



wade A.S.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1009 of 2012

Faim @ Lala Ibrahim Khan,
Age 47 years, Occ. Business,
residing at B/303, Dattatraya Towers,
Phase I, Evershine City, Vasai,
District Thane.
(At present in Kolhapur Central Prison).

..Appellant.

Versus

The State of Maharashtra.

..Respondent.

WITH

CRIMINAL APPEAL NO.1203 OF 2012

Kamlesh @ Babla @ Bablya Shankar Malpedi,
Age 27 years, R/o. House No.1204, Sadarwadi,
Near Shrihari Soceity, Hanuman Mandir Road,
Gokhivare, Tal.Vasai, District Thane.
At- Kolhapur Central Prison No.C-5523,
Circle No.312, Dist. Kolhapur, Kalamba,
Maharashtra 416007.

..Appellant.

Versus

The State of Maharashtra.

..Respondent.

**WITH
CRIMINAL APPEAL NO.1231 OF 2012**

Shri. Haresh @ Harsh Prabhakar Patil,
Age 19 years, Occ.
Residing at House No.283 (C),
Shivdutt Niwas, Fatherwadi,
Gokhivare, Tal. Vasai, Dist. Thane.
Presently at Prisoner No.C-3524,
Kolhapur Central Jail,
Taluka and District Kolhapur. ..Appellant.

Versus

The State of Maharashtra. ..Respondent.

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Mr. Rajendra Shirodkar i/by Mr. Archit Sakhalkar, Advocate for the
Appellant in Criminal Appeal No.1009 of 2012.
Dr. Yug Mohit Chaudhary, Advocate for the Appellant in Criminal
Appeal NO.1203 of 2012.
Mr. Yogesh Rawat with Mr. S.S.Redekar, Advocate for the
Appellant in Criminal Appeal No.1231 of 2012.
Ms.R.M.Gadhavi, APP. for the State.

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**CORAM : SMT V.K. TAHILRAMANI, Acting C.J.&
A.S. GADKARI, J.**

Reserved on : 19th October 2015.

Pronounced on : 20th November 2015.

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

The appellants have questioned the correctness of the
judgment and order dated 10.7.2012 passed by the Additional
Sessions Judge, Vasai, District Thane in Sessions Case No.329 of

2007.. By the said judgment and order dated 10.7.2012 the appellant- original accused No.2-Haresh Patil has been convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer life imprisonment with a fine of Rs.10,000/- and in default of payment of fine further rigorous imprisonment of one year. The appellant -original accused No.1 Kamlesh @Babla @ Bablya Shankar Malpedi, accused No.2 Haresh Patil and accused No.3-Faim @ Lala Ibrahim Khan have been convicted for the offence punishable under Section 120B of the Indian Penal Code and sentenced to suffer life imprisonment with a fine of Rs.10,000/- each and in default of payment of fine to further suffer rigorous imprisonment for one year each. The Trial Court has thus convicted the original accused No.1 Kamlesh @ Babla @ Bablya Malpedi and accused No.3 Faim Lala Ibrahim Khan for the offence punishable under Section-120B of the Indian Penal Code. By the same impugned judgment and order the Trial Court was pleased to acquit the original accused No.4-Durgeshkumar @ Durga Ramshankar Pande from all the charges levelled against him.

For the sake of brevity the appellants named herein above will be referred to with their original accused numbers as they were before the Trial Court.

2. The facts which are enumerated from the record and

necessary to decide the present appeal can briefly be stated as under:-

(i) The date and time of incident was 2.4.2007. Between 9.00 to 9.30p.m. the complainant Arun Chandran (P.W.3) along with his friend Amit Mishra (P.W.4) were proceeding towards Vasai (East) on their scooter. On the bridge, they saw one person was assaulting by stick to the victim. Complainant Arun Chandran (P.W.3) and his friend Amit (P.W.4) stopped their vehicle and rushed towards the person (victim) who was being assaulted. As soon as Arun and Amit rushed towards the person who was assaulting the victim by stick, he ran away.

(ii) Arun (P.W.3) and Amit (P.W.4) thereafter took the injured from an auto rickshaw to the hospital. From the diary which was found from the injured person they came to know the name of the injured as Faim Ibrahim Khan. Arun (P.W.3) intimated the family members of Faim Khan. Arun also lodged FIR (Exh.71) with Manikpur Police Station. On the basis of the said First Information Report bearing CR NO.I-125/2007 came to be registered. The investigation was initially carried out by PSI Naikwade of Manikpur Police Station. Mr. Naikwade drew the spot panchanama, Inquest panchanama and the seizure panchanama. He also recorded the statements of some of the witnesses. The said investigation was subsequently transferred to PSI Nitin

Thakare (PW-22) of LCB, Thane (Rural). He arrested the accused persons. He also discovered the sticks at the instance of accused No.1 Kamlesh under Section 27 of the Evidence Act. PSI Nitin Thakare collected the call detail record pertaining to the mobile phones of the appellants. He also gathered the post mortem notes and Chemical Analysis report during the course of investigation. After completion of the investigation PSI Nitin Thakare submitted the charge sheet in the court of J.M.F.C. Vasai at Vasai under Section 302 and 120B of the Indian Penal Code.

(iii) As the offence under Section-302 of the I.P.C. was exclusively triable by the Court of Sessions, the learned J.M.F.C. committed the said case to the Court of Additional Sessions Judge Vasai, At Vasai. After committal of the case, the learned Trial Court framed the charge below Exh.18. The said charge was read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried. The prosecution in support of its case and to prove the guilt against the accused persons examined in all 22 witnesses. The learned Trial Court after recording the evidence and after hearing the parties to the said case was pleased to convict the appellants as stated herein above.

3 The present case is based on ocular evidence of Arun Chandran (P.W.3), Amit Mishra (P.W.4) and Siddesh Kadam (P.W.21),

P.W.3 Arun Chandran in his testimony has deposed that on 2.4.2007 he along with his friend Amit Mishra (P.W.4) were going towards Vasai (East) by a scooter. On the bridge they saw one person assaulting by stick to the victim. He therefore, stopped his vehicle and went to see what was happened. In the mean while, the person who was assaulting the other person (deceased) threw the stick there and ran away. P.W.3 Arun thereafter took the injured person by auto rickshaw to the hospital. He also found a diary near the injured person. The name of the injured person was Faim Khan. The said injured was admitted to Kanekar hospital. P.W.3-Arun Chandran gave intimation about the incident to the family members of Faim Khan. He handed over the said diary to the police. In the night he received a phone call from the police that the said injured expired. Thereafter, the police obtained his complaint which is at Exh.71. He had seen the person who had assaulted the deceased. He was called for identification parade wherein he identified the said person. He was Haresh Patil (Accused No.2).

In the cross examination this witness had admitted that Amit (P.W.4) was driving scooter. From the other side of the road he saw the accused assaulting. That, when he carried the injured (Munna) to the hospital, he was unable to talk. He further admitted that when he reached on the bridge it was about 9.00 to 9.30 p.m. He had seen the assailant assaulting the victim from the distance of about 10 to 15 ft. and the scooter on which he was pillion rider was at a speed of about 30 K.M. per hour. That, they reached near the injured within 30

to 40 seconds after stopping of the vehicle and by that time the assailant ran away.

4 P.W.4- Amit Mishra has also deposed in the same line as has been deposed by P.W.3 Arun. In the cross examination P.W.4 Amit has admitted that victim was also having scooter. On the date of incident P.W.4 was riding the scooter at the speed of 30 K.M. per hour. That, he stopped his scooter 50ft. ahead from the place where victim was lying. That, within 15 to 20 seconds they reached towards the injured.

5 P.W.21 Siddesh Kadam has deposed that on 2.4.2007 at about 7.30p.m.he along with his friends decided to go to Vasai (West) and they started proceeding on their motorcycle. They stopped on the flyover connecting Vasai East and West. At that time, he saw one person assaulting the said 'uncle' with something in his hand. As a result of which the said person on the scooter fell down on the road. Thereafter said two persons left the place and ran away. P.W.21 thereafter left the said spot.

In the cross examination this witness has admitted that he reached to the flyover at about 9.00p.m. That his statement was recorded by police after about 5 days from the date of incident. He did not remember whether there was light on the flyover or not. He saw the said incident from the distance of about 200ft.

6 P.W.12 Avinash Koshti was serving as Resident Naib

Tahsildar, at Vasai. P.W.12 has conducted the Indemnification parade. In his deposition he has stated that witness Arun Chandran (P.W.1) has identified the accused No.3 Harish. P.W.12 has also stated that another witness has also identified Haresh. P.W.12 is silent about the fact whether P.W.21 Siddesh Kadam has identified the accused No.2 Harish or not. At this stage we must note here that the evidence of P.W.12 Avinash Koshti is as vague as possible and is of no help to the prosecution. The minute scrutiny of his deposition leads us to conclude that he was very casual while deposing in the court. Even the test identification parade panchanama (Exh.98) suffers from various material irregularities and/or infractions of the guidelines framed under the Criminal Manual and therefore in our opinion in view of the facts of present case, the said contemporaneous document (Exh.98) is also unsafe to rely upon.

7 The learned counsel appearing for the appellant No.2 submitted that the date of incident is 2.4.2007. That, the appellant No.2 Haresh was arrested on 22.5.2007 and the identification parade was conducted by the police on 4.8.2007. There is substantial delay caused at the instance of the investigating agency in conducting the said identification parade. He therefore, submitted that reasonable doubt arises about the bonafide of the test identification parade. In support of his

contention, he placed reliance on the decision of the Supreme Court reported in (1988) 1 SCC 14 [Hari Nath and another vs. State of U.P.] The Supreme Court has held that if there is no explanation at all for the delay by the prosecuting agency, the benefit of this wholly unexplained lack of promptitude in holding the test identification, reasonable doubt arises. At this stage, we may also observe that after taking into consideration the evidence of P.W. 3 and 4 in observing accused No.2 in such a short span of 30 seconds precisely and then identifying him after a lapse of more than about four months appears to be very doubtful. As far as P.W.21 is concerned, though he claims himself to be an eye witness he has not identified accused No.12 Harish as the assailant. It further appears that P.W.21, Siddesh is a chance witness and claims that he had seen the incident from a distance of about 200ft. In view of the fact that sufficient delay in conducting the test identification parade by the investigating agency, the principle laid down by the Supreme Court in the case of Hari Nath and Another (supra) is applicable to the present case and we hold that identification by P.W.3 and 4 of accused No.2 Haresh is doubtful and the benefit of doubt goes in favour of accused No.2 Haresh Patil.

8 It is further to be noted here that P.W.3 in his testimony has categorically deposed that the person who was

assaulting the victim had thrown the stick on the spot and ran away. However, surprisingly the police have discovered two wooden logs by effecting a panchanama dated 28.5.2011 (Exh.145) from accused No.1 Kamlesh. The said discovery panchanama has been proved by P.W.22-Nitin Thakare, the Investigating Officer. The scene of offence panchanama which is at Exh. 58 discloses one wooden log was found at the spot of incident itself. The prosecution case rests on the theory that only Accused-2 i.e. Haresh assaulted the deceased with a wooden log and in that view discovery of 2 more wooden logs from accused no.1 Kamlesh creates doubt in the mind of this Court. After taking into consideration the direct contradictions about the wooden log used in the crime and its place of discovery, it creates strong doubt in our mind about the genuineness of the discovery panchanama itself. Discovery at the instance of accused No.1 Kamlesh therefore, assumes no value and is not at all useful to the prosecution as the weapon of assault was found on the spot of incident itself, there was no recovery at the instance of accused No.2, Haresh, to whom role of actual assault is attributed. The record pertaining to the present case is absolutely silent about the fact that there were any finger prints found on the said weapon, of the appellant Haresh.

9 The prosecution has examined P.W.18 Ashok D.

Bhande, P.W.19 Kundan K. Jadhav to prove the motive behind the crime. They deposed that deceased Naim Khan was the brother of accused No.3 Faim @ Lala Ibrahim Khan. Accused No.3 Faim @ Lala Ibraghim Khan was doing the business of transport alongwith deceased Munna @ Naim Khan. A dispute ensued between the brothers on account of money. By the mediation of P.W.18 and 19 the said dispute was resolved. The deceased Munna @ Faim Khan started his own business and was doing well in the same. That, enraged accused No.3 Faim @ Lala Ibrahim Khan and therefore, he decided to kill his brother- Munna @ Naim Khan.

10 The prosecution has thereafter examined P.W.9 Manoj Sagare to further prove the motive and also the conspiracy hatched by the accused persons. P.W.9 has deposed that on 12th of year 2007 (month not mentioned). Lala had called him with vehicle and accused no.1, accused no.2 and accused no.3 had been to the High Court. On the next day he along with accused persons were returning from S.P Office in the vehicle of accused No.3 Faim @ Lala Ibrahim Khan when Lala (accused no.3) said that Munna (deceased) was having excess fat (Charabi) and he (deceased) was to be managed. This is the only sentence which was uttered by accused Faim @ Lala Ibrahim Khan on the basis of which the prosecution has put forth the theory of conspiracy

hatched by the accused persons. A close scrutiny of the evidence of P.W.9 reveals that the said statement made by accused No.3 Faim Khan is neither inculpatory nor is the statement which would lead us to infer that it amounts to conspiracy. It appears that Faim @ Lala Khan (accused no.3) was jealously talking about his brother who was flourishing in his own business and nothing more.

11) The prosecution has also relied upon recovery of three mobile phones at the instance of accused No.3 Faim @ Lala Ibrahim Khan. The prosecution has come up with a case that all the three mobile phones were discovered at the instance of accused No.3. Out of the said three mobile phones, two mobile phones bearing Nos.9322444929 and 9322444930 were in the name of accused No.1 Kamlesh Malpedi and Mobile No.9321662525 was in the name of accused No.3 Faim Khan. The learned counsel appearing for accused No.3 Faim Khan criticized the finding recorded by the learned Trial Court in Paragraphs 55 and 56 of the impugned judgment wherein, the Trial Court has held that call detail record shows that there were an number of calls exchanged between these two mobile phones belonging to accused No.1 Kamlesh Malpedi. He further held that it is impossible that anybody having two mobile phones with it, would call himself from one mobile to another. That, the case of

the prosecution that mobile phone No.9322444429 was used by accused No.2 appearing to be more probable. In the absence of any evidence to the effect that the said mobile phone bearing No.9322444929 was with accused No.2 Haresh, at the time of incident, the observations made by the Trial Court in Paragraphs 55 and 56 of the impugned judgment and the finding recorded thereto, in our considered opinion is based only on conjectures. Mr. Shirodkar, learned counsel appearing for original accused No.1 Faim @ Lala Ibrahim Khan further submitted that assuming for the sake of arguments that there were exchange of phone calls on 1.4.2007 and 2.4.2007 inter see in the said two mobile numbers, the same itself would not attract the charge of conspiracy. In support of his contention he relied upon a decision of the Supreme Court in the case of State (NCT of Delhi) vs. Navjot Sandhu @ Afsan Guru reported in (2005) 11 SCC 600 wherein Supreme Court has held that there were exchanges between two persons on cellular phone but from that circumstance alone no inference can be drawn of reasonable degree of certainty that said persons have entered into conspiracy. According to us, in the present case the prosecution has failed to prove that exchange of telephone calls between the said three phone numbers was for the purpose of firstly hatching and thereafter executing the conspiracy entered into by and

between the accused Nos. 1 and 3. It is to be noted here that accused No.3 Faim Khan is the employer of accused No.1 Kamlesh and accused No.2 Haresh and therefore, there was other probability that they might have exchanged telephone calls for the purpose of their business. The prosecution has not brought on record any other material to show that the said three mobile numbers were being used for the purpose firstly hatching conspiracy and thereafter executing it which was resulted into the death of deceased Faim Khan. In view of the same we give benefit of doubt to original accused No.1 Kamlesh and accused No.3 Faim Khan for the same.

12 Mr. Shirodkar further submitted that in the present case apart from the fact that prosecution has failed to prove the conspiracy, has also failed to produce a certificate as contemplated under Section 65-B(4) of the Evidence Act which is mandatory in view of the amendment to the said Act which has come into effect from 17.2.2000. In support of his contention he relied upon a decision of the Supreme Court in the case of Anvar P.V. vs.P.K.Basheer and others reported in (2014) 10 SCC 473 and in particular, Paragraph Nos. 15 and 22 which reads as under:-

“15. Under Section 65-B(4) of the Evidence Act,
if it is desired to give a statement in any

proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronics record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65-B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

22. The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of

Sections 59 and 65A dealing with the admissibility of electronic record. Sections 63 and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65-A and 65-B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by his Court in Navjot Sandhu case, does not lay down the correct legal position. It requires to be overruled and we do so. An Electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65-B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.”

In the present case the date of incident is 2.4.2007. The amendment of Section 65 of the Evidence Act came into effect from 17.2.2000 and therefore, it was mandatory for the prosecuting agency to produce the certificate in terms of Section 65-B obtained at the time of collecting document (CDR) without which the secondary evidence pertaining to electronic record is inadmissible. Thus, in view of the mandate of Section

65-B of the Evidence Act and in the absence of its compliance the evidence of CDR produced by the prosecuting agency in respect of the three aforesaid mobile phones is fully inadmissible in evidence.

13 Thus, after taking into consideration the entire evidence available on record, we are of the considered opinion that the identification by P.W.3-Arun Chandran and P.W.4-Amit Mishra of accused No.2 Haresh is very doubtful. The test identification parade which was held belatedly also creates doubt about the said fact that whether after the lapse of about four months P.W.3 and P.W.4 the eye witnesses were really able to identify accused No.2-Haresh. As stated above, the P.W. Nos.3 and 4 had at the most only 30 seconds to observe the accused No.2 at the time of incident from a running scooter and they have identified the accused no.2 in test identification parade after a gap of about 4 months without any special characteristics of accused no.2 and therefore, it creates doubt about their claim of identifying the accused No.2-Haresh Patil. As stated earlier the record of call details of the aforesaid three mobile numbers produced by the prosecuting agency is inadmissible in view of the mandate of Section 65-B of the Evidence Act and therefore, according to us the accused persons are entitled for benefit of doubt.

14 Thus, the benefit of doubt is given to the accused persons and they are acquitted from the charges framed against them. Hence, the following order.

ORDER

- a) The appeals preferred by the respective appellant are allowed. They are acquitted from all the charges framed against them.
- b) Fine, if any, paid by the appellants be refunded to them.
- c) The appellants be released from Jail forthwith if they are not required in any other case.
- d) The Appellant-Accused No.3 is on bail and his bail bond stands cancelled.

(A.S. GADKARI, J.)

(ACTING CHIEF JUSTICE)