



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

CRIMINAL APPEAL NO.756 OF 2018

1. Eknath @ Somnath s/o. Bhanudas Kumkar,
Age : 33 years, Occu : Agriculture,
Residing at Revaon, Taluka and District Jalna.
2. Jagannath s/o. Bhanudas Kumkar,
Age : 31 years, Occu : Agriculture,
Residing at above.
3. Bhanudas s/o. Asaram Kumkar,
Age : 68 years, Occu : Agriculture,
Residing at above.

... Appellants
(Accused)

Versus

The State of Maharashtra,
Through the Taluka Jalna Police Station,
Jalna

.. Respondent

.....

Shri. Satej S. Jadhav, Advocate for the Appellants
Dr. Smt. Kalpalata Patil Bharaswadkar, Addl. P.P. for the Respondent –
State

.....

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

RESERVED ON : 04.03.2025
PRONOUNCED ON : 18.03.2025

JUDGMENT (*Per* NEERAJ P. DHOTE, J.) :

. This Appeal, under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the ‘Cr.PC.’) is filed against the Judgment and Order dated 20.06.2018 passed by the learned Additional Sessions Judge, Jalna in Session Case No.67 of 2015 convicting the Appellants for the offence punishable under Section 302 r/w. Sec. 34 of the Indian Penal Code (for short, ‘I.P.C.’) and sentencing

them to suffer Imprisonment for Life and fine of Rs.10,000/- (Rupees Ten Thousand Only) each, in default to suffer Rigorous Imprisonment for Six (6) Months.

2. The Prosecution's case, as revealed from the police report, is as under :-

2A. Appellant No.1 – Eknath and Appellant No.2 – Jagannath are sons of Appellant No.3 – Bhanudas and they all are resident of Revgaon, Tal. and Dist. Jalna. Bhagwan Shankar Kumkar (hereinafter referred to as 'Deceased') was residing in the same village with his sons named Narayan and Ganesh and their families. The Appellant No.3 - Bhanudas was the uncle of Deceased. Four (4) to five (5) years prior to the incident, the Appellant No. 3 – Bhanudas had abused Deceased and relatives after consuming liquor. The Appellant No.3 - Bhanudas was superstitious and used to take his Daughter-in-laws for treatment to one black magician. The Appellant No.3 - Bhanudas was informed by someone that Deceased made witchcraft (*Karani*) on his Daughter-in-laws.

2B. On 06.01.2015 around 16:30 hours when the Informant and his Brother were loading cotton in the truck at the place of their work in village Revgaon, they heard chaos. They both along with others ran towards the direction of chaos. They noticed that their bullock cart

was unmanned and coming towards the village. They saw the Appellants assaulting Deceased with stones. On noticing the Informant and his Brother, the Appellants fled. Deceased was lying in an injured condition with blood oozing from the injuries. The Informant, his Brother and others took Deceased to the Civil Hospital, Jalna in the four (4) wheeler. On their way to the hospital, Deceased stated that Appellants assaulted him with stones. At the hospital, doctor declared him dead. The Informant went to the Taluka Jalna Police Station between 21:00 to 21:15 hours and lodged the Report against the Appellants. Crime came to be registered against the Appellants for the offence punishable under Section 302 r/w. Section 34 of the IPC. Prior to lodging the Report, the Accidental Death Report (A.D.R.) was registered and the Inquest was drawn and the body was referred for the Post-mortem. The Post-mortem was performed, in which the cause of death was revealed as 'Head Injury'.

2C. On registration of the Crime, the Investigating Officer visited the spot and prepared the Spot Panchanama. The Appellants surrendered to the police. Their clothes were seized. The Statements of Witnesses were recorded. The Articles seized during the course of investigation were referred to the Chemical Analyzer. On completion of Investigation, the Appellants came to be Charge-sheeted for the offence punishable under Section 302 r/w. Sec.34 of I.P.C. After the Reports

from the Chemical Analyzer were received, they came to be included in the Charge-sheet.

2D. On committal, the learned Trial Court framed the Charge against the Appellants for the offence punishable under Section 302 r/w. Sec.34 of the IPC at Exh.08, to which the Appellants pleaded not guilty and claimed to be tried. To prove the Charge, the Prosecution examined in all thirteen (13) witnesses and brought on record the relevant documents. After the Prosecution closed their evidence, the Statement of the Appellants came to be recorded under Section 313 (1) (b) of the Cr.P.C. The Appellants claimed false implication. After hearing both the sides and appreciating the evidence available on record, the learned Trial Court passed the impugned Judgment and Order convicting and sentencing the Appellants, as referred in Paragraph No.1 above.

3. Heard the learned Advocate for the Appellants and the learned Addl. P.P. for the State. Scrutinized the evidence available on record.

4. It is submitted by the learned Advocate for the Appellants that, initially ADR was registered and the initial investigation such as Inquest and Post-mortem was done in the ADR. Though the Informant

and two (2) others claimed to have witnessed the incident, they did not lodge Report immediately with the police, though police were available in the hospital where Deceased was taken. Suddenly, at 21:15 Hrs the Informant lodged the false Report implicating the Appellants. The delay in lodging the FIR creates doubt whether the incident was seen by the Informant and other witnesses who claimed to be the Eye Witnesses. Though the incident claims to have occurred in the open space, no villagers are examined. The three (3) Eye Witnesses are relatives of Deceased and they being interested witnesses, are not reliable and cannot be believed. The medical papers are suppressed by the Prosecution. The motive attributed to the incident is Suspicion of black magic and some five (5) year old incident. The muddemal was lying in the Police Station for three (3) weeks before sending to the Chemical Analyzer and therefore, the C.A. Report loses its value. Considering all these aspects, at the most Suspicion can be raised, but Suspicion cannot take place of proof. Prosecution evidence is not free from doubt and hence, the Appeal be allowed by setting aside the impugned Judgment and Order. In support of his submission, the learned Advocate for the Appellant relied on the Judgment in **Ganesh Bhavan Patel and Another vs. The State of Maharashtra, AIR 1979 SC 135** on the point of effect of delay in recording statement of witnesses in criminal case.

5. It is submitted by learned Addl. PP. that the Prosecution examined three (3) eye witnesses to the incident. Their testimony is consistent and corroborates each others. Three (3) stones with blood stains came to be seized from the spot of incident. There is medical evidence on record to corroborate the testimony of Eye Witnesses. The Medical Officer denied the suggestion that the injuries were possible by falling from bullock cart. Though the result of analysis of blood of Deceased was 'inconclusive', the stones seized from the spot of incident were having blood stains of group 'A'. In totality of evidence on record, it falls to the guilt of Appellants. The evidence of Investigating Officer shows that the Appellants surrendered to the police. Though ADR was registered, that does not mean that the death was accidental. The Eye Witnesses carried Deceased to the hospital and thereafter lodged the Report and therefore, it cannot be said that there is delay in lodging FIR. The learned Trial Court has properly appreciated the evidence on record and no interference is called for in the impugned Judgment and Order.

6. The witnesses examined by the Prosecution can be categorized as follows :-

(A) Eye Witnesses :-

- (a) PW1 - Narayan Bhagwan Kumkar
- (b) PW2 - Ganesh Bhagwan Kumkar
- (c) PW3 - Rameshwar Tukaram Kumkar

(B) The Panch Witnesses :-

- (a) PW4 - Baburao Appaji Golde
- (b) PW5 - Shivdas Vitthal Kalani
- (c) PW6 - Sachjin Appasaheb Chalse
- (d) PW8 – Ramesh Dhondiba Shinde

(C) The Medical Officer :-

- (a) PW10 – Dr. Chandragupta Suryakant Makhare

(D) Police Witnesses :-

- (a) PW9 – Pradeep Ambadas Kartare
- (b) PW11 – Sanjay Namdeo Choudhary
- (c) PW12 – Pralahad Baburao Ghuge
- (d) PW13 – Vithal Chandu Kale

(E) The witness, who carried Deceased to the hospital, in his vehicle :-

- (a) PW7 - Tukaram Shankarrao Kumkar

7. PW1 and PW2 are the sons and PW3 is the nephew of Deceased. Their evidence shows that the Appellants are their relatives. There was enmity between the family of Deceased and Appellants for last many years. The Appellant - Bhanudas is the father of Appellant's Eknath and Jagannath. According to the eye witnesses on 06.01.2015 at 04:30 p.m. when they were engaged in the work of loading the truck with the cotton from the godown of one Sitaram Bhosle, they heard chaos from the hutment area situated at some distance from the place of

their work. On hearing the chaos they all proceeded towards the said direction by running. They saw their bullock cart coming towards their direction, however, Deceased was not seen on the bullock cart. When they reached the hutment area, they saw the Appellants assaulting Deceased with stones. On noticing the witnesses, the Appellants ran away. They found Deceased in an injured condition. They called the jeep (four wheeler) of PW7 and carried Deceased to the Civil Hospital, Jalna. On their way to Civil Hospital, Jalna, Deceased was conscious for some time and he told the eye witnesses that the Appellants assaulted him with stones. After some time Deceased fell unconscious. On reaching the Civil Hospital, Deceased was taken inside the hospital. The doctor declared Deceased as dead. The evidence of these three Eye Witnesses is consistent. PW1 went to the Police Station and lodged the Report at Exh.25.

8. All the said three eye witnesses were cross-examined by learned defence Advocate. From the cross-examination it is clear that, the place where Deceased was found in an injured condition was a public place within the vicinity of village Revgaon. Their evidence further shows that the said place was near the residential and public area. It is brought in the cross-examination of PW1 that there was Police Chowki at the Civil Hospital, Jalna and he did not know the reason as to why he did not lodge the Report with the police outpost at the Civil Hospital.

He admitted that many relatives, well wishers, friends and nighbourers were with him at the hospital between the period doctor declared his father dead and his going to the police station, however no talk had taken place amongst them about the action which was to be taken.

9. The evidence of PW4 shows that he acted as the Panch for the Spot Panchanama at Exh.29 which was conducted on 07.01.2015. The spot was in front of the Vasti school of village Revgaon. Two (2) stones and one (1) piece of tile, one (1) Knife, chilly powder mixed with mud and blood stained mud came to be seized from the spot. The cross-examination of the Panch Witness shows that the spot was on the road which was having slope on the eastern side. The said road was used by villagers for going to their fields. It was the road frequented by the public from dawn to dusk. The Spot Panchanama having the sketch of the spot of incident is brought on record in the evidence of this Panch Witness.

10. The evidence of PW13 shows that he was attached to Taluka Jalna Police Station as the Assistant Police Inspector (API) and on 06.01.2015 as per the directions of Senior Police Inspector he went to the Civil Hospital, Jalna where the Deceased was brought. His evidence shows that the ADR bearing No.01/2015 was registered on the basis of Medico Legal Case Report at Exh.108.

11. The evidence of PW11 shows that on 06.01.2015 he was attached to the said Taluka Jalna Police Station as Assistant Police Inspector (API). The A.D.R. No.01/15 was registered in Police Station in respect of death of Bhagwan Shankar Kumkar and enquiry of A.D.R. was assigned to him. As he was out of station, the PI. Mr. Kale (PW13) conducted the Inquest and Police Naik - Shri. Ghuge (PW12) seized the clothes of Deceased under the Panchanama. His evidence is corroborated by the testimony of PW12 and PW13. His further evidence shows that when he was in the Police Station, he recorded the statement of PW1 and registered the Crime No.6/15 against the Appellants for the offence punishable under Section 302 r/w. Sec. 34 of the I.P.C. at Exh.25. His further evidence is in respect of the investigation done by him i.e. visiting the spot of incident, preparing the Spot Panchanama, arresting the Appellants on their Surrender to the Police Station in the midnight, recording the Statement of Witnesses, seizure of clothes of the Appellants, preparing the sketch of the spot of incident through the Revenue Officer, referring the seized muddemal to the Chemical Officer and submitting the Charge-sheet against the Appellants.

12. From the above evidence, it is clear that the Deceased was brought dead to the Civil Hospital by PW1, PW2 and PW3. Thereafter ADR was registered and during the course of investigation in the ADR,

the Inquest came to be drawn and the Post-mortem was done. Though PW1, PW2 and PW3 claims to have witnessed the incident of assault by the Appellants on Deceased and they took the dead body to the hospital, the ADR came to be registered. This indicates that incident was not reported. Had there been disclosure by them about the incident of assault by the Appellants to the Deceased, there would not have been the occasion to register the A.D.R. The evidence of PW1 shows that he went to the Police Station between 09:00 and 09:15 p.m. The incident, according to the said three (3) Eye Witnesses occurred around 04:30 p.m. The delay of about five (5) hours in lodging the Report against the Appellants, by itself may not be fatal, however, non disclosure of the incident at the time of admitting the Deceased to the hospital gives dent to the veracity of the testimony of three (3) Eye Witnesses. The evidence of PW1 shows that, Police Officer Shri. Chaudhari (PW11) told him not to bother and he will record his Report and will take legal action and he gave names of the witnesses to PW11. The evidence of PW11 shows that he recorded the statement of witnesses on the next day i.e. 07.01.2015. In the above referred Judgment, the Hon'ble Apex Court cited by the learned Advocate for the Appellants on the point of effect of delay in recording statement of witnesses, the following observations are made :-

“18. In this connection, the second circumstance, which enhances the potentiality of this delay as a factor undermining the prosecution case, is the order of priority or sequence in which the investigating officer recorded the statements of

witnesses. Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence, over the evidence of other witnesses. Here, the natural order of priorities seems to have been reversed. The investigating officer first recorded the statement of Ravji, in all probability, between 12.45 and 3 a.m. On the 30th, of Constable Shinde, at 4 a.m., and thereafter of Walji, Kanjibhai (P.W. 7), Santukbai (P.W. 6), Pramila, and Kuvarbai, between 8 a.m. and 1 p.m.”

13. The Medical Evidence of PW10 – Dr. Chandragupta Suryakant Makhare who performed the Post-mortem shows the following external and internal injuries. The relevant part from his evidence is reproduced below :-

“Following injuries are mentioned by me in Part 'A' of Post Mortem Report under head of "Head Injuries"

- 1) *Laceration over interior parietal bone left side size of injury was 3 x ½ x ½ cm.*
- 2) *I noticed anterior parietal right side size of injury was 3 x 1 x ½ cm.*
- 3) *I noticed lacerated right parietal region, size of injury was 3 x 1 x 1 cm.*
- 4) *Laceration over transversely place left above first injury. It was fractured injury, size of injury was 5 x 2 x up to bone deep.*
- 5) *Laceration over right side temporal parietal region, vertically placed place, size of injury was 2½ x 1 cm. Bonee deep. It was feeling of fracture of skull below this injury.*
- 6) *Laceration over left temporal parietal region, size of injury was 3 x ½ x 2 cm.*
- 7) *Laceration over right occipito temporal region, irregular edges, size of injury was 4 x 1 x ½ cm*

3. *I also noticed following injuries on dead body of deceased as mentioned in Part 'B' of Post Mortem report. Following injuries:*

- 1) *Abrasion over right knee obliquely, size of injury was 3 x 2 cm.*
- 2) *Abrasion over right knees laterally obliquely present, size of injury was 3 x 1 cm*
4. *Thereafter, I opened skull of deceased and found following internal injuries as mentioned in Column No 19. of Post Mortem Report.*
 - (1) *Head fracture-injury over Anterior parieto bone right side, size of injury was 3 x 1 cm.*
 - (2) *Fracture of Anterio Parito left side vertically present, size of injury was 2 x ½ cm deep to brain.*
 - (3) *Fracture of right occipital region obliquely present, size of injury of 3 x 2 cm.*
 - (4) *Fracture of left side parietal region, transversely placed, size of injury was 5 x 2 cm.*
5. *I also found following injuries*
 - (i) *extradural intracellular haemorrhage*
 - (ii) *Brain membrage laceration.*
6. *I reserved Viscera of deceased. I collected blood sample of the deceased.*
7. *As per my opinion cause of death of the deceased was **Head Injury.***

14. The Post-mortem Report at Exh.86 corroborate the testimony of the Medical Officer. In the Examination-in-chief, PW10 deposed that, the death was Homicidal and aforesaid injuries which were ante mortem, were possible by use of Articles – 1, 2 and 3 which were two (2) Stones and piece of Tile. However, in his cross-examination, it has come that, Injury Nos.1 to 4 mentioned in Column No.19 of the Post-mortem Report were possible due to forceful fall on the ground and

if any person forcibly falls on hard surface, internal injury to brain was possible. Thus, from the medical evidence on record two (2) possibilities have surfaced : (1) Homicidal Death, and (2) Accidental Death.

15. Admittedly, though the incident took place in the broad day light at the public place in the village, there is no evidence of Independent Witness in respect of assault on Deceased by the Appellants. It is true that, merely because the Eye Witnesses are related to the Deceased, their testimony cannot be ignored on that ground itself. However, when there is clear evidence on record that, the Deceased and the Eye Witnesses on the one hand and the Appellants on the other hand were on inimical terms since long, their testimony is required to be considered with great care and caution. Though PW1, PW2 and PW3 claims to have witnessed the incident of assault by the Appellants on Deceased, and they shifted Deceased to the hospital, there is complete silence on their part to disclose the incident for a period of five (5) hours. On the contrary, ADR came to be registered during the course of which the Inquest and Post-mortem took place. This delay or conduct on the part of the Eye Witnesses make us to see their testimony of witnessing the actual incident with doubt. The possibility of false implication due to long standing enmity cannot be ruled out.

16. Moreover, the medical evidence available on record gives two (2) possibilities of the cause of injuries, out of which one is due to fall on the hard surface. The spot, where Deceased was lying in an injured condition, was the hard surface. The other evidence in the nature of C.A. Reports will not take the case of Prosecution any further as it is crystal clear from the evidence of PW11 who conducted investigation of the ADR as well as crime, that the muddemal Articles which were seized during the course of investigation were lying in the Police Station for three (3) weeks and explanation gives for such delay in sending the Muddemal Articles to the Chemical Analyzer is that, he was busy in investigation of another case. The result of analysis of blood of Deceased as per the C.A. Report at Exh.106 was 'inconclusive'. Thus, the CA Report (Exh.98) showing human blood stains of blood group 'A' on the baniyan of the Appellant No.2 – Jagannath and on full pant of Appellant No.1 – Eknath @ Somnath loses its significance. No blood was detected on the clothes of Appellant No.3 – Bhanudas. The conduct of the Appellants surrendering to the police may be relevant under Section 8 of the Evidence Act, however, that by itself cannot form the basis to hold them guilty of the crime, when the testimony of the Eye Witnesses is found to be doubtful and the medical evidence provide two (2) possibilities for the injuries on the Deceased. The other evidence of the Panch Witnesses and PW7 who transported

Deceased to the hospital, and PW9 who carried the Muddemal Articles to the Laboratory, will not take the case of the Prosecution any further.

17. To sum up, registration of ADR on the basis of MLC from the Civil Hospital where Deceased was taken by three (3) witnesses, indicate that the eye witnesses did not disclose the incident at the very first point of time, when there was presence of Police in the hospital, registration of crime against the Appellants on the Report of PW1 who was on highly inimical terms with the Appellants after some hours, non examination of independent Eye Witnesses, two (2) possibilities of causing injuries on Deceased make us to see the Prosecution's case with doubt. The other corroborative evidence, as discussed above, in no way takes the case of Prosecution any further. Though one *Knife* and mud mixed with chilly powder came to be seized from the spot of incident, it has no relevance with the incident, as is clear from the medical evidence and the evidence of Investigating Officer. All the above aspects, lead us to interfere with the impugned Judgment and Order of conviction and sentence recorded by the learned Trial Court. Hence, we proceed to pass the following order.

ORDER

- (i) The Appeal is allowed.
- (ii) The Conviction of the Appellants named Eknath @ Somnath s/o. Bhanudas Kumkar, Jagannath s/o. Bhanudas Kumkar and Bhanudas s/o.

Asaram Kumkar recorded by the Additional Sessions Judge, Jalna for the offence punishable under Section 302 r/w. Section 34 of the I.P.C. and consequent sentence, is quashed and set aside.

(iii) The said Appellants are acquitted for the offence punishable under Section 302 r/w. Sec. 34 of the IPC.

(iv) The said Appellants are behind the bars. They be set at liberty, if not required in any other offence.

(v) The Office endorsement in the operative Order of the impugned Judgment and Order shows that the fine amount was not paid by the Appellants. In case, the fine is paid, the same be refunded to the Appellants.

(NEERAJ P. DHOTE, J.)

(R. G. AVACHAT, J.)

GGP