

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

**CRIMINAL APPEAL NO. 722 OF 2018
AND
CRIMINAL APPLICATION NO. 1623 OF 2017**

Rahul Kondiba Bergal

... Appellant/Applicant
Org. Accused No.1

V/s.

The State of Maharashtra

(through Vaduj Police Station, Dist. Satara) ... Respondent

**AND
CRIMINAL APPEAL NO. 124 OF 2018**

Kailash S. Kathare

... Appellant
/ Org. Accused No.2

V/s.

1. The State of Maharashtra
Vaduj Police Station, Tal.-Khatav,
Dist. Satara

2. Bira Sida Garale

... Respondents

Mr. Prabhakar Parse a/w. Mr. Santosh Devadkar and Ms
Rajashri Kute for the Appellant/Applicant/Org. Accused No.1 in
Appeal/722/2018 and APPA/1623/2017.

Mr. Hrishikesh Chavan, Appointed Advocate for the Appellant/
Org. Accused No.2 in Appeal/124/2018.

Mr. S.V. Gavand, APP for the Respondent/State

**CORAM : NITIN W. SAMBRE &
N. R. BORKAR, JJ.**
RESERVED ON : 07 OCTOBER 2023.
PRONOUNCED ON : 21 MARCH 2024.

COMMON JUDGMENT (PER N.R. BORKAR, J.)

1. Both these appeals are filed against one and the same
judgment and order dated 21 August 2017 passed by the

Additional Sessions Judge, Vaduj in Sessions Case No.57 of 2012. Both these appeals were therefore heard together and are being disposed of by this common judgment.

2. Appellant - Rahul K. Bergal (appellant in Appeal No.722 of 2018) and appellant - Kailas S. Kathare (appellant in Appeal No.124 of 2018) were accused Nos.1 and 2 respectively before the trial Court. They were tried for the offence punishable under Section 302 read with 34 of the Indian Penal Code, 1860 (for short "IPC"). By the impugned judgment and order, the trial Court convicted both the accused for the offence punishable under Section 302 read with 34 of the IPC and sentenced them to suffer rigorous imprisonment for Life and to pay fine of Rs.50,000/- each and in default to suffer rigorous imprisonment for one year.

3. The deceased Priyanka was the daughter of PW-2 Bira Garale. It is the case of prosecution that accused No.1 who is the relative of PW-2 wanted to marry the deceased. However, ignoring his proposal on 15 June 2012, the marriage of the deceased was solemnized with one Dilip Kharje. It is alleged that accused No.1 was thus annoyed and was harassing the deceased.

4. The alleged incident of murder took place on 26 June 2012. One day prior to the incident, the deceased had come to the house of PW-2 as she wanted to collect certain documents from her school. It is alleged that on the date of

incident at about 7.00 p.m., accused No.1 had made phone call on mobile phone of PW-2 which was picked by the deceased. It is alleged that on the said phone call the accused No.1 had threatened the deceased to kill her.

5. It is alleged that after the said phone call in the midnight at about 12.00 a.m., the accused Nos.1 and 2 came to the house of PW-2 and committed the murder of deceased while she and her other family members including PW-2 were sleeping in the verandha of their house.

6. We have heard learned counsel for the appellant/accused No.1, learned appointed counsel for the appellant/accused No.2 and learned APP for the respondent/State.

7. Learned counsel for the appellants/original accused submit that there is no evidence on record in relation to the alleged motive attributed to accused No.1. It is submitted that the trial Court to convict the accused has mainly relied upon the evidence of PW-2, who according to the prosecution is an eye-witness to the incident. It is submitted that the evidence of PW-2 is, however, full of omissions and contradictions. It is submitted that as regards accused No.2 there is no evidence to convict him with the aid of Section 34 of the IPC. It is submitted that there are no allegations that accused No.1 had conspired with the accused No.2 to commit the alleged crime. It is submitted that considering the overall facts and

circumstances, the trial Court ought to have granted the benefit of doubt to the accused.

8. On the other hand, learned APP appearing for the respondent/State submits that, PW-2 is the eye-witness to the incident. It is submitted that there is no evidence on record to show that PW-2 was carrying some sort of grudge against accused Nos.1 and 2, which made him to falsely implicate them in the alleged crime. It is submitted that in absence of such evidence the trial Court has rightly relied upon the evidence of PW-2 to convict both the accused. It is submitted that there is a recovery of Axe at the instance of accused No.1 which corroborates the version of PW-2. It is submitted that considering the overall evidence on record, the trial Court was justified in convicting both the accused.

9. We have perused the evidence on record. According to PW-2, the accused No.1 was making repeated phone calls to the deceased and was harassing her as she did not marry him. According to him, on the date of incident also, at about 7.00 p.m., the accused No.1 had made phone call on his mobile phone, which was picked up by the deceased and she was threatened. PW-2 has specifically stated that after the alleged incident he handed over his mobile phone and mobile phone of deceased to the Investigating Officer. PW-9 Shri Dilip Bhandwalkar, the Investigating Officer has, however, admitted in his cross-examination that he did not seize mobile phones of deceased and her parents. On the contrary, he has

admitted that he had seized the mobile phone of accused No.1 with a view to verify the allegations made in respect of phone calls made by the accused No.1 to the deceased. PW-9 has further admitted that CDRs of mobile phone of the accused No.1 were obtained, however, he had not produced those CDRs along with charge-sheet. The only inference which can be drawn from the above evidence of PW-9 is that no such phone calls as alleged by PW-2 were made by accused No.1.

10. Apart from above, PW-2 has admitted in his cross-examination that accused No.1 was already married and his wife was residing with him at the time of alleged incident. This fact creates doubt about the alleged motive attributed to accused No.1 that he wanted to marry the deceased and as she did not marry him, he was annoyed with her and was harassing her.

11. As regards the alleged incident, PW-2 has stated that one day prior to the incident, the deceased had come to his house as she wanted to collect certain documents from her school. According to him on the date of incident at about 11.30 p.m., after having dinner, he and his family members including the deceased slept in the verandha of his house. In the midnight he heard some sort of sound. He woke up on hearing the said sound as he thought thief might have entered in his house. He then put on the verandha lights. He saw both the accused in the verandaha of his house and at

that time accused No.1 was armed with Axe. He thereafter found that the deceased was lying in injured condition and blood was oozing from her neck. According to PW-2, he tried to apprehend the accused, however, they ran away from the spot. He then contacted the Sarpanch of their village. According to PW-2, the Sarpanch of their village had then intimated about the incident to Vaduj Police Station on phone.

12. The evidence of PW-2 is, however, full of omissions and contradictions. According to PW-2, accused No.1 was armed with Axe. However, there is no reference of Axe in the FIR lodged by him. Similarly, there is no reference of accused No.2 in the FIR. He has not assigned any reason for not mentioning the name of accused No.2 in the FIR. Considering these material omissions in the evidence of PW-2, it would not be safe to rely upon his evidence.

13. Apart from the above, according to PW-2, after the incident he contacted the Sarpanch of their village and apprised him about the incident, who, thereafter, intimated about the incident to Vaduj Police Station. There is station diary entry on record in respect of the said intimation. The defense has examined the police personnel namely, Shantilal Ombase, who recorded the said station dairy entry as DW-1. According to him, on 27.6.2012 at about 2.00 a.m., he received the phone call from Sarpanch of the village Garalewadi about the alleged incident. He took the entry of information given by the Sarpanch in station diary. We have

perused the said station diary entry at Exhibit-93. It records assault by unknown person. In the facts and circumstances, the prosecution ought to have examined the Sarpanch. However, the prosecution has not examined the Sarpanch. This Court in **Ashtaf H. Shah vs. State of Maharashtra**¹, has held that:

"15. We feel that in the instant case it was essential for the prosecution to examine Aru Surve. His evidence was essential to the unfolding of the narrative. He was the person to whom Mahesh Tilekar immediately informed about the incident. His evidence would have thrown light on the claim of Mahesh Tilekar of having seen the incident. No reason has been assigned by the prosecution for not producing him. This circumstance also goes against the prosecution. In this connection it would be essential to reproduce the observations of Their Lordships of the Apex Court in the decision reported in AIR 1971 SC 1586 (The State of UP vs. Jaggo alias Jagdish). In paragraph 15, Their Lordships observed thus:

"15. it is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called. This statutory principle in criminal trials has been stressed by this Court in the case of Habeeb Mohammad vs. The State of Hyderabad AIR 1954 SC 51, for eliciting the truth."

14. Admittedly, after the alleged incident, dog squad was called. The report in respect of dog squad is at Exhibit-76. There is a column in the said report about name and address of the suspected accused. The remark against the said column is 'unknown'. It further appears from the said report that the dog squad had tried to search the suspected accused with the help of sniffer dog. The only inference which can be drawn from the above circumstances is that the assailants were unknown.

¹ 1996 Cri.L.J.3147

15. As regards the recovery of Axe at the instance of accused No.1, PW-2 has admitted that the Axe was shown to him in the police station on 28 June 2012, whereas according to the prosecution, it was recovered on 29.6.2012. Considering the overall facts and circumstances of the case, the Trial Court was not justified in convicting the accused. Hence, , the following order is passed:

ORDER

- a] Both Criminal Appeals are allowed.
- b] The impugned judgment and order dated 21.08.2017 passed by the Additional Sessions Judge, Vaduj in Sessions Case No. 57 of 2012 convicting the **appellant/original accused No.1 - Rahul Kondiba Bergal and appellant/original accused No.2 -Kailas Shivaji Kathare** for the offences punishable under sections 302 read with 34 of the IPC is set aside and they are acquitted of the said offence.
- c] The appellants/original accused Nos.1 and 2 are in jail, they be released forthwith unless their custody is required in connection with any other crime.
- d] The appellants/original accused Nos.1 and 2 shall execute P.R. Bond in the sum of Rs.15,000/- (Rupees Fifteen Thousand) each and one surety of like amount in terms of section 437 of the Code of Criminal Procedure, before the concerned trial Court.

f] Fine amount, if any, paid be refunded to the Appellants.

e] In view of disposal of Criminal Appeal No. 722 of 2018, Criminal Application No. 1623 of 2017 therein does not survive and accordingly, the same is also disposed of.

(N.R. BORKAR, J.)

(NITIN W. SAMBRE, J.)