Bombay High Court Ashraf Hussain Shah vs State Of Maharashtra on 26 March, 1996 Equivalent citations: 1996 CriLJ 3147 Author: V Sahai Bench: R Vaidyanatha, V Sahai JUDGMENT Vishnu Sahai, J. 1. The appellant aggrieved by the Judgment and order dated 13th December 1993 passed by the Additional Sessions Judge, Ratnagiri, in Sessions Case No. 91 of 1992, convicting and sentencing him to undergo life imprisonment under section 302 IPC, has come up in appeal before us. 2. Briefly stated the prosecution case is as under : The informant Suraj Paste (P.W. 1), Mahesh Tilekar (P.W. 2) and the deceased Harishchandra Nachankar were friends. On 20th July 1992 at about 7 p.m. they had gone on an autorickshaw to see places like Thiba Palace, Hanuman Temple etc. in Ratnagiri. At about 10.30 p.m. the same day, they reached the rummy club of Adam Memon, situate near the new vegetable market, within the limits of Ratnagiri City Police Station, Ratnagiri. At that time the deceased Harishchandra asked the appellant, who was present in the club, as to where Adam Memon was. On that the appellant hotly replied that he did not know his whereabouts and he could search for him. An exchange of abuses and hot words took place between the appellant and the deceased and the appellant took out a dagger (knife) from the side of his waist and inflicted blows with the same on the head, neck and other parts of the body of the deceased. The informant Suraj Paste and Mahesh Tilekar became panicky and ran away from the place of the incident and went to Ratnagiri City Police Station, where P. I. Sonawane (P.W. 6) was present. 3. The F.I.R., according to the prosecution was recorded at 11.40 p.m. on 20-7-1992 at Ratnagiri City Police Station by P. I. Sonawane P.W. 6 on the dictation of the informant Suraj Paste. 4. The Post-mortem examination of the dead body of Harischandra was conducted by Dr. Avinash Vithal Lokhande (P.W. 4) and Dr. Chougule (not examined) between 7 a.m. to 8.20 a.m. on 21-7-1992. Dr. Avinash Lokhande found on the dead body in all 14 injuries which were of a triple nature - incised wounds, punctured wounds, and abrasions. He found that beneath injuries 1 and 2 severe damage had been caused to the brain and beneath injury No. 3 which was on the neck, major vessels like cartoid artery and internal jugular vein were cut. In his opinion the first three injuries suffered by the deceased, all of which were incised wounds, were sufficient in the ordinary course of nature to cause the death of the deceased. He also opined that the ante-mortem injuries were possible by the dagger, article 12, shown to him during the trial. The cause of death spelt out in the post mortem report was haemorrhagic shock due to right side cut throat injury and head injury. 5. The investigation was conducted by P. I. Prakash Sonawane (P.W. 6), of Ratnagiri City Police Station and some other officers. After registering the case on the basis of the F.I.R., P. I. Sonawane directed P.S.I. Jadhav to go to the Civil Hospital and draw the inquest panchanama and directed P.S.I. Satpute to go to the spot and remain there. On 21-7-1992 P. I. Sonawane recorded statements of 7 witnesses. On that day he included the inquest panchanama prepared by P.S.I. Jadhav and the spot panchanama in the investigation papers. On 22-7-1992 he recorded the statement of Mahesh Tilekar P.W. 2. That very day he arrested the appellant and on his pointing out seized from his house the blood stained clothes and a

knife which was about 12" in length. The recovery was made from the Padvi of the Appellant's house. P. I. Sonawane sent the recovered articles to the Chemical Analyser. After completing the investigation, on 22-9-1992 he submitted the charge-sheet. 6. The case was committed to the Court of Sessions in the usual manner. In the trial court a charge under section 302 IPC. was framed against the appellant to which he pleaded not guilty and claimed to be tried. In the trial court apart from tendering some documentary evidence prosecution examined as many as 6 witnesses. Out of them two namely, Suraj Paste (P.W. 1) and Mahesh Tilekar (P.W. 2) gave ocular account. The remaining witnesses included the autospy surgeon Dr. Avinash Lokhande, P.W. 4, the Investigating Officer P. I. Sonawane P.W. 6 and recovery witness P.W. 3 Naresh Rajaram Shinde. In defence no witness was examined by the appellant. The learned trial judge rejected the evidence of recovery of clothes and weapon, effected at the pointing out of the appellant, but however, believed the ocular account and the other evidence and passed the impugned order. Hence this appeal. 7. We have heard Mr. A. H. H. Ponda for the appellant and Mr. S. R. Borulkar for the State of Maharashtra. We have also perused the depositions of the prosecution witnesses, the material exhibits tendered by the prosecution and the impugned judgment. After giving our thoughtful consideration to the matter we find that the impugned judgment cannot be sustained and the appellant deserves benefit of doubt. 8. First of all we would like to observe that the learned trial judge was perfectly justified in rejecting the evidence of recovery of blood stained clothes and knife at the pointing out of the appellant, primarily on the ground that there was no evidence to indicate that after seizure these articles were sealed. A Division Bench of this Court to which one of us (Vishnu Sahai J) was a party in the case of Deoraj Deju Suvarna v. State of Maharashtra, reported in 1994 Cri LJ 3602, after considering a large number of authorities has held that not only should the prosecution adduce evidence that after seizure the articles were sealed but should also lead link evidence to the effect that till being sent to the Chemical Analyst they were kept throughout in a sealed condition. This is done to eliminate the suspicion that blood might not have been put on the articles subsequent to the recovery and prior to being sent to the Chemical Analyst. 9. The crucial question in this appeal is whether the evidence of the two eye-witnesses viz, P.W. 1 Suraj Paste and P.W. 2 Mahesh Tilekar inspires confidence or not. We may straight away mention that since both these witnesses were friends of the deceased we have to evaluate their evidence with caution. 10. A perusal of the statement of Suraj Paste P.W. 1 shows that on the date of the incident at about 7 p.m. he along with Mahesh Tilekar P.W. 2 and the deceased on a autorickshaw had gone to visit some places. At about 10.30 p.m. they reached the place the incident where first on account of the deceased Harishchandra making enquiries from the appellant about the whereabouts of Adam Memon, an altercation between the two of them took place and thereafter the appellant assaulted the deceased with a dagger. While the deceased was being assaulted Suraj Paste and Mahesh Tilekar, on account of fear, ran away and went to the Ratnagiri City Police Station. In his cross-examination Suraj Paste admitted that both he and Mahesh Tilekar remained at Ratnagiri

City Police Station for about 1 1/2 hours. He further admitted that during this time P. I. Sonawane also was present there and neither P. I. Sonawane asked them about the incident nor they informed P. I. Sonawane about the same nor they lodged their F.I.R. To us this conduct of both these eye-witnesses appears to be extremely unnatural and a clear pointer to the fact, that they did not see the incident. In our judgment had these witnesses seen the incident there was no question of their sitting dumb at the police station for the entire period of 1 1/2 hours. In this connection it would be useful to refer to the decision of the Apex Court Shivaji Dayanu Patil v. State of Maharashtra. In that case the wife of the deceased was a witness who had kept mum for two days. Castigating her conduct as highly unnatural and improbable, the Apex court in paragraph 11 observed as follows : "A wife, who has seen an assailant giving fatal blows with a stick to her husband, would name the assailant to all present and to the police at an earliest opportunity." In this case also the informant and P.W. 2 Mahesh Tilekar were friends of the deceased and their conduct in not reporting to the police the incident, although they were at the police station for 1 1/2 hours, was highly unnatural and improbable. There is nothing in their evidence to justify it. This conduct of theirs by itself, in our view, is sufficient to hold that they did not see the incident. 11. Another circumstance which militates against the claim of both the eye-witnesses of having seen the incident is the delay in their interrogation under section 161 Cr.P.C. Suraj Paste admitted in his cross-examination that after lodging of the F.I.R. he was not straight away interrogated at the Police Station and it transpires from the record that Mahesh Tilekar was interrogated under section 161 Cr.P.C., two days after the incident i.e. on 22-7-1992. No cogent explanation has been offered by the prosecution for this delay in recording their statements under section 161 Cr.P.C. In this context it would be useful to refer to the observations of Their Lordships of the Apex Court in paragraph 15 and 18 of the judgment Ganesh Bhawan Patel v. State of Maharashtra, which are to the following effect : "15 ..... Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced." "18. ..... Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses." 12. Again the admission by Suraj Paste in his cross-examination to the effect that prior to the lodging of the FIR he had a talk with the friends of the deceased, namely, Sajid Bhaiya, Sandeep Madamkar and Gadekar about the incident at the hospital shows that he may not have seen the incident and therefore only after loud thinking and deliberations between the friends of the deceased the F.I.R. was lodged. 13. Again we find that there is contradiction between the statement of Suraj Paste in the trial court and the FIR lodged by him. In the trial court he stated that immediately after the incident he and Mahesh Tilekar went to the police station. However, in the FIR he has men-

tioned that they first went to the hospital. This contradiction coupled with the infirmities mentioned above, militates against the claim of Suraj Paste of having seen the incident and in our view it would not be safe to rely on his evidence. 14. We now take up the statement of P.W. 2 Mahesh Tilekar for consideration. In paragraphs 10 and 11 we have already mentioned that the conduct of this witness of sitting at Police Station for one and half hours and in not lodging the FIR inspite of the fact that a P. I. Sonawane was present at the police station and the fact that he was interrogated under section 161 Cr.P.C. after two days of the incident are circumstances which strongly militate against his claim of having seen the incident. However, we find that these are not the only infirmities in his evidence. He admitted that after the incident he and Suraj Paste went to the house of Aru Surve and on the way fell the police station (the name has not come in evidence). To our mind, had he seen the incident, either he or Suraj Paste would have lodged the FIR at that police station. These infirmities in his evidence have to be appreciated in the backdrop of his admission in cross-examination that a case under Section 302 IPC, is pending against him. That being so, he could not have dared to say no to the dictates of the police to become an eye witness. In our view, having regard to the over all facts it would not be safe to place reliance on his testimony. 15. We feel that in the instant case it was essential for the prosecution to examine Aru Surve. His evidence was essential to the unfolding of the narrative. He was the person to whom Mahesh Tilekar immediately informed about the incident. His evidence would have thrown light on the claim of Mahesh Tilekar of having seen the incident. No reason has been assigned by the prosecution for not producing him. This circumstance also goes against the prosecution. In this connection it would be essential to reproduce the observations of Their Lordships of the Apex Court in the decision The State of U.P. v. Jaggo alias Jadgish. In paragraph 15 their Lordship observed thus : “15. ..... it is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the”unfolding of the narrative" should be called. This statutory principle in criminal trials has been stressed by this Court in the case of Habeeb Mohammad v. The State of Hyderabad, for eliciting the truck." In that case one Ramesh with whom the deceased was talking at the time of the incident had not been examined and the Apex Court held that he should have been examined for his evidence was essential to the unfolding of the narrative. It also held that mere presentation of an application by the prosecution that since Ramesh had been won over he was not examined was not good enough and that he should have been examined in the court and it was for the court to decide as to whether he was won over. 16. We are not prepared to accept the claim of the prosecution that the FIR of the incident was lodged promptly on the date of the incident itself, i.e. at 11.40 p.m. as alleged by the prosecution . This is because we find that the evidence of Suraj Paste, P.W. 1, militates against this claim of the prosecution. The incident is alleged to have taken place at about 10.30 p.m. on 20-7-1992. The evidence of Suraj Paste is that the same day after the incident, he and Mahesh Tilekar P.W. 2 went to Ratnagiri City Police Station where they sat for one and half hours. Thereafter, they went to

Civil Hospital, Ratnagiri where the deceased was admitted and after the death of the deceased, which was at about midnight (in his statement in the trial court he says the time may have been 2 a.m.), they returned to Ratnagiri City Police Station and lodged the FIR. All this clearly shows that the FIR could not have been lodged at 11.40 p.m. on 20-7-1992. Not only this, but we also find that there is material to indicate that the FIR in the instant case was lodged after deliberations. We find that P.W. 1 Suraj Paste in his cross-examination has stated that in the hospital he met Sajid Bhaiya, Sandip Madamkar and one Gadekar who were friends of the deceased and after discussing about the incident with them he lodged the FIR. In our judgment the FIR is a tainted document. We have gave doubts not only about the time of its being lodged but also about the genuineness of the prosecution case as contained in it. Hence it does not have any corroborative value. As a matter of fact this by itself would have been a sufficient ground for overthrowing the prosecution case. We are fortified in our view by the observations of the Apex Court in the decision Marudanal Augusti v. State of Kerala, which are to the following effect : "The High Court seems to have overlooked the fact that the entire fabric of the prosecution case would collapse if the FIR is held to be fabricated or brought into existence long after the occurrence and any number of witnesses could be added without there being anything to check the authenticity of their evidence." 17. Pursuant to the aforesaid discussion, we feel that the prosecution has failed to bring home the guilt of the appellant beyond reasonable doubt and this is a fit case in which he deserves the benefits of doubt. 18. In the result, this appeal is allowed. The judgment and order dated 13-12-1993 passed by the Additional Sessions Judge, Ratnagiri in Sessions Case No. 91/92 convicting and sentencing the appellant to undergo imprisonment for life under section 302 IPC is set aside. The appellant is acquitted on that count. We are informed that he is in jail. He shall be released forthwith unless wanted in some other case. Office to communicate the operative part of this judgment to the trial court and the superintendent of the jail where in the appellant is detained. Before parting with this judgment, we would like to put on record our appreciation for the learned counsel for the parties for the enormous assistance rendered by them. This is all the more commendable because, in the normal course there were no chances of this appeal being taken up and the same was only taken up after the detention board collapsed. That in such a short time, in such a competent manner, this appeal has been argued is a matter which requires appreciation by us. 19. Appeal allowed.