



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

CRIMINAL APPEAL NO. 370 OF 2021

Raju Motilal Rathod
Age: 35 years, Occu.: Service,
R/o Marsavli Tanda,
Tq. Phulambri, Dist. Aurangabad

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

AND

CRIMINAL APPEAL NO. 89 OF 2021

Vijay Motilal Rathod
Age: 39 years, Occu.: Agri.,
R/o Marsavli Tanda,
Tq. Phulambri, Dist. Aurangabad

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

AND

CRIMINAL APPEAL NO. 45 OF 2021

Sanjay Motilal Rathod
Age: 43 years, Occu.: Service,
R/o Marsavli Tanda,
Tq. Phulambri, Dist. Aurangabad

..APPELLANT

VERSUS

State of Maharashtra

..RESPONDENT

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Mr. M.R. Khatwad, Advocate for appellant in APEAL/370/2021
Mr. S.J. Salunke, Advocate for appellant in APEAL/89/2021
Mr. A.R. Avhad, Advocate for appellant in APEAL/45/2021
Mr. S.D. Ghayal, Addl.P.P. for respondent - State

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**CORAM : R.G. AVACHAT AND
NEERAJ P. DHOTE, JJ.**

DATE : 02nd JANUARY, 2025

ORAL JUDGMENT (PER : R.G. AVACHAT, J.) :

1. These three appeals are taken up together for decision since the challenge therein is to one and the same judgment of conviction and order of consequential sentence dated 27th January, 2021 passed by the Additional Sessions Judge (11th Court), Aurangabad ('trial Court'). The material part of the order of conviction reads thus :-

- 1) *Accused no.1 Raju Motilal Rathod and accused no.2 Vijay Motilal Rathod both are convicted under Section 235(2) of Code of Criminal Procedure for the offence punishable under Section 302 read with 34 of Indian Penal Code.*
- 2) *Accused no.1 Raju Motilal Rathod and accused no.2 Vijay Motilal Rathod, both are sentenced to undergo imprisonment for life and they both shall pay fine of Rs.5,000/- (Rs. Five Thousand only) each. In default of payment of fine, they shall undergo simple imprisonment for one year, each.*
- 3) *Accused no.3 Sanjay Motilal Rathod is convicted under Section 235(2) of Code of Criminal Procedure for the offence punishable under Section 323 of Indian Penal Code. He is sentenced to suffer simple imprisonment for one year and to pay fine of Rs.1,000/- (Rs. One Thousand only). In default of payment of fine amount, he shall undergo simple imprisonment for three months.*
- 4) *Accused no.3 Sanjay Motilal Rathod is acquitted under Section 235(1) of Code of Criminal Procedure of the offence punishable under Section 302 read with 34 of Indian Penal Code.*
- 5) *Accused no.1 Raju Motilal Rathod is acquitted under Section 235(1) of Code of Criminal Procedure of the offence punishable under Section 324 of Indian Penal Code."*

The convicts have, therefore, preferred these three appeals.

2. The case of the prosecution was that one Sominath Rathod (deceased) was the resident of Marsavli Tanda, Tq. Phulambri. He would reside alongwith his wife, PW 1 – Vaishali (informant) and two children. His

parents would reside separately in a house located just in front of his house. Sominath had lent a sum of Rs.20,000/- to appellant – Raju and Rs.15,000/- to appellant – Vijay.

3. It was further the case of the prosecution that on 16th November, 2016, Sominath was at his house alongwith his wife – Vaishali. Appellants – Raju and Vijay came together to his house and gave him a call. Sominath, therefore, went out of the house. Appellant – Raju assaulted Sominath with a knife, while appellant – Vijay beat Sominath with fist and kick blows. When PW 1 – Vaishali intervened, appellant – Raju assaulted her with a knife. Thereafter, appellant – Sanjay came there. He too manhandled Vaishali. Parents-in-law of Vaishali intervened. The appellants then went away.

4. Sominath was rushed to Ghati Hospital, Aurangabad. Vaishali too was treated thereat. Sominath was declared dead on admission. Vaishali then lodged the First Information Report ('F.I.R.') (Exh.3) with Phulambri Police Station. Crime vide C.R. No. 155 of 2016 was registered for the offences punishable under Sections 302 and 324 read with Section 34 of the I.P.C.

5. During investigation, the appellants were arrested. Crime scene panchanama (Exh.28) was drawn. Inquest and autopsy were conducted on the mortal remains of Sominath. PW 1 – Vaishali too was medically screened. Appellant – Raju made a disclosure statement pursuant to which

a knife came to be seized. Clothes on the person of the deceased and all other seized articles were sent to R.F.S.L., Aurangabad. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of investigation, the charge-sheet was filed against the appellants.

6. The trial Court framed the charge (Exh.15). The appellants pleaded not guilty. Their defence was of false implication.

7. To bring home the charge, prosecution examined nine witnesses and produced in evidence certain documents. The appellants too examined one witness in their defence. On appreciation of the evidence in the case, the trial Court convicted the appellants as stated above.

8. Learned counsel for the appellant – Raju would submit that evidence of the witnesses examined by the prosecution was inconsistent with each other. The eye witnesses were none other than the parents and widow of the deceased. The independent witness did not stand by the prosecution. The prosecution has suppressed the genesis of the incident. According to him, the crime scene panchanama (Exh.28) would indicate that situs of the crime was different than one told by father of the deceased. According to him, the incident took place in a spur of moment. It was preceded by a quarrel between the deceased and appellant – Raju. A single knife blow proved fatal. The Medical Officer did not opine the injury was sufficient in the

ordinary course of nature to cause death. Learned counsel, therefore, urged for passing appropriate order.

9. Learned counsel for the other appellants would submit that they have simply been roped in since they are real brothers of appellant – Raju. Original F.I.R. has been suppressed. The informant in his cross-examination admitted that she was accompanied by the relatives to the police station. She further admitted to have given two reports of the incident. She further admitted that the names of these appellants were given in her second report. That suggests they have been falsely implicated. Learned counsel, therefore, urged for allowing the appeals.

10. Learned Addl.P.P. would, on the other hand, submit that evidence of PW 1 – Vaishali is consistent with her F.I.R. The F.I.R. reinforces / corroborates her oral evidence before the Court. The F.I.R. was lodged within 5-6 hours of the incident. She too was injured in the incident. Our attention was drawn to the injury certificate of Vaishali (Exh.75). According to him, evidence of an injured witness carries higher weight. He would further submit that a single knife blow when causes the death of a young man itself suggests what kind of force must have been used while making the assault. The stab was given on the vital part of the body with a sharp weapon. The intention to kill was writ large. Appellant – Vijay had accompanied appellant – Raju. He too assaulted the deceased. He coming together with appellant – Raju indicates that both of them had common

intention to do away with Sominath. Learned Addl.P.P., therefore, ultimately urged for dismissal of the appeals.

11. Considered the submissions advanced. Perused the judgment impugned herein. Let us re-appreciate the evidence on record.

12. Admittedly, Sominath would reside alongwith his wife, PW 1 – Vaishali and two children at Marsavli Tanda, Tq. Phulambri. His parents would reside separately in a house situated just in front of his house. The appellants are the real brothers. They too were the residents of very tanda. The incident did take place little past 07:00 p.m. on 16th November, 2016. Sominath was rushed to Ghati Hospital, Aurangabad. He was, however declared dead on admission.

13. PW 8 – Dr. Ashok conducted autopsy on the person of the deceased. He noticed two external injuries. Those have been mentioned in column no.17 of the postmortem report (Exh.46). Those were as under :-

“1) Stab wound of size 3.5 cm x 1.4 cm x cavity deep (15 cm deep approximately) vertically placed with lower angle acute and upper angle curved, present over left lateral wall of middle 1/3rd of trunk, situated 15 cm below axilla, 21 cm above left iliac spine, 17 cm below left nipple, with blood oozing out through the wound, reddish.

On dissection: the track of the wound is directed upwards and medially from skin-subcutaneous tissue-intercostal muscle between 9th and 10th ribs on left side – thoracic cavity – lower lobe of left lung.

2) Incised wound of size 2 x 0.3 cm, subcutaneous deep with base of wound of size 1.5 cm, concave and curved shaped, present over right zygomatic region and situated 6 cm anterior to right ear and 1 cm lateral to lateral canthus of right eye and tailing present at the upper

end for a length of 0.5 cm; margins clean cut and well defined, reddish.”

In his opinion, Sominath died of hemorrhagic shock due to stab injury to left lung. Still viscera was preserved.

14. As such, the medical evidence indicates the deceased suffered one fatal injury in the nature of stab. The medical officer, however did not testify as to whether the said injury was sufficient in the ordinary course of nature to cause death of the deceased.

15. PW 1 – Vaishali, in her examination-in-chief, testified consistent with the averments in the F.I.R. According to her, the deceased had lent Rs.20,000/- to appellant – Raju and Rs.15,000/- to appellant – Vijay just 10 to 15 days before the fateful day. By little past 07:00 p.m. on 16th November, 2016 she was busy in household work. Her husband, Sominath was also present in the house. It is further in her evidence that appellants – Raju and Vijay came together. Appellant – Raju called her husband loudly as, “ए सोम्या बाहेर ये”. Her husband, therefore, went outside the house. Appellant – Raju assaulted Sominath with a knife. Appellant – Vijay started assaulting him as well. He gave fist and kick blows. She, therefore, intervened to rescue her husband. Appellant – Raju, therefore, assaulted with knife on her left hand. Their brother, appellant – Sanjay also came there and scuffled with her. Her parents-in-law, therefore, intervened. Thereafter the appellants went away.

16. During her cross-examination she claimed ignorance about close friendship between Sominath and appellant – Raju. She further claimed ignorance about monetary transactions of her husband. She even could not state monthly income of her husband. She went on to state that her husband had not maintained any accounts about money to have lent to others. Appellant – Raju had never been to her house nor she has ever visited his house. She denied that wife of appellant – Raju was not cohabiting with him. She further denied that Sominath had abused appellant – Raju over his wife. She further denied that a quarrel had ensued between the two.

17. She admitted that when Sominath was admitted in Ghati Hospital, Aurangabad, the police had come to her to make enquiry relating to the incident. She did not recollect whether she had named appellant – Raju as the assailant. Her brother-in-law – Sitaram Chavan was present in the hospital. She went on to state that she reported about the incident to the police twice. In the report given on the second occasion, her relatives had accompanied her. That time she gave the names of appellants – Vijay and Sanjay. She denied to have lodged a false report.

18. PW 2 – Mangilal and PW 5 – Tulsabai were the parents of deceased – Sominath. Both of them testified that at the relevant time they were present just outside their house. Their evidence further indicates that the appellants beat up Sominath by little past 07:00 p.m. According to them, when PW 1 – Vaishali intervened, she too was assaulted by appellant – Raju.

19. During cross-examination, PW 2 – Mangilal stated that information of the incident was given to the police only once. He went through his statement before giving evidence before the Court. He was told to give evidence as per the statement. He denied that there was no concern of appellants – Vijay and Sanjay. PW 5 – Tulsabai, mother of the deceased, testified that appellant – Raju gave 5-6 knife blows to Sominath. According to her, at the time of incident she was at her house. She admitted that appellant – Raju and Sominath were friends.

20. PW 3 – Ravindra was the resident of very *tanda*. He testified that he was present in front of the house of deceased – Sominath. It was he, who carried Sominath to hospital in his Tata Sumo vehicle. During his cross-examination, he testified that appellant – Raju did not have any issue. Deceased – Sominath said appellant – Raju to send his wife to him and he will make her pregnant. He went on to state that, therefore, quarrel ensued between the two. According to him, one Mangilal Megha Rathod was present around while the incident took place.

21. Learned A.P.P. in-charge of the case cross-examined this witness with the permission of the Court. He was confronted with his police statement. He denied to have been won over by the appellants.

22. PW 4 – Faruq is a witness to the crime scene panchanama (Exh.28). PW 6 – Balu is a witness to the disclosure statement made by

appellant – Raju pursuant to which a knife came to be seized. It is in his evidence that appellant – Raju made a statement before him that he concealed the knife and would take them to that place to take it out. His statement was accordingly recorded (Exh.38). Appellant – Raju then took them to Pirbawada Fata. Then he took them to a government water tank near a school. He took out a knife from the bushes nearby the tank. The same was seized by the police under panchanama Exhibit 39.

23. PW 7 – Chandan is a witness to the panchanama relating to seizure of clothes of the accused. He did not stand by the prosecution.

24. PW 10 – Dr. Pratibha testified that she examined PW 1 – Vaishali on 14th December, 2016. She noticed injury on the left arm of Vaishali. The age of injury was within twenty-four hours. She accordingly issued injury certificate (Exh.75).

25. During her cross-examination, she was confronted with the MLC register wherein it was recorded that Vaishali suffered blunt trauma (BT). She admitted that the said word was struck down and then she wrote 'CLW'. According to her, PW 1 – Vaishali did not state her with what kind of weapon she suffered the injury. She could not state the age and the nature of injury.

26. It is true that injury certificate (Exh.75) indicates PW 1 – Vaishali to have suffered CLW to her left forearm with a sharp and hard object. The

injury was simple in nature. She had given history of assault as on 16th November, 2016.

27. The injury certificate was issued after about a month of the incident. To be precise, it was issued on 14th December, 2016. It is not known as to when in the MLC register entry of blunt trauma to have been suffered by the injured was recorded then why it was changed to CLW. We, therefore, do not propose to give much reliance to the testimony of PW 10 – Dr. Pratibha and PW 1 – Vaishali as well as regards appellant – Raju allegedly causing injury to Vaishali with a knife.

28. PW 9 – Vijay did investigation of the crime. He admitted in his cross-examination that while he went to Ghati Hospital, he came to know about involvement of appellant – Raju alone. The same suggests that the incident in fact took place between appellant – Raju and the deceased. According to him, during enquiry of MLC, names of appellants – Vijay and Sanjay were not revealed.

29. Aforesaid is the evidence adduced by the prosecution in the case. The same is now to be appreciated. Admittedly, Sominath died of stab injury. Medical officer, who conducted autopsy, did not testify that the said injury was sufficient in the ordinary course of nature to cause death. It is true that the injury was caused on the vital part of the body. The weapon used was a knife. The incident allegedly took place over monetary transactions

between the appellants and the deceased. PW 1 – Vaishali, widow of the deceased, in her cross-examination testified that she was unaware about the monthly income of her husband and even details of his money transactions. She even testified that no record was maintained by the deceased about the hand loans given by him. Then it is surprising as to how could she narrate in the F.I.R. that the incident took place as her husband lent appellants – Raju and Vijay Rs.20,000/- and Rs.15,000/- respectively just fifteen days before the incident. The prosecution did not adduce evidence to indicate as to what triggered the incident. The mother of the deceased admitted that deceased – Sominath and appellant – Raju were friends. The said fact was, however denied by PW 1 – Vaishali, widow of the deceased. The same indicates that PW 1 – Vaishali (informant) was very much economical with truth. Other two witnesses were none other than parents of the deceased. The so called independent witness viz. PW 3 – Ravindra did not stand by the prosecution. The appellants examined a defence witness, who was admittedly residing in the neighbourhood of the deceased. According to him, a quarrel took place between appellant – Raju and the deceased. Appellant – Raju did not have any issue. Deceased – Sominath, therefore, asked him to send his wife to him and he will make her pregnant. The settled legal preposition is that the defence witness is entitled to have weight equal to that of prosecution witness, unless his credit was impeached.

30. Admittedly, the informant had reported about the incident twice. The F.I.R. (Exh.21) on record is the second version of the incident. The first

one has been suppressed from the Court. She admitted that the names of appellants – Vijay and Sanjay were reported in the second report. The evidence of Investigating Officer reinforces the same, since according to him during MLC enquiry only role of appellant – Raju had been surfaced. As such, PW 1 – Vaishali is such a witness, who goes to an extent to implicate innocent persons in the offence of murder. As per the defence version, a quarrel had ensued between appellant – Raju and deceased – Sominath over the reasons stated hereinabove. Had the appellant – Raju really intended to do away with Sominath, he would have rained on the person of the deceased, knife blows. It is a case of single knife blow, given as a result of quarrel and the conduct of the deceased causing grave and sudden provocation of appellant – Raju. Since the Medical Officer did not opine that the injury was sufficient in the ordinary course of nature to cause death, in our view it would be a case of attributing appellant – Raju with the knowledge of consequence of the assault, since the assault was made with a knife and on the vital part of the body. In our view, therefore, the case would fall under second part of Section 304 of the I.P.C.

31. For all the aforesaid reasons, the appeals stand disposed of in terms of following order :-

ORDER

- (I) Criminal Appeal No. 370 of 2021 is partly allowed.
- (II) Impugned judgment and order dated 27th January, 2021, passed by learned Additional Sessions Judge,

Aurangabad, in Sessions Case No. 112 of 2017, convicting and sentencing the appellant – Raju Motilal Rathod for the offence punishable under Section 302 of Indian Penal Code and imposing a fine with default sentence, is hereby set aside. He stands acquitted thereof.

Instead, appellant – Raju Motilal Rathod is convicted for the offence punishable under Section 304 Part-II of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for a period of eight (8) years and to pay a fine of Rs.1,000/- (Rupees One Thousand). In default of payment of the fine, he shall suffer rigorous imprisonment for two (2) months. If the fine amount has already been paid, the same be adjusted.

- (III) Criminal Appeal No. 89 of 2021 is allowed.
- (IV) Impugned judgment and order dated 27th January, 2021, passed by learned Additional Sessions Judge, Aurangabad, in Sessions Case No. 112 of 2017, convicting and sentencing appellant – Vijay Motilal Rathod for the offence punishable under Section 302 of Indian Penal Code and imposing a fine with default sentence, is hereby set aside. He stands acquitted thereof. If the fine amount has already been paid, the same be adjusted.
- (V) Criminal Appeal No. 45 of 2021 is allowed.
- (VI) Impugned judgment and order dated 27th January, 2021, passed by learned Additional Sessions Judge, Aurangabad, in Sessions Case No. 112 of 2017,

convicting and sentencing appellant – Sanjay Motilal Rathod for the offence punishable under Section 323 of Indian Penal Code and imposing a fine with default sentence, is hereby set aside. He stands acquitted thereof. If the fine amount has already been paid, the same be adjusted.

SSD

(NEERAJ P. DHOTE, J.)**(R.G. AVACHAT, J.)**