case of double murder, unfortunately prosecution went for trial by examining only abovementioned five witnesses. Be it so.

9. Taking into consideration the nature of Charge, it is first to be seen whether prosecution had discharged its burden of establishing death of Gangadhar and Gajanan to be homicidal and not accidental or otherwise.

10. We have carefully gone through the substantive evidence of PW-3 Dr. Milind Vasant Sonavane, Autopsy Doctor and also carefully examined the answers given by him while under cross. It seems that deceased Gajanan has suffered three incised wounds on head, incised wound on the face, one depressed CLW on forehead, contusion to the left eye, multiple abrasions on the face, head and neck. Taking into account the external and internal injuries, the Autopsy Doctor seems to be very categorical that death of Gajanan is due to traumatic and haemorrhagic shock due to fracture to skull and injury to brain. He has attributed the injury to be due to sharp weapon and he is of clear opinion that it is a homicidal death.

Likewise in case of Gangadhar also, he claims to have come across incised wounds over head, temporal region, incised wound

over face & left upper back, over posterior aspect, over occipital region, suture wound over head, multiple abrasions on face, forehead, eye and other parts of the body. In this case also, he speaks about reaching to an opinion that death is due to haemorrhagic shock due to fracture to skull and injury to brain by means of sharp weapon and he has termed 'death to be homicidal one'.

11. Above Medico-Legal Expert seems to be cross-examined at length. Initially on the point of lividity, then on rigor mortis and then on decomposition etc., witness is unable to state exact time of death. He has admitted that Injury No. 6 in Post Mortem Report (Exhibit-79), which pertains to autopsy of deceased Gajanan, to be possible by big stone, but he has flatly denied that said injury is possible on account of fall from motor-cycle and landing on a stone. However, he has admitted that Injury Nos. 7 to 9 are possible by fall or even by drag of the body. He has answered that Injury Nos. 1 & 6 are possible by hard and blunt object having large surface area. According to him, Injury Nos. 2 to 5 to be possible by sharp cutting object and Injury Nos. 7 to 9 to be possible on account of coming in contact with rough surface or blunt object. He has admitted that when he gave opinion, at that time weapon was not confronted to him by the police.

As regards to Injury Nos. 1 to 9 in Post Mortem Report (Exhibit-81) pertaining to Gangadhar is concerned, he has answered that said injuries are not possible by stone, whereas Injury Nos. 5 & 6 are possible by fall or drag. He denied Injury Nos. 1 to 4 and 7 to 9 to be possible by axe.

In further cross-examination, he had answered that he had received Inquest Panchanamas and in case of Gajanan, seven injuries were noted in Inquest Panchanama, whereas on his autopsy, he came across nine injuries and in Inquest Panchanama of Gangadhar, six injuries were noted, but he came across nine injuries. However, he denied that the injuries mentioned in Column Nos. 12 & 14 of Autopsy Report are not injuries and he denied that there is difference between inquest and post-mortem findings. He candidly admitted that in the papers of YCM Hospital, there is a reference of road traffic accident and that name of the patient has noted as 'unknown'.

12. Taking into account, the above evidence of Medico-Legal Expert, the number and nature of injuries suffered by both the deceased and Autopsy Doctor, having remained unshaken regarding opinion of cause of death, there is every reason to hold here that, the prosecution has established death of Gangadhar and Gajanan to be homicidal and not otherwise. Admittedly, though there are medical papers carrying noting about road traffic accident, there is no further foundation in that regard, nor it is further substantiated.

13. It is tried to be submitted that medical account and ocular account are at variance. We are not ready to accept such submissions. It is to be noted that inquest merely depicts external appearance of deadbody, whereas autopsy always reveals external as well as internal features of the body. Even otherwise, it is the expert's evidence that would prevail and not Inquest Panchanama, which is drawn by Police Personnel. There has to be major contradiction in both i.e. inquest and autopsy to doubt its veracity, which is not the case hereso. Therefore, the above submissions being

devoid of merits, cannot be considered.

For above reasons, we hold that here deaths of both Gangadhar and Gajanan are nothing but homicidal.

14. Now the pivotal question that falls for our consideration is 'whether the accused persons are authors of the grievous injuries suffered by both the deceased?'.

Here admittedly, there is sole testimony of complainant (PW-4). Unfortunately mother of deceased has backed off and has not supported the prosecution. Surprisingly, companion of PW-4 viz. Avinash Dhanave is also not examined by the prosecution for the best reasons known to them. Therefore, the sheet anchor for prosecution is PW-4 and prosecution has heavily relied on his testimony i.e. in the capacity of not only real brother of deceased, but also as an Eye Witness.

On the contrary, defence has branded him as a got up witness/ planted witness by advancing a case that he was not at all present at the spot of incidence and his very testimony abundantly demonstrates the same. According to the appellants, he is also related witness and therefore, interested one.

15. Let us see whose case is acceptable. At Exhibit-85, there is testimony of PW-4 Balaji Rambhau Gadade. On carefully visiting his evidence, it is emerging that the deceased resided with his brother (PW-4) and parents at Indrayani Nagar, Alandi. According to this witness, accused used to beat his brother as well as Gajanan Navghare. Two years prior to the incident also, accused had entered

their house to beat Gangadhar twice, thrice.

Regarding occurrence in question, it is his testimony that on 08/06/2012, his brother Gangadhar and Gajanan left the house at around 9.30 p.m., but as they do not return till 11.00 to 11.30 p.m., this witness along with Avinash Dhanave went in their search and while going towards Padmavati Zopadpatti, he saw motor-cycle lying and accused persons assaulting his brother Gangadhar and Gajanan with sickle and stones. Then he speaks about shifting his injured brother Gangadhar to YCM Hospital and he approaching police to lodge complaint.

While under cross, he seems to have answered that he saw occurrence from a distance of 20 feet i.e. in the yellow electricity lamp-post. He answered that he saw the occurrence, which is lasted for 5 to 10 minutes. He also answered about his brother and Gajanan shouting for help. He admitted that none of them came near the spot and even he did not go to make hue and cry. He admitted that when the incident was going on, he did not go to Police Station. He admitted that there is no Padmavati Zopadpatti on the route going to village Alandi i.e. from their vicinity. He admitted that Avinash Dhanave is a good friend of his brother and he was in jail in a case of murder and several offences registered against Avinash Dhanave. He admitted that since two years preceding to the incident, there was no complaint lodged against accused at Police Station, nor the incident of accused entering their house and beating his brother was reported to the police. Suggestion to this witness that he had not seen assault to be made by the accused, is denied. However, he admitted that he had not seen, who had intercepted the

motor-cycle of his brother and that he had not stated about it to the police. However, portion marked "A" to that extent, on being confronted to him, he is unable to assign any reason as to why it is so mentioned in his complaint. Above is the only evidence of PW-4.

The last witness on behalf of the prosecution is PW-5 and he is an Investigating Officer.

SUMMATION

16. On taking audit of evidence of complainant (PW-4), it is evident that here alleged occurrence has taken place in the night. Deceased Gangadhar and Gajanan allegedly left house on motor-cycle. PW-4 does not speak in chief as to where they both intended to go. Only in cross, he stated that his brother went towards Padmavati Zopadpatti. On carefully examining evidence of PW-4, it is emerging that when he allegedly reached the spot, that time, motor-cycle was said to be lying at one spot and injured and deceased were lying at the separate spot. Though PW-4 spoke about seeing assault on his brother Gangadhar at the hands of accused persons by means of sickle and stones and inspite of knowing them and naming them, he has not elaborated which of the accused is holding what and who did what. General allegations are made that accused were assaulting his brother.

It is surprising to note that inspite of being a brother of deceased Gangadhar and having claimed to have eye witnessed the actual occurrence, he has neither intervened, nor made any attempt to save his brother. This is most unnatural conduct on his part. He claims to be standing at a short distance of 5 to 10 feet, but

unfortunately has remained a mute spectator.

It is pertinent to note that there are several accused and they all are imputed role of assault by sickle and stones. However, investigating machinery seems to have succeeded in causing recovery of only a single sickle. Therefore, as submitted before us by both learned Counsels for appellants, it is doubtful whether this witness at all had an occasion to see the alleged occurrence.

17. Thus, here there is evidence of solitary Eye Witness and it is unfortunately uncorroborated. Law is fairly settled that conviction can be recorded even on the basis of sole Eye Witness, however, there is a rider that such sole testimony should be credible, reliable, trustworthy and must be found to have a ring of truth. It should be unblemished and free from doubts. Therefore, Hon'ble Supreme Court has cautioned in catena of judgments, that testimony of a sole Eye Witness, more particularly, when it is of related witness, it should be approached and assessed with great caution.

Here, for above discussed reasons, testimony of PW-4 does not inspire confidence. He not only kept himself hiding inspite of claiming to be at the spot, but he also failed to accompany his injured brother Gangadhar to the YCM Hospital. Consequently, medical papers of said hospital are carrying notings about unknown person being brought. This aspect lends support to the submission of learned Counsel for appellants that it is doubtful whether PW-4 is at all an Eye Witness.

18. It is also pertinent to note that, complaint carries timing of information received at about 11.15 p.m., but surprisingly PW-5,

Investigating Officer in his testimony before the Court, stated that on 08/06/2012 telephonic information was received from unknown person at 11.15 p.m. itself. Therefore, such material having emerged on record, it is doubtful whether complaint is at all lodged and FIR is registered at the time, which is claimed by the witnesses i.e. PW-4 & PW-5.

19. Here as pointed by learned Defence Counsel, there is a parallel theory of occurrence to be reported as 'Road Traffic Accident'. Papers of YCM Hospital to that effect clearly suggest that injured was brought to the hospital with history of road traffic accident. Investigating Officer himself admits about such occurrence to be reported. Such material also contributes to confusion on the point of actual occurrence.

20. History of 'Road Traffic Accident' seems to be at the instance of Police Personnel Mr. More, who allegedly shifted Gangadhar to YCM Hospital. This person Mr. More is infact crucial witness, but unfortunately for the best reasons known to the prosecution, he is not examined. Equally, Avinash Dhanave, who was said to be in the company of PW-4, is also not made to step in the witness-box. Hence, allegation of defence about prosecution deliberately withholding important witness, has substance.

21. Learned APP is unable to counter or refute the assertions made by defence with reference to Road Traffic Accident. Even motive putforth by the prosecution is apparently stale i.e. two years prior to the occurrence in question. Therefore, even motive is not firmly established by prosecution in the learned Trial Court. For above

discussed reasons, case of prosecution is rendered doubtful.

22. We have carefully gone through the judgment passed by learned Trial Court. We are of considered view that there is no proper appreciation of evidence at the hands of learned Trial Judge before accepting the testimonies of prosecution witnesses more particularly that of PW-4 & PW-5.

23. Case being of double murder and so a serious one, the quality of evidence was expected to be of impeccable character. The evidence ought to have been free from infirmities and doubts of all nature. Precisely such requirements are not fulfilled from the evidence on record. Learned Trial Judge was expected to assign sound reasons for believing the case of prosecution. On going through the judgment and order, the same does not seems to have been done by learned Trial Judge. Therefore, appellants succeed. Resultantly, intervention at the hands of this Court is called for and we accordingly proceed to pass the following order :-

ORDER

1. Criminal Appeals bearing Nos. 586 of 2015, 734 of 2019, 717 of 2015, 788 of 2015, 759 of 2015, 829 of 2015, 896 of 2015 & 969 of 2017 are hereby allowed.

2. The judgment and order dated 23/03/2015 passed by the Court of learned Additional Sessions Judge, Khed-Rajgurunagar, District-Pune in Sessions Case No. 169 of 2014 for the offence punishable under Sections 302, 143, 147, 148 read with 149 of the Indian Penal Code, 1860 vide C. R. No. 22/2012 registered at Alandi

Police Station, is hereby quashed and set aside. The appellants/original accused nos. 3 to 10 are acquitted of the offences, for which they were charged and tried.

3. Appellant/original accused nos. 3 to 10 are set at liberty, if not required in any other case.

4. Bail bonds of accused persons, if any, stand cancelled.

5. Criminal Appeal bearing Nos. 586 of 2015, 734 of 2019, 717 of 2015, 788 of 2015, 759 of 2015, 829 of 2015, 896 of 2015 & 969 of 2017 stand disposed of accordingly.

6. In view of the aforesaid order, Criminal Interim Application No. 709 of 2020 in Criminal Appeal No. 788 of 2015, Criminal Application No. 1223 of 2016 in Criminal Appeal No. 759 of 2015 and Criminal Application No. 1359 of 2018 in Criminal Appeal No. 896 of 2015 stand disposed of accordingly.

[ABHAY S. WAGHWASE, J.]

[SUNIL B. SHUKRE, J.]