

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

CRIMINAL APPEAL NO. 207 OF 2003

The State of Maharashtra,
Through Police Station,
Ghansawangi, Tq. Ghansawangi,
District Jalna.

... **APPELLANT**
(Ori. Complainant)

VERSUS

1. Ganesh s/o Vitthal Pawar,
Age 25 years, Occu. Labourer,
R/o. Borranjani, Taluka
Ghansawangi, Dist. Jalna.
2. Pandurang s/o Vasant Pawar,
Age 22 yeas, Occu. Labourer,
R/o. Deotali Tanda, Taluka
Ghansawangi, Dist. Jalna.
3. Bhimrao s/o Vitthal Pawar,
Age 30 years, Occu. Labourer,
R/o. Borranjani, Taluka
Ghansawangi, Dist. Jalna.
4. Achyut s/o Vitthal Pawar,
Age 38 years, Occu. Labourer,
R/o. Bor Ranjani, Taluka
Ghansawangi, Dist. Jalna.

... **RESPONDENT**
(Ori. Accused)

...
Mr. M. M. Nerlikar, APP for Appellant / State.
Mr. Joydeep Chatterji, Advocate for Respondents / Accused.
...

CORAM : **T. V. NALAWADE &
K. L. WADANE, JJ.**

DATE : 21st June, 2018.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed by the State against the judgment and order of Sessions Case No.247 of 2001, which was pending in the Court of IInd Additional Sessions Judge, Jalna. All the Respondents are acquitted by the Trial Court of the offence punishable under Section 302 read with 34 of the Indian Penal Code. During the pendency of present appeal, Respondent No.4 died, the appeal against him needs to be abated and so the appeal against the remaining three Respondents is heard.

2 In short, the facts leading to institution of the appeal can be stated as follows:

Deceased Govind Pawar, was the husband of a sister of first informant Kundlik Rathod. Deceased was resident of Deoli Tanda, Tahsil Ghansawangi, District Jalna and first informant also hails from the same village. All the accused persons are residents of the same village. The relations between deceased and accused persons were strained as in the past a criminal case was filed against accused

persons in respect of assault made on the deceased by Accused No.3 Bhima and others. Bhima had insisted that Govind should withdraw the case against him, but Govind had not withdrawn the case. Bhima and other persons in that case were acquitted. After the decision of acquittal, Bhima had given threat to Govind to teach him lesson. Accused Nos.1, 3 and 4 are real brothers *interse* and Accused No.2 is cousin of Accused No.1.

3 The incident in question took place on 29th July, 2001, which was Sunday and weekly Bazar day of Paradgaon. Deceased Govind, first informant and Seva Chavan had gone to Paradgaon for Bazar. They were returning from Paradgaon to Deoli Tanda and when they were present in one lane of Paradgaon, from the back side all the four accused came running and they intercepted these persons. During the incident, Accused No.4 Achyut and Accused No.2 Pandurang held Govind and then Accused No.1 Ganesh gave blows of Jambia (dragger) on the back and abdomen of Govind. Govind sustained bleeding injuries and he collapsed on the ground. After that Bhima gave kick blows to Govind.

4 Kundlik and Seva Chavan tried to intervene by requesting the accused not to assault Govind, but Ganesh said that they were there to finish Govind. Then, Kundlik used force and snatched Jambia from the hand of Ganesh. When Kundlik snatched Jambia, Ganesh sustained bleeding injury to his hand. There was hue and cry and the people of that lane started gathering. All the four accused then ran away.

5 Kundlik shifted Govind in one four wheeler to Ranjani Government Hospital. Some persons including Seva Chavan helped him. Seva Chavan was sent to village to give news. Police had already reached the hospital and from there Govind was shifted to Government Hospital, Jalna and then to Government Hospital, Aurangabad. Govind had become unconscious. First informant, Police Patil of the village, Sudam, widow of Govind and others shifted Govind to Civil Hospital, Aurangabad in a vehicle and they remained in his company. After admitting Govind in the Government Hospital, first informant, Police Patil and one more person went to Ghansawangi Police Station to give report. Jambia, which the first informant had snatched from the hand of Ganesh was with the first

informant and he produced Jambia before Police. He took the names of all the four accused and he described the aforesaid incident to the Police. Crime at C.R.No.66 of 2001 came to be registered in Ghansawangi Police Station for the offences punishable under Sections 307 and 323 read with 34 of the Indian Penal Code at 07:30 am on 30th July, 2001.

6 During the course of investigation, Police prepared Panchanama of spot where the incident had taken place and also recorded the statements of eye witnesses and other persons. Jambia was taken over. Govind succumbed to injuries sustained in the incident and postmortem was conducted on his dead body. So many injuries caused by the sharp weapon were found on the dead body and doctor gave opinion that the death took place due to injuries caused by sharp weapon like Jambia, which was taken over by the Police in the matter. Articles taken over were sent to CA office. Blood was detected on the earth sample collected from the spot of offence and also on Jambia (dagger). Charge-sheet was filed against all the four accused for the offence punishable under Section 302 read with 34 of the Indian Penal Code. Charge was framed for

this offence. All the accused pleaded not guilty. Prosecution examined in all eight witnesses. The Trial Court has not believed the prosecution evidence and acquittal is given in favour of all the four accused.

7 At the time of considering the evidence given by the prosecution, it needs to be kept in mind that Accused No.1 Ganesh is not disputing that he was present on the spot at the relevant time. He has contended that he had also sustained injuries. The admitted record, injury certificate is at Exhibit 20 and it shows that he sustained one incised wound on right palm and one incised wound over left index finger. These injuries were caused by sharp weapon and they were caused within six hours prior to the examination. Admitted document at Exhibit 20 shows that Accused No.1 was examined on 29th July, 2001 at 05:00 pm when the incident had taken place on that day in noon time. There is statement given by Accused No.1 under Section 313 of the Code of Criminal Procedure also. Thus, Accused No.1 had admitted his presence on the spot and involvement in the incident. He had admitted that there was scuffle between him and deceased Govind. There is no such material against the remaining accused

persons. These circumstances are not considered by the Trial Court. The defence of Accused No.1 that he had snatched the dragger from the hand of deceased is falsified by circumstance of production of dragger by PW-1. The provisions of Sections 18 and 58 of Evidence Act are virtually ignored by the Trial Court. It is the duty of Court to ascertain whether inference is possible on such admission.

8 Kundlik Rathod (PW-1) has given evidence on motive. He has given evidence that in the past, there was quarrel between deceased Govind and the accused persons including Accused No.1 and during quarrel Bhima had assaulted Govind with axe. He has deposed that a case was filed against Accused No.1 and Bhima and they were asking him to withdraw the case. He has given evidence that Govind was not ready to withdraw the case, but then Bhima and other accused of that case were acquitted. He has given evidence that after the decision of the case, accused Bhima had given threat to Govind to teach him lesson. During the statement recorded under Section 313 of the Code of Criminal Procedure, this part of evidence was put to all the accused. Accused No.1 has admitted that there was a case filed against him in respect of the aforesaid incident.

9 Kundlik Rathod (PW-1) has given evidence that after about one month of the decision of previous case in favour of accused persons, the incident in question took place and it took place in village Paradgaon. He has given evidence that he, witness Seva and deceased Govind were returning to their village from Paradgaon. He has deposed that Accused Nos.1 to 4 followed them and then accused Pandurang and Achyut held Govind in the incident and Ganesh gave blows of dragger on the person of Govind. He has given evidence that many blows were given and Govind collapsed on the ground. He has given evidence against Bhima that Bhima gave stick blows to Govind and he snatched the dragger from the hand of Ganesh and during that attempt Ganesh sustained injuries to his hand. He has given evidence that there was hue and cry and then accused persons ran away from the spot. He has given evidence that he shifted Govind to Hospital of Ranjani and from there Govind was shifted to Civil Hospital of Jalna and from hospital of Jalna, they shifted Govind to Government Hospital, Aurangabad. He has given evidence that after admitting Govind in Aurangabad Government Hospital, he went to Ghansawangi Police Station to lodge the report

and the report at Exhibit 28 was given by him. He has given evidence that the dagger, which was produced in the Court, was snatched by him from the hand of Ganesh and it was produced before Police. He has given evidence that when Police prepared spot Panchanama, spot was shown by him and he produced his clothes before the Police as there were blood stains on the clothes, article 5 and article 6.

10 The FIR at Exhibit 28 is consistent on material points with the oral version given in the Court by Kundlik Rathod (PW-1). There is only one exaggeration. In FIR, he had not mentioned that Bhima had assaulted the deceased by using stick. On this evidence, witness was cross-examined. During cross-examination, he admitted that Bhima had not assaulted Govind by using stick. Thus, the evidence as against Bhima that he used stick cannot be used against Bhima. Further, postmortem report, which this Court is considering at later stage, does not show that any injury was caused due to the weapon like stick. Thus, there is corroboration of FIR to oral evidence given against Ganesh.

11 Seva Chavan (PW-6) is examined as eye witness by Police and his name is mentioned in FIR as eye witness. He is from

village Deoli Tanda, Tahsil Ghansawangi. He has given evidence that he knew deceased Govind and all the accused from prior to the day of incident. He has given evidence that on the day of incident, he and Kundlik were in the company of Govind and at about 04:00 pm they were returning from Paradgaon. He has deposed that he noticed that when Govind was behind him, incident started and he looked back as there was shouting. He has given evidence that in the incident accused Pandurang and accused Achyut held Govind and Ganesh assaulted Govind by using dragger. He has given evidence that Bhima gave kick blows to Govind. He has given evidence that in the incident Kundlik snatched dragger from the hand of Ganesh and in that incident, Ganesh received injuries to his right hand. He has given evidence that after the incident, due to request made by Kundlik, he went to the village to give message.

12 The evidence of Seva Chavan (PW-6) remained unshattered during his extensive cross-examination. It is true that his evidence does not show that he intervened in the indent to save Govind, but that does not mean that he was not present on the spot. It can be said that there is possibility of exaggeration and this witness

was at some distance from Govind and he paid attention to backside when incident started and he had virtually no time to intervene in the incident. There are other circumstances showing that the widow of Govind and other persons of the village including Police Patil came to Primary Health Center, Ranjani. The evidence is given by this witness that it is he who went to village and gave news about the incident. The tenor of cross-examination of this witness shows that his presence on the spot is not disputed. On the contrary, it is suggested to him that during the incident Govind was trying to finish Ganesh and due to that the scuffle took place and in the scuffle Govind sustained injury due to article 1. It is suggested to him that except Ganesh, no other accused was present on the spot at the time of incident. The tenor of cross-examination of Kundlik (PW-1) is similar. Thus, the presence of Kundlik is also not disputed. As there are aforesaid circumstances and as there is name of Seva (PW-6) in FIR, no doubt is created about the version of Seva that the injuries, which were found on the dead body of Govind, were inflicted by accused Ganesh.

13 Jagannath Pawar (PW-4) is resident of Deoli Tanda and

he is also examined as eye witness. He has deposed that he had seen Govind, Kundlik and Seva together near Grampanchayat Office, Paradgaon and he had also seen the accused persons in village Paradgaon. He has given evidence that he was present in the vicinity of village Panchayat office and when he heard shouting, he rushed to the spot. He has given evidence on incident, which is similar to the evidence given by aforesaid eye witnesses. His evidence is also mainly against accused Ganesh that Ganesh assaulted Govind by using dragger and then Govind collapsed on the ground. He has given evidence that in his presence Kundlik snatched dragger from the hand of Ganesh and then accused ran away. Evidence of this witness shows that he knew Govind and accused persons prior to the date of incident. His evidence shows that he remained with Govind when Govind was first shifted to Primary Health Center Ranjani, then Civil Hospital, Jalna and then to Civil Hospital, Aurangabad. He has given evidence on motive also, which is similar to the evidence given by PW-1.

14 The tenor of cross-examination of Jagannath (PW-4) also shows that the defence has not disputed that he had gone to Primary

Health Center, Ranjani. Some omissions in relation to previous statement of this witness are proved and they are in respect of evidence given against accused Bhima by this witness. Nothing is brought on record to create probability that this witness has any reason to give false evidence against the accused persons. There is clear suggestion given to him in the cross-examination that in the incident Govind was attempting to finish Ganesh by using article 1, but Ganesh had scuffle with Govind and in the scuffle Govind sustained injuries. The suggestion about scuffle is denied by this witness, but the facts remained that the defence did not dispute that this witness was present on the spot at the relevant time.

15 The prosecution examined one more eye witness namely Syed Qudratali Osmanali (PW-5). He has given evidence, which is similar to the evidence of PW-1 and other witnesses. Though he is not named in the FIR, he is resident of Ranjani Tahsil Ghansawangi. He has given evidence that he was at Paradgaon and he had seen both deceased and accused in village Paradgaon at 04:00 pm. Incident took place near village Panchayat and so his evidence is important. He has given evidence against Ganesh that Ganesh

assaulted Govind by using knife. Though he has given evidence against Bhima that Bhima had given kick blows, as injuries caused by other weapon were not found on the dead body and as there is possibility of exaggeration, there is no need to discuss the evidence of this witness also as against Bhima. He has given evidence on motive also and his evidence shows that he knew deceased and Ganesh from prior to the day of incident.

16 Other witness like Ramesh Pawar (PW-2) has given evidence on the disclosure made about the incident by Govind in Ranjani Hospital. There is no medical record to show that Govind was conscious when he was taken to Ranjani Primary Health Center. This Court holds that the evidence given by this witness on the dying declaration of Govind is not that convincing. Police statement was recorded on 30th July, 2001. However, other evidence of this witness, which is on disclosure made by Kundlik to him is there. In any case when there is evidence of eye witness, even if evidence of Ramesh (PW-2) is ignored, that cannot go to the root of the case of prosecution.

17 The evidence of Police Inspector, Pandharinath Bhosale (PW-8) shows that he had made attempt to see that the dying declaration of Govind is recorded, but his version shows that no such dying declaration could be recorded. His evidence shows that Police had referred Accused No.1 Ganesh to Civil Hospital, Jalna from Primary Health Center Ghansawangi for treatment. The record shows that Ganesh was not arrested immediately and he could be arrested on 1st August, 2001. Injury certificate at Exhibit 20, which is already described shows that Ganesh was referred by Ghansawangi Police Station for medical examination on 29th July, 2001. Thus, on 29th July, 2001, either accused Ganesh had approached police or police had information against Ganesh about his involvement in the incident. This circumstance is important in view of the nature of defence taken by Ganesh in the present matter. Though such circumstance creates probability of receiving specific information regarding commission of crime and involvement of particular person as accused by police and due to that, it can be inferred that the information of the nature of FIR was received by Police, that circumstance cannot go to the rood of prosecution case. Due to that circumstance, the FIR, which is proved in the evidence of PW-1 will not be available for the purpose of

corroboration to the version of PW-1. In the resent case, even if there is no such corroboration and it is presumed that police had already specific information of the nature of FIR prior to giving of report by PW-1, the other evidence is sufficient for basing conviction.

18 It is already observed that Accused No.1 has not disputed his presence on the spot. The presence of most of the eye witnesses on the spot at the relevant time is also not disputed. The evidence of Pandharinath (PW-8) shows that the clothes of Complainant were taken over as there were blood stains on those clothes. Those clothes were sent to CA office and blood was detected on those clothes. Such circumstance gives corroboration to the version of eye witnesses and it shows that the witness was present on the spot at the relevant time. The evidence of spot of offence is not disputed and that evidence also corroborates the versions of eye witnesses.

19 Dr. Sunil Jawale (PW-7) conducted postmortem examination on the dead body on 30th June, 2001. It appears that Govind succumbed to injuries when he was unconscious and in the Government Hospital in early hours on 30th June, 2001. Postmortem was conducted on the dead body on 30th June, 2001 between 02:00

pm and 03:00 pm. Postmortem report is duly proved in the evidence of Dr. Sunil Jawale (PW-7) as Exhibit 19. The doctor found following injuries on the dead body of Govind :

- “1- Two incised wounds either side of chest IVth and Vth I.C.S. margins sharp, oedematons, deep to the thorasic cavity, No lungs parenchyma injured, appeared to be a surgical intervention for drain out the plural collection.
- 2- A stab injury over back, left infra scapular area, 7 x 3 cms. Tailing seen at one end. 5 cm deep, margins sharp and incised, oedemations. Evidence of injured lung parenchyma seen with injury to bronchioles. The lung Parechyma is oedematons. Pleura incised at the site.
- 3- Stab injury 7 x 3 cms over back, in the middle of medial boarder of Rt.scapula, 5 cms deep tailing seen at one end 5 cms deep. Margins sharp and incised, oedemators, evidence of injured lung parenchyma with injury to Bronchitons and pleura seen.
- 4- A stab wound seen over abdomen, Lt.Lumbar quadrant 5 x 3 cms one end tailing seen, margins incised and clean cut 9 cms deep, injury to the mesentry seen with contused appearance, small intestine contused.”

20 Dr. Sunil Jawale (PW-7) has given evidence that all the aforesaid injuries were ante-mortem in nature and these injuries are sufficient to cause death in ordinary course of nature. The weapon dragger, article 1 was shown to the doctor and the doctor has given opinion that such weapon can cause the aforesaid injuries. This witness was not cross-examined by the defence. It can be said that the defence is not disputing that Govind died homicidal death and aforesaid injuries caused the death.

21 The aforesaid discussion shows the following things:

- a) There was motive for Accused No.1 Ganesh for the crime.
- b) Ganesh is admitting his presence on the spot at the relevant time and also his involvement in the incident by admitting that there was scuffle between him and deceased Govind.
- c) Ganesh is admitting that weapon dragger was used in the incident.

- d) Ganesh is admitting that he sustained injuries to his hand in the incident.
- e) There is direct evidence of the witnesses, some of whom are from other place. Both the witnesses mentioned in the FIR supported the case of prosecution. Their presence on the spot is not disputed by the defence. There is also corroboration of other circumstances to the evidence of witnesses mentioned in the FIR. The statements of witnesses were recorded on 30th July, 2001. The evidence shows that the deceased was first shifted to Primary Health Center, Ranjani, then to Civil Hospital, Jalna and then Civil Hospital, Aurangabad and the first informant was busy, he was in company of deceased and so some delay was caused in giving FIR to the police. After FIR Police could make proper investigation.
- f) Accused Ganesh was referred by Police on 29th July, 2001 for medical examination and Ganesh has

admitted that he sustained injuries in the incident. His explanation that he was trying to save himself is not plausible as injuries on his hand were sustained due to snatching of weapon and not due to assault.

- g) Medical evidence is consistent with the evidence given by the eye witnesses.
- h) There is consistency in the evidence given by the eye witnesses and there is corroboration of the circumstantial evidence to the direct evidence.

22 The aforesaid material is not considered and appreciated by the Trial Court atleast as against Accused No.1 Ganesh. Considering the site of body of deceased where injuries were inflicted on him and considering the site of body of accused where he sustained the injuries, the Trial Court ought to have drawn proper inference. The Trial Court ought to have considered the defence taken by Ganesh at the time of appreciation of direct evidence and ought to have come to the conclusion as to whether defence taken by accused was probable in nature. This Court holds that the evidence

given by the prosecution was more than sufficient to prove that it is Ganesh who caused the aforesaid injuries intentionally to Govind. Inference is also easy that there was intention to finish Govind. Further, there is evidence of doctor that these injuries are sufficient in ordinary course of nature to cause death. Thus, only one inference is possible that it is murder and accused No.1 Ganesh murdered Govind. This Court holds that the Trial Court has not properly appreciated the material available under Section 3 of the Evidence Act and the Trial Court did not properly appreciate the interpretation of the term “proved” used in Section 3 of the Evidence Act. When there is direct evidence of witness, whose presence on the spot is not disputed and when there is circumstantial evidence falling under Sections 6, 7 and 8 of the Evidence Act, very convincing reasons need to be given for not believing such evidence. This Court holds that the Trial Court has not considered the aforesaid material as provided by the aforesaid provisions of the Evidence Act and the Trial Court has committed serious error in giving decision of acquittal in favour of Accused No.1 Ganesh.

23 It is true that four accused persons were shown to be

involved in the matter and there was no circumstantial check to the evidence given as against Accused Nos.2 to 4. It is also true that the crime was registered late and prior to the registration of crime, there was specific information atleast as against Ganesh. In such circumstances, truth was easily separable. The evidence given as against Accused Nos.2 to 4 could have been easily ignored and on the basis of other evidence the Trial Court could have safely convicted Accused No.1 for the offence of murder. Thus, interference is warranted in the decision given by the Trial Court in favour of Ganesh. In view of the nature of evidence and the reason for the incident, this Court holds that it is not the rarest of rare case where death penalty is warranted. As this Court is giving imprisonment for life, there is no need to give hearing to the accused on the point of quantum of sentence. Such hearing was given to the learned counsel for the Accused. In the result, the following order is passed:

ORDER

- I. The appeal as against Respondent No.1 Ganesh s/o Vitthal Pawar is hereby allowed.
- II. The judgment and order of the Trial Court acquitting Respondent No.1 Ganesh s/o Vitthal

Pawar of the offence punishable under Section 302 read with 34 of the Indian Penal Code is hereby set aside. He stands convicted for the offence punishable under Section 302 of the Indian Penal Code. He is sentenced to suffer imprisonment for life and he is to pay fine of Rs.1,000/-. In default of payment of fine, he is to further undergo rigorous imprisonment for one month. He is entitled to set off in respect of the period for which he was behind the bars in this case. He is to surrender to his bail bonds for undergoing sentence.

- III. The appeal as against Respondent Nos.2 and 3 stands dismissed.
- IV. Appeal as against Respondent No.4 is disposed of as abated.

[K. L. WADANE, J.]

[T. V. NALAWADE, J.]

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