

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO.45 OF 1997**

- |   |   |
|---|---|
| <p>1. Babu Bhairu Ovhal<br/>Aged 18, Occ. Labourer,</p> <p>2. Sonu Bhairu Ovhal<br/>Aged 25 years, Occ. Labourer,<br/>Both residing at Punawale,<br/>Taluka Mulshi, Dist. Pune.</p> | <p>...Appellants<br/>(Orig. Accused Nos. 1 &amp; 2)</p> |
| Versus  |   |
| <p>The State of Maharashtra</p>   | <p>...Respondent<br/>(Orig. Complainant)</p>            |

-----

Dr. Yug Choudhary a/w Mr. Dashrath Gaikwad & Mr. Dhruv Jadhav  
i/b Mr. Rohan Nahar, Advocates for the Appellants.  
Mrs. M.M. Deshmukh, APP for the Respondent-State.

-----

**CORAM : S.S. SHINDE &  
N.B. SURYAWANSHI, JJ.**

**JUDGMENT RESERVED ON : 15TH JANUARY, 2020.**

**JUDGMENT PRONOUNCED ON : 30<sup>th</sup> APRIL, 2020.**

**JUDGMENT : (Per N.B. SURYAWANSHI, J.)**

. The appellant/original accused No.1 in this appeal,  
challenges his conviction under Section 302 of the Indian Penal

Code (for short 'IPC') in Sessions Case No. 192 of 1993, by the learned Sessions Judge, Pune. The original accused No.2 challenges his conviction under Section 304 Part II of the IPC.

2. The prosecution case in short is as under :-

In Village Punawale, Taluka-Mulashi, young boys formed an association by name 'Shivaji Maratha Tarun Mandal'. The said Mandal celebrates Ganesh Festival every year by erecting a pendal installing Ganesh Idol and doing decorations.

In the year 1992, the Mandal had installed an idol of Ganpati in front of Bhairavnath temple. As a part of decoration, water fountain was fixed in front of the stage. Complainant Sahadu Dhavale, deceased Ramesh Dhavale, witnesses Vishnu Kate, Anil Bandal and others are the members/workers of the said Mandal. Accused Nos.1 and 2 are brothers inter se, who belong to Buddha Community. All reside in the same village.

In the evening of 4<sup>th</sup> September, 1992, at about 6.00 p.m. accused No.1 Babu came near the water fountain, which was fixed near the stage on which Ganpati idol was installed. He started

urinating there. Some boys including deceased Ramesh who were present there, took exception to the act of accused No.1 Babu. There was hot exchange of words between accused No.1 Babu and deceased Ramesh. Deceased Ramesh pushed and drove away accused No.1 Babu from the said place.

It is further prosecution case that after about one and half or two hours, deceased Ramesh and PW-5 Vishnu Kate were passing along the road in front of Mayakka Devi Temple. On the way, they saw accused No.1 Babu and accused No.2 Sonu approaching from opposite side. When they came near each other, accused No.2 Sonu asked deceased Ramesh as to why he pushed his brother accused No.1 Babu. Thereafter, accused No.2 Sonu caught hold of both the hands of deceased Ramesh at his back side and accused No.1 Babu took out a knife and gave two blows to Ramesh, one of which landed on the left arm and the other on the abdomen. Due to the blow on abdomen, his intestines came out. Deceased Ramesh pressed his hands on the abdomen and shouted for help. Accused No.1 Babu and accused No.2 Sonu started running away in different directions. Due to the shouts of deceased Ramesh, PW-6 Somnath Dharmalkar, who has his Pan shop at a

short distance, came and tried to obstruct accused No.1 Babu. However, accused No.1 Babu threatened to hit him with the same knife and he managed to run away. This incident was also witnessed by PW-7 Anil Bandal. The injured Ramesh was brought by PW-5 Vishnu Kate and PW-7 Anil Bandal to Bhairavnath temple. He was put on the floor in the temple. Information was given to the house of Ramesh. Immediately, PW-2 Sahadu, the elder brother of Ramesh alongwith others rushed to Bhairavnath temple. Saree brought by somebody to tie the incised wound of Ramesh. Ramesh was shifted to Sassoon Hospital, however, on arriving at Sassoon Hospital, he was declared dead.

PW-2 Sahadu informed the Sassoon Police Chowky about the incident. Paud Police were contacted by Sassoon Police Chowky. PSI PW-8 Vishnu Mane, on receiving wireless message, went to Sassoon Hospital, met PW-2 Sahadu and recorded complaint (Exhibit 15) and forwarded the same to the Police Station, on the basis of which C.R. No.81 of 1992 was registered against both the accused, for offences punishable under section 302 r/w 34 and section 295-B of the IPC.

Investigation commenced and panchnama of scene of offence (Exhibit 13) was prepared. Both the accused were arrested and clothes on their person were seized vide panchnama (Exhibit 17). On the same day, blood stained knife was recovered at the instance of accused No.1 Babu, from the grass in an open space near the house of one Bhagwan Jadhav, vide seizure panchnama (Exhibit 19-A). After completion of investigation, charge-sheet came to be filed and the matter was committed to the Sessions Court. Charge under section 302 r/w 34 of the IPC was framed against both the accused. So also, charge under section 295-A of the IPC was framed against accused No.1 Babu.

In support of its case, prosecution has examined 10 witnesses including PW-5 Vishnu Kate and PW-7 Anil Bandal being eyewitnesses, PW-6 Somnath Dharmalkar to prove that immediately after the incident he tried to obstruct the accused persons, PW-1 Balu Dhavale, PW-3 Kerba Shinde and PW-4 Subhash Ranwade are panch witnesses to the different panchnamas, PW-2 Sahadu, elder brother of deceased Ramesh, who has lodged the complaint, Medical Officer PW-10 Dr. Sayyad Abdul Sami who conducted post-mortem and the investigating officer PI PW-8 Vishnu Mane and

Inspector PW-9 Vasant Ingawale, who gave the details of investigation done by them.

The defence of the accused persons is of total denial. In the statement under section 313 of the Cr.P.C., they have stated that on the date of incident at about 7.30 p.m. accused No.1 Babu was urinating in an open space, behind the gymnasium. At that time PW-4 Subhash Ranwade came there and abused him. In short time, thereafter the members of the Maratha Mandal alongwith other villagers came in the locality of Buddha people. They broke the street lights and also set their houses on fire. Buddha Temple was also damaged, so also, the idol of Lord Buddha. They rushed to Kala Khadak Police Chowky to inform the police, but the police detained them and later on falsely implicated them in this case.

3. Heard the learned counsel for the appellants and the learned APP for the State. With their able assistance, we have perused the grounds raised in the Appeal Memo and the record including the notes of evidence.

4. The learned counsel for the appellants assailed the conviction on various grounds including that the spot of offence is doubtful. There was no blood found on the spot of offence or at the temple where the deceased was kept after the assault. The evidence of the eyewitnesses is not corroborated by the medical evidence. On the contrary, the medical evidence is contrary to the version given by the eyewitnesses and hence the same ought to have been disbelieved by the learned Trial Court. It has come in the evidence of prosecution witnesses that the deceased was wearing a trouser when he left the house to go to the Pandal. However, the inquest panchnama does not refer that the deceased was wearing full pant. Even in the panchnama of seizure of the clothes of the deceased trousers are not found. The autopsy surgeon has also stated that the deceased was wearing shirt, baniyan and underwear. This creates serious doubt about the prosecution version. It is further urged that there was no light on the spot of the incident, which is admitted by the panchas of the spot panchnama. He further argued that the FIR is delayed and the statement first in point of time was suppressed by the prosecution. He termed the evidence of prosecution witnesses as unreliable on various grounds

including the omissions and contradictions in their evidence and also on the ground that the witnesses though claimed to have carried the deceased by holding him to the temple etc, no blood is found on the clothes of these witnesses. This makes their presence at the spot doubtful. It is further argued that seizure of clothes of the accused is doubtful and is unbelievable that the accused were wearing the blood stained clothes, when they were arrested. The blood stains were found on the back side of the pant of the accused also falsify the prosecution story. For absence of signature of accused on the panchnama of seizure of cloths of accused, the same needs to be disbelieved. There is no arrest panchanama on record, which creates doubt the prosecution version that arrest of the accused was on a particular date. He further submits that the seizure of knife under Section 27 of the Evidence Act is not reliable as the seizure was made from an open place accessible to all. The panch to the seizure panchnama is working at Pimpri Chinchwad and taking into consideration his duty hours and his weekly holiday being Thursday, he could not be present for the seizure of knife panchnama which was conducted on Saturday between 11 a.m. to 11:45 a.m. He would submit that there was delay in dispatch of



clothes of accused and knife to the Chemical Analyser, which is not explained by the prosecution and the same renders the prosecution case doubtful.

5. Learned counsel for the appellant/accused relied on following judgments in support of his arguments, **Bir Singh & Ors. Vs. The State of Uttar Pradesh, reported in [1978 CRI. L.J. 177], Bhusai (Alias) Mohammad Mian & Anr. Vs. State of Uttar Pradesh, reported in [1971 SCC (Cr.) 66] and Ramsewak & Ors. Vs. State of M.P., reported in [2004 CRI. L.J. 3043].**

6. He lastly argued that at the time of framing of charge accused No.1 has given his age is 18 years. The date of incident is 4<sup>th</sup> September, 1992 and the charge came be framed on 8<sup>th</sup> February, 1995, that is almost after more than two and half years of the date of the offence. Thus, on the date of offence the age of the appellant/accused No.1 Babu is not more than 16½ years and he ought to have been treated as a juvenile offender / child in conflict with law and tried as such. Thus, the learned Trial Judge ought to

have investigated / enquired this issue. He further argues that even on the date of judgment, i.e., on 13<sup>th</sup> December, 1996 he has given his age as 19 years. The learned Advocate therefore contends that there is no dispute about age given by the appellant/accused No.1 Babu. By relying upon Section 2 (35) of The Juvenile Justice (Care and Protection of Children) Act, 2015, where the person below of 18 years age is held to be juvenile. By further placing Section 9 (2) Act proviso he contends that at any stage of trial the plea of juvenality can be raised. He further contends that, the entire trial is vitiated as the appellant/accused No.1 Babu though was juvenile on the date of incident he was not tried as juvenile. In this behalf, he placed reliance in the ratio in **Gopinath Ghosh Vs. The State of West Bengal [1984 (Supp.) SCC 228]**.

7. The learned APP, on the other hand, supports the judgment contending that there is cogent and reliable evidence on record to sustain the conviction of the appellants. PW-5, PW-6 and PW-7, being the eyewitnesses, their version is corroborated by other evidence brought on record by the prosecution. The learned Trial

Court was perfectly justified in recording the conviction. The learned APP therefore contends that there is no substance in the appeal filed by the appellants and same may be dismissed.

8. We will consider evidence of the eyewitnesses first. PW-5 Vishnu Kate claims to be eyewitness. He states that on the day of incident in the evening accused No.1 Babu came near the Ganpati Pandal and started pissing near the water fountain, in standing position. Deceased Ramesh questioned him, accused No.1 Babu retorted and asked as to whether that place belongs to father of Ramesh. Ramesh thereupon asked accused No.1 Babu to leave the place. Accordingly, accused No.1 Babu left the place. Thereafter, 'Aarti' was performed and all went home to take meals. PW-5 Vishnu Kate returned back at 07.30 p.m. Deceased Ramesh was already there. Deceased Ramesh and PW-5 Vishnu Kate went to buy cigarettes at shop of PW-6 Somnath. However, they did not get any cigarette at the shop of PW-6 Somnath. PW-6 Somnath told them to buy cigarettes from other shop which was in front of Mayakka temple. PW-5 Vishnu Kate further deposed that when he and Ramesh came in front of the Mayakka temple, accused Nos. 1

and 2 were seen coming from the main road from opposite side. PW-7 Anil Bandal was also seen coming from opposite side. At that time, accused No.2 Sonu asked Ramesh as to why he pushed his brother i.e. accused No.1 Babu. At that time, accused No.2 Sonu caught hold of both the hands of Ramesh from his back side and accused No.1 Babu took out a knife from pocket and gave blows. Due to blows, bowels of Ramesh came out and he suffered bleeding injury on his left hand. Ramesh pressed his hands on the abdomen and shouted for catching the accused persons. However, accused No.1 Babu ran away towards western side and accused No.2 Sonu ran away towards eastern side. On hearing the shouts of Ramesh, PW-6 Somnath came out of his cabin and he came across accused No.1 Babu and obstructed him. However, accused No.1 Babu threatened him by pointing knife by saying that in case he did not get aside, he would hit him. Thereafter accused No.1 Babu was successful in running away. Thereafter, PW-5 Vishnu Kate and PW-7 Anil Bandal helped injured Ramesh and brought him to the temple of Bhairavnath. Even PW-6 Somnath helped Ramesh to lie on the floor in the temple. Somebody went to the house of Ramesh and informed about the incident. His brother PW-2 Sahadu and other

family members of Ramesh came to the temple. Thereafter, somebody, on the request of PW-2 Sahadu, brought a saree with which Sahadu tied the abdomen of Ramesh and then Ramesh was taken in the jeep to the Sassoon Hospital, Pune.

9. In the cross-examination PW-5 Vishnu Kate admitted that, he and other members of the Mandal were charged by the police for attacking and burning the houses of Buddha people. He and five others were in jail in connection with that crime. He did not state before the police that 'Ramesh Dhawale and Subhash Ranawade put the fountain in working condition', 'at that time, accused No.1 Babu came there', 'accused No.1 Babu pissed in a standing position', wherein 'standing position' is an omission, 'Ramesh told Subhash that accused No.1 was pissing near the fountain', 'Accused No.1 Babu asked Ramesh as to whether the place belongs to his (Ramesh's) father', 'We did 'Aarti' after accused No.1 left the place', 'We did not get cigarettes in the pan-shop of Somnath and that he therefore told us that we could have cigarettes from his other cabin', 'Myself and Ramesh had come in front of the

temple of deity Mayakka', 'Accused No.2 Sonu caught hold of the hands of Ramesh from his backside', 'Babu took out a knife from his pocket', 'Ramesh was made to lie on the floor in the temple', 'then I caught hold of Sonu Bahiru Ovhal but he gave a jerk to me and ran away'. He also did not state in his police statement that 'accused No.1 Babu ran away on in western direction and accused No.2 Sonu ran away on in eastern direction'. He could not explain as to why these statements are not mentioned in his police statement.

10. PW-5 Vishnu Kate stated that accused No.1 Babu gave blows on the arm of Ramesh and then he gave the blow on his stomach. Blood came out from the injury on the abdomen of Ramesh. But he did not see that the blood had fallen down. He claims to have helped the deceased to walk from the spot to the temple. However, surprisingly, clothes of this witness did not get blood stains. He further admits that, he did not pay any attention if blood had fallen down on the floor of Bhairavnath temple. This witness has also stated that the deceased was wearing black colour trouser at the time of incident. However, no trouser is found and/or is

seized during the investigation. This witness further states that deceased asked accused No.1 Babu as to why he is urinating there which led to quarrel.

11. PW-7 Anil Bandal states that PW-4 Subhash Ranwade asked accused No.1 Babu why he was urinating there, due to which the subsequent incident of stabbing of deceased Ramesh occurred. He has given version similar to the version given by PW-5 Vishnu. He states that after quarrel between Ramesh Dhawale and Accused No.1 Babu, Ramesh pushed accused No.1 Babu and asked him to leave the place. Thereafter, accused No.1 Babu left the place. The boys who were present there decided to settle the accounts after taking meals and after returning from home. He further states that at about 7:30 pm to 7:45 pm, he started for Bhairavnath temple and reached in front of Mayakka temple. At that time, he saw Ramesh and PW-5 Vishnu coming from the western side. He also saw both the accused coming from the eastern side. The accused No. 2 Sonu asked Ramesh as to why he pushed his brother i.e. accused No.1 Babu, a short while ago. Thereafter, the accused No.2 Sonu caught hold of both the hands of Ramesh on his back side. The accused

No.1 Babu took out a knife from his pocket and gave its blows to Ramesh on his left arm and stomach. Upon that, Ramesh shouted “pakda, pakda”. At that time, PW-6 Somnath came from his pan shop and obstructed and tried to catch hold of accused No. 1 Babu, but, the accused No. 1 Babu threatened him with knife, which stopped PW-6 Somnath from intervention. Both the accused ran away in opposite directions. Thereafter PW-7 Anil, Vishnu and Somnath lifted the deceased Ramesh and brought him to Bhairavnath temple. He again stated that they caught hold of Ramesh and made him to walk to the temple.

12. The evidence of this witness is full of omissions and contradictions. He has substantially improved his version in the Court. His statement that the accused No. 2 Sonu held hands of the deceased from behind is proved as omission. He admitted that he did not intervene in the quarrel which took place between Ramesh and accused No. 2 Sonu. He did not try to free hands of Ramesh, held by the accused No. 2 Sonu. He did not try to obstruct any of the accused. He claims to have reached near Ramesh after blows were given to him so also Vishnu and Somnath Dharmalkar. This witness



was well acquainted with the deceased and he was also arrested for attack and burning of the Dalit houses.

13.           Though this witness admits that bowels of Ramesh came out due to blow on stomach, surprisingly, he states that the injuries of Ramesh were not bleeding. Even this witness does not have blood stains of deceased on his clothes, though he helped the deceased to go to the temple. The omissions and contradictions brought on record in the evidence of this witness which were proved through PW- 8 Investigating Officer render the evidence of this witness highly doubtful.

14.           PW-6 Somnath in his evidence claims that deceased made a dying declaration to him to the effect that accused No.1 Babu had assaulted him with a knife. He further states that at the time of assault, Dilip Dhawale and Madhu Kate were present at his pan stall. According to him, the injuries of the deceased were not bleeding. PW-6 helped him to walk from the spot to the temple. He states that neither his clothes nor his hands got stained with blood of deceased.

Oral dying declaration stated by this witness is not believable in view of the fact that PW-2 Sahadu, brother of deceased has categorically stated that the deceased Ramesh was not speaking when he saw him. PW-5 Vishnu also admits that the deceased was not in a condition to speak. Though PW-5 Vishnu and PW-7 Anil were throughout present, both of them nowhere mentioned that any statement was made by the deceased.

15. In view of the medical evidence in respect of the loss of blood from the injury suffered by the deceased, it is impossible to believe the version of PW-6 Somnath that the injuries of the deceased were not bleeding and though PW-6 Somnath helped him to walk from the spot to the temple, neither his clothes nor his hands got stained with the blood of the deceased.

16. Considering the evidence of the eye witnesses PW-5 Vishnu, PW-6 Somnath and PW-7 Anil, it is clear that they are stating falsehood. Though they accept that due to blow on the stomach, the bowels of deceased had come out, they flatly deny that there was profuse bleeding from the stomach. They claim that

they carried the deceased from the spot to Bhairavnath temple, however, their clothes were not stained with the blood of the deceased. These three witnesses were closely acquainted with the deceased and their statements were recorded on the next day of incident. They are contradicting one another in respect of the manner in which the first incident of urinating by the accused No. 1 Babu prior to the assault occurred. Clothes of PW-5 Vishnu, PW-6 Somnath and PW-7 Anil have not been seized. The statements of PW-5 Vishnu and PW-7 Anil that the accused No. 2 Sonu held hands of the deceased from behind is an omission which is proved on record. As per the version of PW-6 Somnath, at the time of assault, Dilip Dhawale and Madhu Kate were present at his pan stall. Thus, infact 6 persons were present at the time of incident (PW-5 Vishnu, PW-6 Somnath, PW-7 Anil, deceased Ramesh, Dilip Dhawale and Madhu Kate) and the accused were only two. Thus, the accused were outnumbered. This also creates doubt about the prosecution's version about the manner in which the incident of assault has taken place. The version of PW-5 Vishnu that the deceased asked the accused No. 1 Babu why he was urinating there, which led to a quarrel between them is contradicted by PW-7

Anil, who states that it was PW-4 who asked the accused No. 1 Babu that why he was urinating there. It is pertinent to note that PW-4 does not mention that he asked the accused No. 1 Babu as to why he was urinating there. He does not claim to be present at that time at pandal. Thus, taking into consideration the aforesaid aspects, the version of the eye witnesses does not inspire confidence which renders the prosecution's case doubtful.

17. The evidence of PW-2 Sahadu brother of the deceased who lodged complaint Exhibit 15 is also of not much help to the prosecution. On receiving information that deceased Ramesh was assaulted he went to Bhairavnath temple. He found Ramesh lying on the road in front of Bhairavnath temple. Somebody brought saree on his request and PW-2 Sahadu tied it around the stomach of Ramesh. Thereafter, in a jeep, he brought Ramesh to the Sassoon Hospital, Pune at 08.30 p.m. On the same night he gave information to the Sassoon police Chowky. It was reduced into the writing and the said information was forwarded to Paud police station and his complaint Exhibit 15 was recorded.

18. In his cross he states that Ramesh returned home between 6.00 p.m. and 7.45 p.m. to take his meals and after taking his meals he left home. He states in his cross that there was no blood, when he saw Ramesh in the Bhairavnath temple. He did not state before police that Ramesh was lying on the road in front of the Bhairavnath temple. He admits Ramesh was not speaking when he saw him. The complaint was recorded at 3.00 a.m. in the night. He further admitted that Ramesh was wearing a full pant when he left the house.

19. Then there is evidence of panch witnesses, PW-1 Balu is the panch to the spot panchnama (Exhibit 13), PW-3 Kerba is panch to the seizure of clothes of the accused persons (Exhibit 16) conducted on 05<sup>th</sup> September 1992. PW-4 Subhash is the panch to the spot panchnama (Exhibit 18). He is also panch to the memorandum statement under Section 27 of the Evidence Act of accused No.1 Babu (Exhibit 19) and the recovery of knife panchnama (Exhibit 20). The accused were arrested on the following day of the incident and prosecution claims there were blood stains on their clothes. On the back side of trouser of accused

No.1 Babu, red colour spot was noted. The prosecution does not claim to have found any blood on the clothes of accused No.2 Sonu. If at all the accused No.1 Babu had stabbed the deceased from front then the blood must come on clothes of the accused No.1 Babu. However, surprisingly no blood was found on the clothes of accused No.1 Babu. Neither arrest panchnama was made in this case nor the prosecution has brought on record as to when and where the accused persons were arrested.

20. So far as the seizure of knife from accused No.1 Babu is concerned admittedly, there was no mud found on the knife. The knife was recovered from the open space accessible to all. PW-4 Subhash panch to the memorandum statement and recovery of knife admits that he is working as a clerk at the paper mill in Chinchwad, Pune and his duty hours are 8.00 a.m. to 4.30 p.m and his weekly holiday is Thursday. Both these panchnamas were conducted on 05<sup>th</sup> September 1992 i.e. on Saturday between 11.00 a.m. to 11.45 a.m. Thus, no reliance can be placed on the said panchnama. It is evident on perusing Exhibit 19A that the words

“Tyavar raktache daag” have been interpolated subsequently, thus these panchnamas are not of any help to the prosecution.

21. The prosecution has examined two Investigating Officers PW-8 Vishnu Mane and PW-9 Vasant Ingawale. PW-8 has proved CA report. Blood group of both the accused persons is ‘O+’. PW-8 admitted in his evidence that on 04<sup>th</sup> September 1992 that night in village wherein the houses Dalit were attacked, in connection with the incident. Stones were thrown on the houses of other Boudha and the Boudha temple was damaged. PW-8 also admitted in his evidence, he received wireless message from the control room, Paud Rural, that Ramesh Ramchandra Dhawale was stabbed in front of the Ganpati idol installed by ‘Shivaji Maratha Tarun Mandal’, which probabalizes the defence argument that spot of incident is different than the one which is claimed by prosecution. This witness has proved the material omissions and contradictions from the evidence of eye witnesses PW-5 Vishnu, PW-6 Somnath and PW-7 Anil. The omissions and contradictions in the evidence of these witnesses are of substantial nature which renders the prosecution case doubtful.

22. PW-9 Vasant Ingawale is working as a Circle Police Inspector, Haveli police Station to whom the investigation of C.R. No.81 of 1992 was handed over on 15<sup>th</sup> November 1992. He recorded supplementary statements of Vishnu Kate, Anil Bandal and Somnath Dharmalkar. He received post-mortem report and filed charge-sheet in the Court against the accused. He proved contradictions in the evidence of Vishnu Kate, Somnath Dharmalkar and Anil Bandal.

23. In the present case, the spot of incident where the accused no. 1 Babu was urinating is doubtful, whether it was in the pendal, behind pendal or near gymnasium. The evidence led by the prosecution in this behalf is not clear. The spot of incident where actual stabbing took place also is doubtful. According to the prosecution, deceased Ramesh was stabbed on the road in front of Mayakka temple. Though due to stabbing injury on stomach, his bowels came out and there was profuse bleeding, as per the medical evidence, no blood was found on the road. From that spot, the deceased was carried to Bhairavnath temple which is 100 feet



away from the spot. Why he was not taken to Mayakka temple is a mystery not explained by the prosecution. Again, no blood was found on the floor of Bhairavnath temple, where the deceased Ramesh was made to lie. The Investigating Agency has failed to seize the blood stain earth from the spot. The Investigating Officer admits that he did not notice any blood at Bhairavnath temple. Thus, all these aspects create serious doubt about the prosecution version that the spot of incident was in front of Mayakka temple and from there the deceased was carried to Bhairavnath temple and was made to lie on the floor of Bhairavnath temple. The defence version appears to be probable that the incident in question might not have happened at the place where the prosecution is alleging.

24. The medical evidence also improbabilizes the prosecution version. Though as per the medical evidence there was profuse bleeding and at least one and half liter blood was must have oozed out from the wound suffered by the deceased, surprisingly, no blood was found on the spot. Thus, there is considerable doubt in respect of the place of incident. Though the prosecution claims that there was rain and therefore blood could not be found, it is difficult to

believe that even stains of blood could not be found on the soil or on the floor inside the Bhairavnath temple or on the road. The absence of blood at all these places leads us to disbelieve the prosecution case.

25. It is apt to reproduce here observations of the Hon'ble Supreme Court in **Bir Singh and others Vs. The State of Uttar Pradesh** reported in 1978 CRI. L.J. 177 wherein it is held thus:-

*“19. Another important argument advanced by counsel for the appellants is that there is absolutely no evidence to show that there was any blood at the place where P.W.2 fell down. It was contended that according to the Doctor's version having regard to the injury, blood must have been oozing out. If the blood was there then the Investigating Officer could not have failed to notice the same. The fact that blood at that place was not indicated in the sketch map clearly shows that P.W.2 did not receive injuries at that place. This is undoubtedly an important aspect which merits serious consideration. The Sessions Judge seems to have commented on the fact that P.W.2 did not accompany the dead body but in our*

*opinion nothing much turns on that because P.W.1 must have been in a hurry to rush to the Police Station and as P.W.2 was seriously injured, he may not have thought it advisable to carry him. But the fact remains that the prosecution has not been able to show that there was any blood at the place where P.W.2 fell down which raises a reasonable inference that P.W.2 may have been assaulted elsewhere and once that is so then the case regarding the assault of the deceased at the place of occurrence also automatically fails because the two incidents are parts of the same transaction.”*

26. The eye witnesses have substantially improved their version in the Court. The material omissions are brought on record in their evidence. They contradict one another on material particulars. Though PW - 5 Vishnu, PW - 6 Somnath and PW - 7 Anil claimed to have carried the deceased Ramesh to Bhairavnath temple their clothes were not stained with blood of deceased and their consistent statement is that no blood was oozing from the injury of the deceased, renders the testimony of these witnesses unworthy of credit. Particularly, in the light of the medical evidence that the victim who suffered abdominal injury where his bowels

came out, if was made to walk for 100 feet, then blood would have oozed out of abdominal injury. It is clear that they are not telling truth before the Court and it is unsafe to rely on their evidence.

The incident has occurred at 8 pm in September during monsoon. As per the spot panch PW-1, there were two electric poles at a distance of 35 feet and 67 feet from the spot. Though the Investigating Officer claims that the lights were on when the spot panchanama was conducted at 6:00 am in the next morning, PW-1 Panch contradicts him by saying that the lights were not on at that time. This probablies the defence version that the light on the poles were not working.

27. So far as the first information report given by PW-2 is concerned, according to the PW-2, he took his brother Ramesh to Sassoon Hospital, Pune and he gave information of the offence to Sassoon Police Chowky which was reduced into the writing and it was signed by him. Thereafter, his complaint (Exh. 15) was recorded. The incident had occurred at 8 pm and PW-2 and others carried the deceased and reached Sassoon Hospital at about 8:30 to 8:45 pm and on arrival at Sassoon Hospital, the deceased

Ramesh was declared dead. The statement of PW-2 was recorded at Sassoon Hospital, Pune at 10:30 pm. However, the statement is not brought on record by the prosecution. This statement was the first version of the occurrence given by PW-2 to Sassoon Police Chowky. However, in cross-examination, PW-2 states that his complaint was recorded at 3.00 a.m., which is after a delay of more than 7 hours. There is no explanation for this delay. Thus, the statement of PW-2 recorded at Sassoon Police Chowky appears to have been suppressed by the prosecution and for that adverse inference needs to be drawn against the prosecution.

28. There is absolutely no evidence, so far as accused No.2 Sonu is concerned, though it is alleged that he caught hold of hand of the deceased from behind and accused No.1 Babu inflicted blows of knife on the abdomen and left hand of the deceased. The medical evidence improbabilizes the same, as the Medical Officer has stated that, if the hands of deceased were caught behind and if the assault is from front side, then the injury on the left hand was not possible.

29. The prosecution claims to have arrested the accused persons on 05/09/1992 and on the same day, their clothes were seized and knife was recovered. It is pertinent to note that the Investigation Officer admitted to have forwarded the articles like blood of sample of deceased etc. to the Forensic Laboratory on 07/09/1992. Though the clothes of the accused and knife were available on that day, for the reasons best known to the Investigating Officer, the same were not forwarded along with the other articles. The clothes of the accused and knife were sent to Forensic Laboratory only on 15/09/1992. This delay could not be explained by the Investigating Officer and this creates serious doubt about the prosecution version that the blood stained clothes and knife were seized from the accused.

In view of the forgoing discussion, the entire prosecution case is shrouded in serious doubts and the conviction recorded by the learned Trial Court is unsustainable.

30. The next argument of appellant No. 1 is that at the time of trial his claim of juvenility is not investigated and on that count,

the trial is vitiated. It is clear from the record that the appellant No. 1, at the time of framing of charge on 08/02/1995, gave his age as 18 years. The incident has taken place on 04/09/1992 and thus, charge was framed almost after 2 ½ years from the date of the incident. Thus, it is clear that on the date of offence, the age of the first appellant was not more than 16 ½ years and he should have been treated as juvenile and his trial ought to have been separated. Even at the time of hearing on the point of sentence, i.e. on 13/02/1996, he has given his age as 19 years. At both these occasions,, the prosecution has not disputed the age of the first appellant. The learned advocate for the appellants was justified in placing reliance on Section 2 (35) of the Juvenile Justice (Care and Protection of Children) Act, 2015. In view of the fact that the first appellant was below 18 years of age when he committed the offence, it was incumbent on the part of the learned trial Court to separate his trial and send him to juvenile Court.

31. In **Gopinath Ghosh** (supra), the accused, for the first time, claimed before the Hon'ble Supreme Court that he was aged below 18 years on the date of occurrence and was entitled to the

benefits of West Bengal Children Act, 1959. The Hon'ble Supreme Court entertained the said plea considering the underlying intendment and beneficial provisions of the socially progressive statute read with Article 39 (f) and held that the entire trial of the accused was without jurisdiction and vitiated. In view of the applicability of West Bengal Children Act, the conviction and sentence of life imprisonment under Section 302 of the IPC awarded to the accused therein was set aside. The Hon'ble Supreme Court further observed that the learned Sessions Judge as well as High Court were not right in substituting their own estimate and the age of the accused must not be less than 24 years.

32. Applying the ratio to the facts of the present case that since the first appellant has given his age 18 years on the date of framing of charge and has given his age 19 years at the time of hearing on the point of sentence, which was not disputed at any point of time by the prosecution, it is obvious that his age was about 16 ½ years, at the time of commission of offence and thus juvenile. We are, therefore, of the considered view that in the light of the ratio in **Gopinath Ghosh** (supra), since the appellant No. 1 was juvenile



on the date of incident, his conviction is therefore vitiated and the same is liable to be set aside.

33. In the light of the aforesaid reasons, we find that the conviction of appellants recorded by the trial Court under Sections 302 and 304 II of the IPC is unsustainable and hence we pass the following order:-

**ORDER**

- i) Criminal Appeal No.45 of 1997 is allowed. The impugned judgment and order of conviction passed by the learned Sessions Judge, Pune in Sessions Case No. 192 of 1993 is hereby quashed and set aside and the appellants/accused are acquitted.
- ii) Bail Bond of the accused, if any, stand cancelled.
- iii) The appellants/accused to furnish bail of Rs.15,000/- each with one surety of like amount, in terms of Section 437-A of the Code of Criminal Procedure.

**(N.B. SURYAWANSHI, J.)**

**(S.S. SHINDE, J.)**