



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 10 OF 2014

Mangesh Pandurang Bandagle	]	
Age 21 years, Occ. : Driver,	]	
Residing at : Behind Anandchhaya Store,	]	
Nagesh Patil Wadi, Ghatla, Chembur,	]	
Mumbai – 400 071.	]	
(At present : Central Jail at Mumbai - 11)	]	... Appellant (Org. Accused No.1)

Versus

The State of Maharashtra	]	
(At the instance of Chembur Police Station,	]	
Mumbai)	]	... Respondent

WITH

CRIMINAL APPEAL NO. 253 OF 2014

Ganesh Avinash Khetam @ Babu	]	
Age 21 years	]	
Residing at : Bharat Samajseva Sangh,	]	
Near Hanuman Temple, Khardev Nagar,	]	
Ghatala, Chembur,	]	
Mumbai – 400 071.	]	
(At present : Kolhapur Prison)	]	... Appellant (Org. Accused No.2)

Versus

The State of Maharashtra	]	
(At the instance of Chembur Police Station)	]	... Respondent

Mr.Saurabh Butala i/b. Mr.Harshad Sathe for Appellant in
Appeal No. 10 of 2014.
Mr.K.S. Patil i/b. Mr.Shailesh Chavan for Appellant in
Appeal No. 253 of 2014.
Mrs.G.P. Mulekar, A.P.P. for Respondent-State.

**CORAM : A. S. GADKARI AND
SHIVKUMAR DIGE, JJ.**

**RESERVED ON : 12th June 2023.
PRONOUNCED ON : 31st August 2023.**

JUDGMENT (Per : A.S. Gadkari, J.)

1. Appellants have questioned the correctness of Judgment and Order dated 17th September 2012 passed in Sessions Case No. 872 of 2011 by the learned Adhoc Additional Sessions Judge, Sewree, Mumbai, convicting them for an offence punishable under Section 302 read with 34 of the Indian Penal Code (for short, "I.P.C.") and sentenced to suffer rigorous imprisonment for life and to pay a fine of Rs.1,000/- each, in default of payment of fine to further suffer simple imprisonment for one month. The Trial Court by the impugned Judgment and Order has acquitted Appellants for the offence punishable under Section 120-B of I.P.C..

2. For the sake of brevity, hereinafter the Appellants will be referred to as per their original nomenclature before the trial Court i.e. Appellant Mangesh (Appeal No.10 of 2014) will be referred as accused No.1 and Appellant Ganesh (Appeal No. 253 of 2014) will be referred as accused No.2.

3. Heard Mr.Saurabh Butala, learned counsel for accused No.1, Mr.Kuldeep Patil, learned counsel for accused No.2 and Mrs.G.P. Mulekar, learned A.P.P. for Respondent-State. Perused entire record and the written

submissions filed by the learned counsel for Appellants.

4. Shorn of unnecessary details, the facts necessary to decide the Appeals can be summarized as under :

4.1 The date and time of incident is 13th September 2011 between 10.15 to 10.30 am. The name of deceased is Prithviraj @ Nannya Jayraj Sardar, aged about 19 years on the date of incident.

4.2 It is the prosecution case that, 3-4 months prior to the date of incident, there was fighting between deceased and Mangesh (A-1). On the basis of a complaint of accused No.1, Nannya (deceased) and his three friends were arrested by the police. On the said count there was enmity between the group of Appellants and deceased. Appellants used to give threats to the deceased for revenge and/or to kill him.

4.3 On 12th September 2011 at about 10.30 pm Prithviraj @ Nannya came to his house, took dinner, informed his mother that the Appellants threatened him to assault and would kill him and therefore they would lodge a complaint with the police. Smt.Sushila Sardar (PW-1), the mother of deceased told him that, on the next day in the morning they would lodge the complaint and advised Nannya not to go for work. She also informed the said fact to her brother Bharat B. Jadhav (PW-4), who assured her to come to her place in the morning at about 10.00 am.

4.4 On 13th September 2011 Nannya (deceased) woke up and at about 10.00 am went to attend the nature's call at the public toilet, which

was situated nearby his house. At about 10.25 to 10.30 am one person rushed to the house of Smt.Sushila Sardar (PW-1) and told that, somebody had assaulted her son with knife and Nannya was coming towards the house. PW-1 immediately went in search of Nannya. She found her son in injured condition in another lane and when she was looking around she noticed that, Ganesh (A-2) was running away from the said place with a blood stained knife in his hand. Nannya was lying in the lane and was having injuries on his chest, stomach and other parts of his body.

4.5 Smt.Sushila Sardar (PW-1) with the help of other persons took Nannya to Shatabdi Hospital. Information was reported to the police. API Mr.Sanjay Bhapkar (PW-10) recorded statement of Smt.Sushila Sardar (PW-1) and registered crime. He went to the spot of incident and effected Spot Panchanama (Exh.34) in presence of witness Bharat K. Pathadiya (PW-9). He also seized one chappal (Article 5) of a man. He carried out Inquest Panchanama (Exh.21). He arrested Appellants and seized their clothes. He recorded statements of some of the witnesses. Further investigation was handed over to P.I. Mr.Vijay G. Darekar (PW-11).

4.6 The weapon used in the present crime i.e. knife (Article 4) was recovered at the instance of Ganesh (A-2) by effecting Memorandum and Recovery Panchanama (Exh.31 & 32) in presence of Shri Goga R. More (PW-8). There were blood stains on the said weapon. The Chemical Analyzer's report indicates that, the blood stains on the knife (Article-4) recovered from

Ganesh (A-2) were of human origin.

4.7 After completion of investigation PW-11 submitted chargesheet in the Court of Metropolitan Magistrate.

As the offence punishable under Section 302 of I.P.C. is exclusively triable by the Court of Sessions, the learned Magistrate committed the case to the Court of Sessions.

4.8 The Trial Court framed charge below Exh.7 against both the accused. It was read over and explained to them in vernacular language. The Appellants denied the charge and claimed to be tried. Their defence as can be gathered from their line of cross-examination and statements recorded under Section 313 of Cr.PC., is of total denial and false implication in the case.

4.9 The prosecution in support of its case examined in all 11 witnesses. Smt.Sushila J. Sardar (PW-1) is the mother of deceased. Mr.Bharat B. Jadhav (PW-4) is the uncle of deceased. Shri Nikhilesh P. Satvirkar (PW-2) and Shri Nikhil S. Gaikwad (PW-3) are the friends of deceased and eye-witnesses to the incident. Dr.Shailendra D. Gujar (PW-6) gave initial treatment to the deceased at Shatabdi Hospital on 13th September 2011 at about 12.20 pm. Dr.Sanjay D. Vadhere (PW-7) conducted autopsy on the dead body of Nannya. Shri Goga R. More (PW-8) is the panch witness to the recovery of Knife (Exh.31 & 32) from Ganesh (A-2) and Shri Bharat K. Pathadiya (PW-9) is the panch witness to the Spot Panchanama (Exh.34).

Shri Sanjay B. Bhosale (PW-5), Sanjay M. Bhapkar (PW-10) and Shri Vijay G. Darekar (PW-11) are the Police Officers, who have conducted investigation of the crime at different stages.

4.10 After recording of evidence and hearing the arguments of the learned Advocates appearing for respective parties, the trial Court by its impugned Judgment and Order was pleased to convict and sentence the Appellants as noted hereinabove.

5. Mr. Butala, learned counsel appearing for accused No.1-Mangesh submitted that, PW-2 & PW-3 i.e. friends of deceased Nannya are chance witnesses, being members of the gang of deceased and were working together with him. That admittedly they were residing at Vashi and were working at Nerul. The said witnesses have failed to offer satisfactory explanation about their presence at the scene of offence on the date and time of explanation. That, as per their own testimony, PW-2 & PW-3 ran away from the spot of incident, did not accompany deceased to the hospital, did not inform about the said incident to the mother of deceased or any of their other friends and even to the police. The conduct of PW-2 & PW-3 is therefore unnatural and raises serious doubts about their presence at the spot of incident. He submitted that, PW-2 & PW-3 have stated that, when 'hot talks' between deceased and Ganesh (A-2) were going on, Mangesh (A-1) reached there. It is therefore apparent that, Mangesh (A-1) was not having knowledge that, Ganesh (A-2) was carrying a weapon (Article-4) with him.

He submitted that, there is no evidence on record to infer that, there was pre-planning or meeting of minds between the Appellants *inter se* prior to the alleged incident. That, even otherwise the words allegedly uttered by Mangesh (A-1) 'सोडू नको देऊन टाक' (*sodu nako deun tak*) without any prior knowledge of weapon allegedly possessed by Ganesh (A-2), by itself does not mean that, Mangesh (A-1) intended, exhorted or asked Ganesh (A-2) to kill deceased. He submitted that, the said alleged instigation has been misinterpreted by the prosecution and has erroneously accepted by the trial Court as instigation by Mangesh (A-1) to Ganesh (A-2) to kill deceased Nannya. He submitted that, PW-4 i.e. uncle of deceased appears to be a chance witness and not an eye-witness to the incident. That, PW-11 has admitted that, deceased was arrested in connection with a FIR lodged by Mangesh (A-1) on prior occasion and the deceased was therefore arrested by the police. He lastly submitted that, the prosecution has failed to prove beyond reasonable doubt a case against Mangesh (A-1) and therefore he may be acquitted from the charges framed against him by allowing his appeal.

6. Mr.Patil, learned counsel appearing for accused No.2-Ganesh submitted that, PW-2 & PW-3 i.e. close friends of deceased Nannya were working with him at Nerul, Navi Mumbai and they have not offered any explanation as to why they came to Chembur instead of going from Vashi to Nerul for work on the alleged date of incident. That PW-2 & PW-3 are unnatural and untrustworthy witnesses, being friends of deceased and

belonging to the gang headed by deceased. He submitted that, PW-1 & PW-4 are not eye witnesses and are interested witnesses, being mother and real uncle respectively of deceased. That, their presence at the scene of offence is not proved by the prosecution. That there is absence of motive against the Ganesh (A-2). The alleged recovery of knife at the instance of Ganesh (A-2) is under doubt and therefore cannot be believed. He submitted that, merely because there is no cross-examination on certain points on behalf of Ganesh (A-2), the Court is not bound to accept the testimony of those witnesses. He submitted that, Spot Panchanama (Exh.34) does not mention existence of a *Pan Shop* and therefore the deposition of PW-2 & PW-3 to that effect is not a true version of facts. In support of his submissions, he relied on the following decisions, namely, (i) Chunthuram Vs. State of Chhattisgarh, reported in (2020) 10 SCC 733, (ii) Amar Singh Vs. State (NCT of Delhi), reported in (2020) 19 SCC 165, (iii) Lahu Kamlakar Patil & Anr. Vs. State of Maharashtra, reported in (2013) 6 SCC 417, (iv) State of Maharashtra Vs. Raju Bhaskar Potphode, reported in (2007) 11 SCC 261, (v) Narsinbhai Haribhai Prajapati Vs. Chhatrasinh & Ors., reported in AIR 1977 SC 1753 and (vi) Juwarsing & Ors. Vs. The State of M.P., reported in AIR 1981 SC 373.

He therefore prayed that, the Appeal may be allowed by acquitting the Appellant.

7. It is to be noted here that, both the learned counsel for Appellants have not seriously disputed various recoveries including the recovery of knife (Article-4) at the instance of Ganesh (A-2) and the Chemical Analyzer's Reports thereof. They have also not disputed the fact of homicidal death of Nannya. However, they have elaborately pleaded on the points which have been noted in para No.5 & 6 above. Therefore evidence of PW-1 to PW-4 assumes importance in the present case.

8. Mr. Nikhilesh Satvirkar (PW-2) was a friend of Nannya (deceased). He was knowing deceased five years prior to the date of incident, as he was residing in the same vicinity. That, the incident took place on 13th September 2011 at about 10.00 am. He and Nikhil Gaikwad (PW-3) went to the said locality at about 10.00 am. They met Nannya near Karnataka Highschool. Nannya told them that, he would come back after taking a bath. At that time Nannya was going to answer nature's call with a tin of water in his hand. The public toilet was at a distance of 2 to 3 minutes walking distance from the house of Nannya. That there was one *pan* stall in front of the toilet. Nannya went to the said shop for taking a cigarette. PW-2 & PW-3 were standing at a distance of about 50 feet from the *pan* shop/stall. When Nannya had been for taking the cigarette, there was 'hot talk' between Ganesh (A-2) and Nannya. Mangesh (A-1) told Ganesh (A-2) to beat Nannya and not to save him. Ganesh (A-2) thereafter took out a weapon from his pocket and gave strokes of it on the stomach, both hands and other parts of

body of Nannya. Nannya tried to escape from the said place and meanwhile he felled down. Nannya felled at a distance of about 50 feet from the place of assault. Accused persons ran away towards Ghatla village. This witness has identified the knife (Article-4) used by Ganesh (A-2). He also identified the Appellants in the Court. That, the police did not record his statement on the same day. He subsequently came to know that, Nannya had expired.

8.1 In his elaborate cross-examination PW-2 has admitted that, Ganesh (A-2) and Nannya (deceased) both were 'hotly talking' with each other. He has denied the suggestion that, when the hot talk between Ganesh (A-2) and deceased were going on Mangesh (A-1) uttered the words 'देऊन टाक' (*deun tak*), were not heard by him. That, he was a good friend of Nannya. He was on visiting terms to his house. He has admitted that, there were many persons present at the spot of incident. He has denied the suggestion that, because of noise of gathered persons, he could not hear the words used by Mangesh (A-1) i.e. 'देऊन टाक' (*deun tak*). He has admitted that, there is a road in between the place of incident and the place place where he along with PW-2 were standing. That, he was unable to state the specific description of the weapon, which was in the hand of Ganesh (A-2). He has admitted that, he was unable to state the number of strokes given by Ganesh (A-2), as he had not seen it. He has denied the suggestion that, the Appellants were not present at the spot at the time of incident. He has admitted that, Nannya (deceased) was arrested on the charges of beating by

him to Mangesh (A-1). That, some of his friends were also arrested in the said case.

9. Nikhil S. Gaikwad (PW-3) has deposed that, prior to shifting to Vashi Naka, he was residing at Khardevnagar, Chembur. Deceased, PW-2 & others were his friends, when he was staying at Khardevnagar. That, deceased, himself and PW-2 were working at Bhavana Port Showroom at Nerul. The incident took place on 13th September 2011. It was Tuesday, the day of salary and therefore he and PW-2 had come to meet Nannya, near Karnatak School, Chembur between 9.30 to 9.45 am. They told the said fact to Nannya on mobile and therefore Nannya came to meet them at Karnatak School. Nannya was going to a public toilet. The toilet was at a distance of 15 to 20 feet from the place where they were standing near the school. That firstly Ganesh (A-2) met deceased. They talked something. However, PW-3 did not hear it. In the meanwhile, Mangesh (A-1) came there and abused deceased. Mangesh (A-1) told Ganesh (A-2) that, 'सोडू नको देऊन टाक' (*sodu nako deun tak*) i.e. 'do not leave, give him'. That, the meaning of 'देऊन टाक' (*deun tak*) is to kill him. Ganesh (A-2) took out a knife, which was in his pocket and pierced it in the stomach of deceased. He gave 3 to 4 strokes of knife on the body of deceased. After seeing this, PW-3 fled from the spot. He has identified the knife (Article-4). He has also identified Appellants present before the Court.

9.1 In his cross-examination he has admitted that, he firstly met Nannya at about 9.30 to 9.45 am. He has denied that, he did not see Nannya going to toilet. He has admitted that, at that time there was 'hot talk' loudly going between deceased and Ganesh (A-2), but he had not heard their voices. He had heard the voice of Mangesh (A-1) as 'देऊन टाक' (*deun tak*) because he loudly said it. PW-3 has admitted that, there were quarrels going on between the group of Prithviraj (deceased) and the group of Appellants. That, he was in the group of deceased. He has denied the suggestion that, due to the traffic of vehicles on the road and crowd of people, he could not see the incident happened. He has admitted that, he along with other four persons was having a gang.

10. Smt.Sushila Jayraj Sardar (PW-1) is the mother of deceased. She has deposed that, Nannu (deceased) was educated upto 10th standard and was working in a private showroom of four wheeler at Nerul, Navi Mumbai. That there was dispute between Appellants and deceased. Because of the same, the Appellants were giving threats to her son time and again. On 12th September 2011 deceased came to house at about 10.30 pm, took dinner and told her that the Appellants threatened him to kill on phone. Deceased was therefore afraid of it. PW-1 told him that, it being night in the morning they would go to the Police Station to lodge complaint. On 13th September 2011 her son woke up and at about 10.00 am and went for attending the natures call. That at about 10.25 am one known person came to her and told that

somebody had beaten her son with knife and her son is coming towards the house. She therefore went running outside to see her son in the lane. She went in the adjoining lane near Karnatak Highschool. She saw a blood stained knife in the hand of Ganesh (A-2) and he was running away. Deceased was lying in the same lane by the side of Karnatak Highschool. She lifted him and found injuries on his chest, stomach, hand and leg. His clothes were smeared with blood. She called the persons present there and with their help took deceased to Shatabdi Hospital in a rickshaw. In the hospital, Nannya was alive till 11.45 am. The doctors in the Shatabdi Hospital told her that, there were no advanced facilities for treatment and told her to take Nannya to Sion Hospital. Her complaint / F.I.R. (Exh.16) was recorded by Police at Shatabdi Hospital. Nannya expired during transit to Sion Hospital. She has identified the clothes of her son and knife (Article-4). She has also identified the Appellants as the assailants in the Court.

10.1 In her cross-examination, she has admitted that, once her son Nannya was taken by police, but she did not know the reasons for that. She has admitted that, she did not personally see Ganesh (A-2) beating and giving blows of knife to her son. That she had not seen the person who pierced knife in the body of her son. She has denied the suggestion that her son was a '*bhai*' in their area and he was on inimical terms with many persons.

11. Bharat B. Jadhav (PW-4) is the uncle of Nannya i.e. brother of PW-1. He has deposed that, Appellants were threatening to kill deceased and therefore on 12th September 2011 between 10.00 to 10.30 pm his sister (PW-1) telephoned him. At about 11.30 pm, PW-1 came to his house and told him that, the police were threatening deceased and told him to come to her house at 13th September 2011 in the morning for going to the Police Station for lodging a complaint. That therefore on 13th September 2011 at about 10.15 am he reached to the *pan* stall, which was near to the house of PW-1. He saw Appellants were running from the backside of toilet. That Ganesh (A-2) was ahead of Mangesh (A-1) and Ganesh (A-2) was having a knife in his hand. He also saw his sister came running from the lane and went to the adjacent lane where deceased was lying. The spot where deceased was lying was at a distance of about 10 feet from the house of PW-1 and the public toilet was at a distance of 15 feet from her house. The body of Nannya was smeared with blood. His sister and one lady carried deceased in a rickshaw to Shatabdi Hospital. He went to the hospital by another rickshaw. Nannya was in Shatabdi Hospital for half an hour. On the advise of doctor, they shifted Nannya to Sion Hospital. In transit to Sion Hospital Nannya expired. He has identified to Appellants as the assailants. In his elaborate cross-examination, nothing beneficial to the Appellants is elicited.

12. Perusal of testimonies of PW-1 & PW-4 clearly discloses that, they are not eye witnesses.

It is apparent from the testimony of PW-1 that, she is not an eye witness to the incident and saw her son lying at the spot, when she went there after receipt of information from a known person. Her version that, she saw Ganesh (A-2) running with a knife in his hand appears to be an exaggerated version and creates doubt about the same in the mind of this Court. Her evidence otherwise also only corroborates the fact of Ganesh (A-2) running away with knife in his hand from near the place where Nannya was lying.

12.1 From the evidence of PW-4 it reveals that, he is a chance witness and reached at the scene of offence at the particular time i.e. at 10.15 am and saw the Appellants running therefrom. Even otherwise, PW-4 is also not an eye-witness to the incident.

13. Minute scrutiny of the evidence of PW-2 discloses that, on an earlier occasion he along with his friends had beat Mangesh (A-1) and they along with Nannya (deceased) were arrested on that count. In his cross-examination he has categorically stated that, he had heard the words used by Mangesh (A-1) as 'देऊन टाक' (*deun tak*). He has admitted that, Ganesh @ Babu (A-2) and Nannya (deceased) both were 'hotly talking' with each other. He has given the admission of 'hot talks' by both Ganesh @ Babu (A-2) and Nannya (deceased).

13.1 PW-3 has also given vital admissions. He has admitted that, there was some talk between Ganesh (A-2) and Prithviraj and thereafter

Mangesh (A-1) came there. Mangesh (A-1) abused deceased and thereafter told Ganesh (A-2) not to leave deceased and to kill him. That Ganesh (A-2) was having a knife in his pocket and after the quarrel and on the instigation of Mangesh (A-1), he assaulted deceased.

13.2 According to us, PW Nos.2 & 3 are reliable witnesses and their evidence is trustworthy. The admissions given by them in their cross-examination are important to ascertain the intention to cause grievous hurt leading to culpable homicide not amounting to murder and not murder as contemplated under Section 302 of I.P.C..

14. Recovery Panchanama of knife (Exh.32) at the instance of Ganesh discloses that, the knife was having a blade of 3 $\frac{3}{4}$ th inch long i.e. relatively small sized knife.

14.1 From the perusal of injuries suffered by deceased, it appears that, Ganesh (A-2) did not act cruelly. After assault, Nannya (deceased) ran away from the spot of incident and then fell down in a nearby lane. Evidence on record reveals that, Ganesh (A-2) did not chase and in fact left the spot of incident along with Mangesh (A-1) immediately.

15. It is an admitted fact on record that, both the groups were on inimical terms. When the quarrel / 'hot talks' between Ganesh (A-2) and Nannya (deceased) was going on, Mangesh (A-1) came there and he instigated Ganesh (A-2) saying that, 'सोडू नको देऊन टाक' (*sodu nako deun tak*) (did not leave, give him), it added fuel to the fire. In the facts and

circumstances of the case in hand it cannot be construed that, by the said words uttered by Mangesh (A-1), he instigated Ganesh (A-2) to commit murder of deceased. Evidence on record indicates that, they developed common intention at the spur of moment and then Ganesh (A-2) assaulted Nannya (deceased) with the knife, which he was possessing. Mere possession of weapon which was admittedly concealed cannot be construed as intentional preparation by Ganesh (A-2).

15.1 Instigation by Mangesh (A-1) is incidental and not intentional – as he came at the scene of offence during the quarrel / ‘hot talks’ between Ganesh (A-2) and deceased Nannya. Therefore the trial Court has rightly acquitted both the Appellants under Section 120B of I.P.C..

15.2 It appears to us that, Ganesh (A-2) was not having intention to commit murder of deceased, however he had knowledge that, if Nannya is assaulted with knife, he may suffer grievous hurt, which may lead to his death.

16. After taking into consideration all the aforesaid facts and evidence on record, we are of the view that, the present case falls within the purview of Exception 4 of Section 300 of I.P.C. and the offence committed by the Appellants is under Section 304 (Part-II) read with 34 of I.P.C..

16.1 Hence the following Order :-

- a) Both the Appeals are partly allowed.
- b) The conviction and sentence of Appellants under Section 302

read with 34 of I.P.C. is set aside and instead they are convicted under Section 304 (Part-II) read with 34 of I.P.C.. The Appellants are directed to undergo R.I. for a period of 10 years and to pay a fine of Rs.10,000/- each. In default of payment of fine to further undergo R.I. for six months.

- c) Appellants shall be released from jail on completion of sentence as directed, unless required in any other case/cases.

[SHIVKUMAR DIGE, J.]

[A.S. GADKARI, J.]