

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.177 OF 2017
WITH
INTERIM APPLICATION NO.5344 OF 2024

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Bahgwan Dagdu Kumbhar,
Age : 44 Years, Hindu, Indian Inhabitant,
Occupation : Worker, Residing at : Shantaram
Warghade Chawl, Room No.4, Shelargaon,
Bhiwandi, Mumbai. **...Appellant**

Versus

State of Maharashtra,
(Through Shanti Nagar Police Station,
vide C.R. No. I 318 of 2011). **...Respondent**

Mr.Yashpal Thakur, Advocate for Appellant.
Ms.Gauri S. Rao, APP for Respondent – State.

CORAM : M.S.KARNIK &
S. M. MODAK, JJ.
DATE : 6th MAY 2026

JUDGMENT : (PER : S.M.MODAK, J.)

1. The Appellant is challenging the correctness of the judgment of conviction delivered by the Court of Additional Sessions Judge–Thane on 19th May 2014 in Sessions Case No.173 of 2012. The Appellant was convicted for the offence punishable under Section 302 of the Indian

Penal Code, 1860 (“**IPC**”, henceforth). The sentence is life imprisonment and fine of Rs.500/- (Rupees Five Hundred). There is further imprisonment for one month if the fine is not paid. He was acquitted for the offence under Section 364 of IPC for want of evidence.

2. Sum and substance of the prosecution case is as follows:-

The deceased Sidharth Ramru Bharati and the Appellant accused were working in the same Company and they knew each other. The incident took place on 2nd December 2011 at about 3.30 p.m. to 3.45 p.m. The spot is situated near a compound wall of Saibaba mandir at Bhiwandi, District : Thane. The complaint was lodged by one Jaggu Ramesh Thakur who neither knew the accused nor the deceased.

3. At the material time, Jaggu along with his friends had gone on an open ground near Saibaba temple for playing cricket. They were busy in playing cricket. Somehow the ball went beyond the compound wall. First-Informant Jaggu in search of ball jumped over the compound wall and he went near the place wherein the assault was taking place. When he went to that place, to his surprise he saw one person assaulting another person with a knife. He was shocked and he shouted

for help as a result of which, his friends who are PW No.2 and PW No.3 also went there.

4. When all of them went there, they saw one unknown person assaulting another unknown person. The assaulter was none other than the accused who is the Appellant before us. The assaulter saw all these 3 persons and started running away. He threw the knife in the nearby bushes. Someone called the police. Police came there and took the assaulter into custody. He is none other than the Appellant accused.

5. Jaggu lodged the complaint, CR No.I-318 of 2011 with Shanti Nagar Police Station on same date. As he did not know the name of the assailant, he described him by giving details of the clothes worn by the assaulter. Apart from that, the assaulter was also brought to the Police Station.

6. The investigation was handed over to the Investigating Officer PW No.8. Upon completion of the investigation, a charge-sheet was filed before the learned Magistrate for the offence under Sections 302 and 364 of IPC. The case was committed to the Additional Sessions Judge. During the trial, the prosecution examined all 8 witnesses. Their description is as follows:-

- (i) PW No.1–Jaggu Ramesh Thakur–First Informant.
- (ii) PW No.2–Mangesh Vandan Choudhary.
- (iii) PW No.3–Ashirwad Balaram Patil.
- (iv) PW No.4–Jiyauddin Janmohd. Shah–Panch to the seizure of articles seized from the person of the accused.
- (v) PW No.5–Mohd. Yunus Abdul Sattar Siddhiki – is the Panch to the memorandum of statement given by the Appellant and consequent seizure of the knife.
- (vi) PW No.6–Dr.Avinashkumar Hambirrao Dhanawade, is the Medical Officer who has done the post mortem.
- (vii) PW No.7–Ashraf Yakub Momin, is the Representative from the company who was operating the CCTV system installed at Saibaba Temple.
- (viii) PW No.8–Balasaheb Kisanrao Gahandule, is the Investigating Officer.

7. The case is based on the direct evidence of 3 witnesses and corroborative evidence in the form of seizure of incriminating articles.

On this background, we have heard learned Advocate Shri.Yashpal Thakur for the Appellant who is appointed Advocate and learned APP.

8. Mr.Thakur tried to point out that this is not a case of murder but it is a case of culpable homicide amounting to murder. There is no dispute that the death was an unnatural death. It is true that whether the offence will fall within the ambit of Section 302 or 304 would

depend upon several factors including the weapon used, part of the body on which there were injuries and the nature of such injuries. In this case, we have seen the injuries noticed by PW No.6 while carrying out the post mortem panchnama.

9. Inasmuch as there are 7 injuries on the neck, right occipital region, forearm, wrist joint, shoulder and leg. All are incised wounds. It is true that if there are injuries caused with the knife, there is always an incised wound which occurs if there is blow with the help of blade of the knife and not with the handle. Having gone through the nature of injuries, we have no doubt in our mind that the assaulter had an intention to commit the murder. It strictly falls within Part-I of Section 300 of IPC. Hence we are not inclined to accept the submission of Mr.Thakur that the offence will fall within the purview of Section 304 of IPC.

10. Mr.Thakur has advanced his arguments on following points:-

- (i) There is variance and inconsistency between the testimony of 3 eye witnesses.
- (ii) There is absolutely no evidence about the motive.
- (iii) He argued that as per the testimony of eye witnesses, the assaulter had thrown the knife at the spot after the assault.

Whereas, prosecution came with the case that the knife was recovered at the instance of the Appellant. According to him, the place where the assault took place and the place from where the knife was recovered are at sufficient long distance and the theory of recovery of knife at the instance of the Appellant needs to be discarded.

11. Learned APP supported said judgment and according to him, the identity of the Appellant was well established from the testimony of eye witnesses and the inconsistency between their evidence is not of such nature which is sufficient to discard their evidence. According to him, there is no merit in the Appeal and it needs to be dismissed.

12. First of all, we will deal with the submission about inconsistency in the evidence of 3 eye witnesses. We have gone through the evidence of PW No.1–Jaggu Ramesh Thakur who is the First informant. He along with other 2 eye witnesses, PW No.2–Mangesh Choudhary and PW No.3–Ashirwad Balaram Patil, all were playing cricket on 2nd July 2011 in the afternoon. All have deposed that PW No.1–Jaggu had jumped the compound wall that he had gone near open space. All of them are consistent. There is some inconsistency about the facts deposed by them regarding events that took place after Jaggu jumped

the wall and went there. What Jaggu has deposed is that after jumping the wall, he saw that the accused was giving a blow using a weapon like a knife on the neck of the other person. After seeing this, he called his friends. His friends went there and together they caught the accused.

13. Whereas PW No.2–Mangesh has deposed that after Jaggu jumped from the compound wall, Jaggu started shouting and he came back to the ground and informed this fact to them and then all the boys climbed the wall and went to the spot. It is true about certain issues, there is inconsistency. Jaggu does not say that he came back to the cricket ground whereas PW No.2 says that Jaggu came to the cricket ground.

14. Whereas, PW No.3–Ashirwad has deposed that Jaggu called them and all of them went there and there they saw accused was giving blow of knife to another person. So, evidence of Ashirwad is consistent with the facts deposed by PW No1–Jaggu.

15. We have to see whether this inconsistency is of such a nature that goes to the root of the matter such that the said evidence of 3 eye-witnesses has to be discarded totally. We find that this inconsistency is not of such kind so as to disbelieve the eye witnesses.

16. After reading their evidence, it is clear that all of them were playing cricket. It is clear that Jaggu first jumped from the compound wall and went to the spot of the incident. The only variance is how the other two witnesses were informed about the incident. That is to say, whether they were informed when Jaggu returned back to the cricket ground or whether both of them were informed when Jaggu shouted for help. Merely based on this variance, we feel that the evidence of other 3 witnesses cannot be discarded considering that they are otherwise consistent on other issues to the extent that Jaggu first went there (whether went on after hebushesaring the shout or after Jaggu returned) and after that other 2 also went there and they saw the accused and the deceased there.

17. There is one more variance pointed out by Mr.Thakur. It is in respect of what the witnesses saw after they individually jumped the wall and went to the spot of the incident. As per Jaggu, when his friends arrived there, they caught the accused. He does not say anything about what the assailant has done about the knife. Whereas PW No. 2-Mangesh Choudhary has deposed that after he went there, the assailant threw the knife and started running away. Whereas PW

No. 3–Ashirwad Patil has deposed that after seeing them, accused started running away and threw the knife from his hand and that he was chased and caught.

18. No doubt, there is some variance, but again the issue is, *‘whether this variance is of such a nature so as to doubt the presence of these three witnesses and their creditability’*. They are natural variations. So to say, one person may depose that they caught the assailant, others may focus on the fact that the assailant tried to run away and they chased him and then caught him. One may depose what he saw about the knife. At the same time, one may not depose, what has happened about the knife, that is to say, *‘whether he has thrown away or whether he was still possessing it’*. Ultimately, it depends upon how a particular witness has perceived the incident and to what extent, he remembers it, recollects it and deposes before the Court considering that the incident took place on 2nd December 2011 and they deposed in the year 2013.

19. We have also gone through the cross-examination. We do not find that their testimony is shaken during cross-examination. On general issues, they have been cross-examined. The location is of Saibaba temple. It is a natural reaction of assailant to have ran away.

PW No. 2–Mangesh has admitted during cross-examination that he has not seen accused giving blow of knife. Even during his chief-examination, he has not deposed that fact. What he has deposed is when he went there, he saw one person near a tree holding a knife and then the said person threw away the knife. Whereas, PW No.3–Ashirwad during cross-examination was asked about the residential houses in the vicinity of Saibaba temple. He was asked about the distance of the tree and compound wall. He was asked about the height of the compound wall which is about 4 to 5 feet. Except that, there is no serious cross-examination.

20. After considering this, we find that PW No.1–Jaggu has witnessed the entire incident. Whereas PW No.2–Mangesh had seen that assailant standing near the tree with the knife. Whereas PW No.3–Ashirwad has also seen the actual assault by the assailant. From this discussion, it is clear that the assailant has assaulted the deceased with the knife.

21. Now there is a question that arises on the involvement of Appellant in that incident, '*whether it is accused only who has assaulted or not*'. From their evidence, it is clear that Police came there

and they took the Appellant to the Police Station. Admittedly, there is no evidence adduced on behalf of the prosecution about who those Police were. We only find reference in the arrest panchnama that accused was caught at the spot and he was brought to the Police Station.

22. Mr. Thakur, learned counsel for the Appellant has also raised a point about distance in between the place of incident and the place from where the knife was recovered. We can see the description of the spot of incident. It is recorded in the panchnama at Exhibit-35. The spot is situated near Saibaba temple, near the compound wall of open ground near the garden. The Police noticed blood stains near a shrub. Panchnama was admitted by the defence. This has also been recorded by the Trial Court in its judgment (paragraph No.18). Thus blood stains were found near the shrub is an admitted fact. The description of the spot is admitted.

23. On this background, we have seen the description of the place from where the knife was recovered. Panch-witness is PW No.5- Mohd. Yunus Abdul Sattar Siddhiki. According to his evidence, memorandum was recorded in the Police Station and then they visited

the spot. While deposing in chief-examination, he changed the sequence, that is to say, first he has deposed about visiting the spot and seizure of knife from the bushbusheses and then he has stated about the giving of memorandum statement.

24. According to Mr.Thakur, during chief-examination, he has given description. It is near playground, near Saibaba temple and the knife was taken out from bushes. We have also seen the description of the place of panchnama. The concerned Investigating Officer has also deposed about this fact. When we see the description from the panchnama, we find that it is more or less similar to the spot of the incident, that is the shrubs ahead of the compound wall behind Saibaba temple. Though Mr.Thakur, learned counsel for the Appellant tried to argue that there is distance in between these two places, even the panch was asked about the distance in between the Police Station and Saibaba temple, it is one kilometer. But we do not find anywhere in his evidence and in the evidence of the Investigating Officer that there is vast distance in between the spot and the place from where the knife was recovered. We have to go by what has come in the evidence and not about general perception. We are not accepting this

contention. It is but natural that the knife was recovered from the spot, because as per the eye-witnesses, the assailant had thrown away the knife after the assault.

25. Mr.Thakur, learned counsel for the Appellant has also tried to argue on the point of absence of motive. We have perused the evidence of PW No.8–Balasaheb Gahandule, the Investigating Officer. The Investigating Officer has only deposed during cross-examination that accused and deceased were working in the same company and that they were friends. None of the witnesses are examined from the family of the deceased or his fellow worker in order to ascertain what was the dispute which compelled the Appellant to assault the deceased. It is admittedly not there. But the issue as to what extent the motive plays an important role. The answer is No. Because the prosecution comes with the case of witnessing the incident by PW Nos. 1 to 3 and accused being caught at the spot. So we do not feel that motive has got any role to play. On absence of motive, we cannot discard the deposition of the prosecution witness which is otherwise reliable.

26. The Investigating Agency has made an attempt to collect the material from the C.C.T.V. Cameras installed near Saibaba temple. The

Investigating Agency has tried to check the footages from the D.V.D. Even one witness PW No.7–Ashraf Momin is also examined, who looks after the machinery installed there. After seeing the footages, he saw two persons entering the Saibaba temple, however, only one person coming out from the temple. It is true that except his bare words, there are no supporting documents. So to say, these footages were not taken in pen-drive and produced before Trial Court along with required certificate. So this evidence is not of any importance to the prosecution.

27. The evidence about the knife at the instance of the Appellant is very much there. We do not find the inconsistency is of such a nature so compelling as to discard the evidence of PW Nos.1 to 3. The clothes of the Appellant were seized from his person, when he was arrested.

There is also chemical analyzer report which pertains to the articles seized from the spot, the clothes of the deceased, the clothes of accused and the weapon. Even though blood found on these articles was human blood, the blood group could not be ascertained, as it was inconclusive.

28. The Trial Court while dealing with this piece of evidence in paragraph No.41, has observed that inconclusiveness of the blood group does not vitally affect the case of prosecution. The Trial Court is right because blood group of the deceased needs to be ascertained and then it has to be tallied with blood found on the clothes of the Appellant and blood found on the seized knife. For want of grouping, this does not help the prosecution.

29. In a nutshell, we uphold the findings of the Trial Court. After considering the entire evidence, we feel that the Trial Court has rightly held that it is homicidal death and that it is the Appellant who is responsible for committing murder. It is proved that it is the Appellant only who has committed murder of the deceased. Though Mr.Thakur tried his level best to convince us that there are certain lacunae in the evidence, however, for the reasons stated above, we are unable to accept his contention. Even we are not with Mr.Thakur that offence will not fall under Section 302 but under Section 304 of IPC. So we have no alternative but to dismiss the Appeal as it is without merit.

30. Hence, the Appeal is dismissed. Pending Interim Application, if any, is also disposed of.

31. We appreciate the efforts taken by Mr.Thakur in arguing this Appeal.

(S. M. MODAK, J.)

(M. S. KARNIK, J.)