

**(2014) 03 BOM CK 0107**

**Bombay High Court**

**Case No:** Criminal Appeal No. 1143 of 2006

Kiran Ashok Jadhav

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

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**Date of Decision:** March 10, 2014

**Acts Referred:**

- Bombay Police Act, 1951 - Section 135 37(1)(a)
- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 134 3
- Penal Code, 1860 (IPC) - Section 302 34

**Citation:** (2014) ALLMR(Cri) 3850 : (2014) 3 BomCR(Cri) 33

**Hon'ble Judges:** P.V. Hardas, J; A.S. Gadkari, J

**Bench:** Division Bench

**Advocate:** Kartik Garg instructed by Mr. S.V. Marwadi, for the Appellant; H.J. Dedhia, Addl. P.P., for the Respondent

**Final Decision:** Allowed

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**Judgement**

A.S. Gadkari, JJ.

The Appellant, original accused No. 1, has questioned the correctness of the Judgment and Order dated 13 October 2006 passed by the 10th Ad hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No. 427 of 2006 thereby convicting him for the offence punishable u/s 302 of the Indian Penal Code and sentencing him to suffer life imprisonment and to pay a fine of Rs. 15,000/-, in default of the same to suffer rigorous imprisonment for two years. The Appellant has further been convicted for the offence punishable u/s 135 of the Bombay Police Act and sentenced to suffer rigorous imprisonment for one year. It has been ordered that the said two sentences shall run concurrently. The brief facts which have been enumerated from the record can be stated as under:

i) P.W. 7-Atmaram Davare, Police Sub-Inspector was attached to Goregaon Police Station on 23 February 2006. That at about 11.30 p.m. one Gangaram Panchal gave him telephonic message that one person in an injured condition was lying in toilet near Teen Dongri, wherein the said public latrine/toilet is situated. P.W. 7 PSI Davare along with his staff immediately rushed to the spot and found that an injured was lying in pool of blood. He admitted the said injured in Cooper Hospital. After examining the said injured person, the concerned doctor gave an opinion that the said person is already dead. P.W. 7 PSI Davare thereafter recorded the statement of the said Gangaram Panchal which is dated 24 February 2006 and is at Exhibit 34 on record. The said statement of Gangaram Panchal was treated as First Information Report. On the basis of the said First Information Report, CR bearing No. 119 of 2006 came to be recorded. The said First Information Report is at Exhibit 11. P.W. 7 PSI Davare thereafter recorded the panchanama of the scene of offence i.e. the spot panchanama which is at Exhibit 12. P.W. 7 PSI Davare also seized the clothes of the deceased in the presence of panchas by effecting seizure panchanama which is at Exhibit 32. The said clothes were one pant, underwear and a full T-shirt stained with blood.

ii) P.W. 8 Police Inspector Firoz Patel subsequently carried out the investigation pertaining to CR No. 119 of 2006. He arrested the accused on 25 February 2006. He also seized the clothes of the two accused persons i.e. the Appellant and original accused No. 2 Shekhar @ Babya. P.W. 8 PI Firoz Patel seized clothes from the present Appellant having bloodstains by effecting a detailed panchanama which is at Exhibit 29.

iii) P.W. 8 PI Firoz Patel recorded the voluntary statement of the Appellant in the presence of panchas. By the said statement the Appellant expressed his willingness to point out the place where he has sealed the weapon which was used in the commission of the said crime. Accordingly, P.W. 8 recorded the memorandum statement of the Appellant which is at Exhibit 24. The Appellant thereafter led the police towards Yashwant Nagar, Teen Dongri and took the police towards a hut and from the ceiling of the said hut, he produced one chopper. P.W. 8 PI Firoz Patel seized the said chopper by effecting a detailed recovery panchanama. The said panchanama is at Exhibit 25. During the course of investigation P.W. 8 PI Firoz Patel recorded the statements of various witnesses. He forwarded the seized articles to Chemical Analyzer along with the forwarding letter. It was revealed to P.W. 8 PI Firoz Patel that the name of deceased was Ramesh Kaunder and after concluding the investigation, he submitted a charge-sheet before the Court of competent jurisdiction.

2. After committal of the case to the Court of Sessions, the learned Trial Court framed charge below Exhibit 2 u/s 302 read with 34 of the Indian Penal Code and u/s 37(1)(a) and u/s 135 of the Bombay Police Act. The said charge was read over to the accused persons. The accused persons denied and claimed to be tried. The

Learned Trial Court by its judgment and order dated 13 October 2006 was pleased to acquit original accused No. 2 Shekhar @ Babya from all the charges levelled against him. The Learned Trial Court was, however, pleased to convict the present Appellant by its said order dated 13 October 2006 as stated herein above.

3. Mr. Kartik Garg, learned counsel appearing for the Appellant has submitted that the entire case of the prosecution is based on the testimony of a solitary eyewitness viz. P.W. 1-Vijay Sonawane and the same is neither reliable nor trustworthy. He has further submitted that the articles, particularly the bloodstained clothes and the chopper recovered at the instance of the Appellant by effecting a panchanama which is at Exhibit 25, nowhere mentions that the alleged chopper after recovered from the Appellant was sealed in the presence of pancha witnesses and there is no cogent evidence on record to show that the sealing which was alleged to have been effected by the investigating agency by effecting the panchanama below Exhibit 25 was such that the same could not have been tampered with. He further submitted that the report received by the Chemical Analyzer which is at Exhibit 38, is not put before the Appellant in the form of a relevant question while recording the statement u/s 313 of the Criminal Procedure Code which has caused great prejudice to the Appellant and the same amounts to denial of a fair opportunity of being heard in the matter.

4. Mr. H.J. Dedhia, learned Additional Public Prosecutor for and on behalf of the State in his arguments has supported the judgment and order passed by the Learned Trial Judge and submitted that the present Appeal may be dismissed by maintaining the order passed by the Learned Trial Court.

5. In order to effectively deal with the submissions advanced before us by Mr. Kartik Garg, learned counsel appearing for the Appellant and the learned Additional Public Prosecutor Mr. H.J. Dedhia, it would be useful to refer to the evidence of the prosecution witnesses.

6. The present case is based on ocular as well as circumstantial evidence. P.W. 1-Vijay Sonawane is the eyewitness to the incident which occurred on 23 February 2006 at about 11.30 p.m. P.W. 1 Vijay Sonawane in his deposition has stated that he knew the Appellant Kiran Jadhav as Kiran was residing in his locality. He has further stated that on 23 February 2006 after finishing his work, he had his dinner and was watching television. He thereafter went to answer the call of nature at about 11.30 p.m. At that time he noticed that the Appellant was holding a wooden strip and he was proceeding towards the toilet. He saw the Appellant Kiran Jadhav assaulting the deceased Ramesh with the said wooden strip in the latrine/toilet. He also saw that the Appellant thereafter assaulted the deceased with a knife over the stomach. He thereafter proceeded to his house.

7. P.W. 1-Vijay Sonawane has been cross examined at length by the Appellant and in his cross examination he has admitted that he was knowing the deceased Ramesh

as well as the Appellant Kiran. In the cross examination this witness has admitted that he did not obstruct the Appellant when he saw that the Appellant was assaulting deceased Ramesh. He has further admitted that he did not shout and did not take any precaution to gather the persons who were residing near the said toilet/latrine. An admission has further been elicited in his cross examination that at the time of the said incident, he did not shout. He has further admitted that he did not try to lift the injured Ramesh by calling the neighbours, neither did he knock any door of the neighbours to inform them about the incident. He has further admitted in the cross examination that he did not feel it necessary to inform the said incident to the police immediately after it happened. He also did not give any information about the said incident on the next day morning to any of his neighbours. He has further admitted that he did not feel it necessary before resuming on duty on the next day, to give information to the police about the incident. He has further admitted in his cross examination that he did not feel to give any report to the police even after finishing his work before he proceeded towards outside the city. He has categorically admitted in his deposition that his statement came to be recorded by the police on 27 February 2006 when he personally visited the police station. He has further admitted that before he visited the police station, the police authority had visited his house and had kept a message for the same.

8. P.W. 2 is the wife of deceased Ramesh viz. Archana Ramesh Kaunder. P.W. 2-Archana in her testimony had stated that she knew the accused since her childhood. She had further deposed that before the incident the Appellant had given threat to the deceased that one day the Appellant would kill the deceased. She has further stated that on 23 February 2006 near the milk dairy at about 5.30 a.m. the Appellant had given a threat that he will kill her husband and on the same day she received the information that there was assault on her husband Ramesh in the latrine at the hands of the Appellant. In the cross examination this witness has admitted that she did not lodge any complaint against the Appellant when he administered the threat to her husband. She has further stated in her cross examination that her statement was recorded by the police on 24 February 2006 between 1.00 a.m. and 2.00 a.m. She has further stated that on the date of incident she was residing with her mother.

9. P.W. 3 Satish Tambe, is the pancha witness to the recovery of chopper at the instance of the Appellant. This witness has stated in his testimony that on 27 February 2006 police called him in the police station and at that time one person was present there. That the said person disclosed his name as Kiran Jadhav i.e. the Appellant herein. At that time the Appellant disclosed that he is willing to point out a chopper which was used at the time of crime. Thereafter the police recorded a memorandum statement of the Appellant which is at Exhibit 24. The Appellant thereafter led the police and the pancha witness to Yashwant Nagar, Teen Dongri and the Appellant thereafter took out one chopper from the ceiling of his house. The police thereafter drew a detailed panchanama about the same and took the

signature of P.W. 3-Satish Tambe. The said panchanama is at Exhibit 25. P.W. 3-Satish Tambe has further stated in his testimony that the police thereafter affixed labels on the said chopper. This witness has been cross examined at length by the Appellant. In his cross examination this witness has admitted that one case is pending against him and the said case is pertaining to liquor. In his cross examination this witness was confronted with article A, as the same is not a chopper, but is a knife to which this witness has denied.

10. At this juncture it is useful to note here that Exhibit 25 which is the panchanama dated 27 February 2006 of discovery of the chopper, at its end only mentions that after taking the chopper into custody in presence of the pancha, the police have wrapped in paper and affixed the labels signed by the pancha. It is pertinent to note that neither in the substantive evidence of P.W. 3-Satish Tambe nor in the panchanama which is at Exhibit 25 it is anywhere mentioned and/or it has come on record that the chopper after taking into custody by the police, is properly sealed in presence of the pancha witnesses and thereafter signatures of the pancha witnesses have been obtained on the said sealed article.

11. P.W. 4-Surendra Bhatkar and P.W. 5-Chotu Mayekar are the pancha witnesses to the panchanama pertaining to arrest and seizure of clothes of the Appellant. These witnesses have stated that they found bloodstains on the clothes of the Appellant. The arrest and seizure of clothes panchanama is at Exhibit 29.

12. P.W. 6 is Sandip Rajane and is a pancha witness to the seizure of clothes of the deceased. It appears from the record that he is a formal witness and has been examined to establish the fact that the clothes of the deceased were seized in his presence.

13. P.W. 7 is PSI Atmaram Davare then attached to Goregaon Police Station who after receipt of the telephonic message from Gangaram Panchal immediately went to the spot and thereafter recorded the statement of Gangaram Panchal which was subsequently treated as F.I.R. He has stated in his testimony that, after the information received from Gangaram Panchal that, one person is injured and is lying in the toilet near Teen Dongri, he himself along with his staff visited the spot and found that an injured was lying in the pool of blood. He has further deposed that the said injured was admitted in Cooper Hospital wherein the doctors gave the opinion that the said person is already dead. He has stated that he recorded the statement of Gangaram Panchal which is at Exhibit 34. P.W. 7-PSI Atmaram Davare has further deposed that, he drew the spot panchanama which is at Exhibit 12. He also collected the sample of earth mixed with blood and also seized the clothes of the deceased in the presence of panchas. This witness has been cross examined by the Appellant. However, no fruitful material has been elicited in the said process.

14. P.W. 8 Firoz Patel, Police Inspector then attached to Goregaon Police Station. This witness in his testimony has stated that he carried out the investigation in the

present case (CR No. 119 of 2006). This witness has further stated that he arrested the Appellant. He has further stated that he also seized the clothes of the accused by effecting a panchanama which is at Exhibit 29. He has further stated that he had recorded a voluntary statement of the Appellant in the presence of panchas wherein the Appellant expressed his willingness to point out the place where he has concealed the weapon used in the crime. He accordingly recorded the memorandum panchanama which is at Exhibit 24. He has further stated that the Appellant, Kiran thereafter led the police towards Yashwant Nagar, Teen Dongri to his hut. That the Appellant took out one chopper which was kept near the ceiling of the said hut and handed it over to the police. He has stated that he seized the said chopper and drew the panchanama which is at Exhibit 25 after taking the signatures of the panchas. He has further stated that the label on the chopper-article A before the Court was the same and the label which was shown to him bears his signature. He has further deposed that he referred the seized property to the Chemical Analyzer along with a forwarding letter. He has stated that after completion of investigation, he submitted a charge-sheet issued against the Appellant. This witness has been cross examined by the Appellant and he has admitted in the cross examination that he has not drawn the arrest panchanama on Ram Mandir Road. He has further admitted that at the time of arrest of the Appellant, the family members of the Appellant were present in the house. He has further admitted that he did not record the statements of the family members.

15. We have carefully scrutinized the entire evidence on record and we found that P.W. 1-Vijay Sonawane is the solitary eyewitness to the incident. As stated herein above, the statement of P.W. 1-Vijay came to be recorded by the police on 27 February 2006 i.e. after a lapse of four days. P.W. 1-Vijay in unequivocal terms has admitted, in his cross examination, that though he was present at the time of the incident, he did not obstruct the Appellant when he saw the Appellant assaulting deceased Ramesh. He did not shout and he had not taken any precaution to gather the persons who were residing near the said area. He further admitted that, he did not shout at that relevant time. He further admitted that, he did not knock the door of any of the neighbours adjacent to the said spot of incident, neither he informed it to anybody. He has further categorically admitted in his evidence that he did not feel it necessary to inform this incident to the police immediately. He has further admitted that he did not give information about the said incident even on the next day morning to any neighbours. He has further admitted that he did not feel it necessary before assuming to his duty, to give information to the police about the incident. He has further admitted that he did not feel it necessary to give any report to the police after finishing his work and before he proceeded outside the city. He has further admitted that before he personally went to the police station, the police authority had visited his house and had kept a message about the same.

16. The learned counsel appearing for the Appellant has relied upon an unreported judgment of the Division Bench of this Court in Criminal Appeal No. 1186 of 2004

dated 4 September 2013 in case of Rajnath Dudhnath Yadav v. The State of Maharashtra. The Division Bench of this Court in the said judgment has relied upon the case of [Jagdish Prasad and others Vs. State of Madhya Pradesh](#), and the case of [Vadivelu Thevar Vs. The State of Madras](#), . In the case of Jagdish Prasad (supra), the Supreme Court has observed thus:

As a general rule, a Court can and may act on the testimony of a single witness though uncorroborated provided the testimony, of that single witness is found out entirely reliable. In that case, there will be no legal impediment for recording a conviction. But if the evidence is open to doubt or suspicion, the court will require sufficient corroboration. In this connection, reference may be made to a decision of this Court in [Vadivelu Thevar Vs. The State of Madras](#), wherein this court has classified the testimony of a witness into three categories viz. (1) wholly reliable (2) wholly unreliable and (3) neither wholly reliable or wholly unreliable and observed that though in the first two categories of classification, there may not be any difficulty in coming to a conclusion either accepting or rejecting the testimony but it is in the third category of cases that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony either direct or circumstantial.

17. In the case of Vadivelu Thevar (supra), the Supreme Court in paragraph 11 of the said judgment has observed thus:

(11) In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that no particular number of witnesses shall in any case be required for the proof of any fact. The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a number of statutes as set out in Sarkar's I Law of Evidence 9th Edition, at pp. 1 100 and 1 101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in S. 134 quoted above. The section enshrines the well recognized maxim that Evidence has to be weighed and not counted. Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon.

18. Thus it is clear that the testimony of a sole witness can be relied upon if it is found reliable and trustworthy. It is pertinent to note here that at the first instance the statement of P.W. 1-Vijay Sonawane has been recorded by the police after a gap of four days. It is further pertinent to note that the recovery panchanama is also dated 27 February 2006 and therefore we are of the opinion that the police after recording the recovery panchanama at the instance of the Appellant, has recorded

the statement of this witness, which creates doubt about its reliability and truthfulness in our mind and therefore we refrain from relying on the statement of P.W. 1-Vijay Sonawane, who claims to be an eyewitness to the incident.

19. As stated herein above P.W. 3 Satish Tambe the pancha witness to the recovery of chopper at the instance of the Appellant, in his testimony has nowhere stated that after seizing the weapon of crime i.e. chopper at the instance of the Appellant, the police sealed the same. He has stated that the police affixed the labels signed by him on the wrapping. It is further pertinent to note that there is no evidence on record to show that the parcels which contain the chopper and the clothes of the Appellant, which were seized from the accused were received by the Chemical Analyzer in a sealed condition and there was no possibility at all of them being tampered with. In other words, there is no evidence on record to show that the sealed parcel containing the chopper and the clothes of the accused were continued to remain in a sealed condition till the same were received by the Chemical Analyzer. In our opinion, there is every possibility that the alleged recovery of the chopper and the clothes of the accused having bloodstains is susceptible for tampering with and in our opinion, the said piece of evidence produced by the prosecution cannot be relied upon at all.

20. Learned counsel appearing for the Appellant has urged before us that the Chemical Analyzer's report which has been relied upon by the prosecution was not put in the form of question to the Appellant while recording his statement u/s 313 of the Criminal Procedure Code which has caused great prejudice thereby affecting his right of being heard in the matter i.e. to say the requirement of following the principles of natural justice having been violated by the Learned Trial Court. Learned counsel appearing for the Appellant relied upon the judgment of the Hon'ble Supreme Court in the case of [Sujit Biswas Vs. State of Assam](#), . The Hon'ble Supreme Court in paragraph 12 of the said judgment has observed thus:

12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person u/s 313, Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination u/s 313, Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.



21. It is thus clear that the object of examination of the accused u/s 313 is to give an opportunity to him to explain the incriminating circumstances put forth by the prosecution against him. Section 313 also meets the requirements of principles of natural justice. In the present case the prosecution has relied upon the Chemical Analyzer's report as an incriminating circumstance against the Appellant because bloodstains of Blood Group "A" were found on the chopper, so also on the clothes of the accused. It was the duty of the Trial Court to examine the Appellant and to seek his explanation as regards the said incriminating material that has surfaced against him. As has been held by the Hon'ble Supreme Court in the case of Sujit Biswas (supra), the circumstances which are not put to the Appellant in his examination u/s 313 of the Criminal Procedure Code, cannot be used against him and must be excluded from consideration.

22. In view of the facts mentioned herein above, the cumulative effect of the evidence adduced by the prosecution is that the chain of circumstances put forth by the prosecution is not complete. As we have already held herein above that the evidence of P.W. 1-Vijay Sonawane, who is alleged to be an eye witness is not reliable and trustworthy and therefore cannot be relied upon at all. A cumulative effect of the foregoing analysis of the facts is that, the Appellant/accused is entitled for the benefit of doubt and deserves to be acquitted from the charges levelled against him. Accordingly, Criminal Appeal is allowed and the conviction and sentence of the Appellant is hereby quashed and set aside and the Appellant is acquitted of the offence with which he was charged and convicted. Fine if paid by the Appellant be refunded to him. Since the Appellant is in Jail, he be released forthwith if not required in any other case.