

# **BOMBAY HIGH COURT**

State

Vs.

Pandurang Tatyasaheb Shinde

Criminal Revn. Appln. No. 921 of 1955

(Gajendragadkar and Shah, JJ.)

10.10.1955

## **JUDGMENT**

**Shah, J.**

1. This is an application filed by the State of Bombay praying for an order enhancing the sentence passed upon the accused, Pandurang Tatyasaheb Shinde. The accused was tried before the Additional Sessions Judge, South Satara, at Sangli for an offence under Section 302, Penal Code. The trial was held with the aid of four Assessors. Three of the Assessors were of the opinion that the accused was guilty of the offence charged. The fourth Assessor was not present at the time of the arguments and the learned Judge did not record his opinion. Agreeing with the view of the Assessors who were present, the learned Sessions Judge convicted the accused of the offence charged. Having regard to certain circumstances mentioned in para 24 of the judgment the learned Judge sentenced the accused to transportation for life and further ordered him to pay a fine of Rs. 500/- and in default to suffer rigorous imprisonment for three years. Against the order of conviction and sentence, the accused preferred an appeal to this Court which was summarily dismissed. The State has now applied for enhancement of the sentence passed upon the accused. Even though the appeal filed by the accused has been summarily dismissed no order could be passed to the prejudice of the accused without hearing him on the merits of his conviction. We have accordingly heard the Advocate appearing on behalf of the accused on the merits of his conviction and in our view the conviction of the accused is amply justified.

2. The case for the prosecution is as follows : The deceased Hambirrao Bhausahab Shinde was a paternal cousin of the accused. Hambirrao had two brothers Bajaram and Shivaji. The accused had two brothers Babasaheb and Abasaheb. It appears that was long standing enmity between the family of Hambirrao and the family of the accused. Bhausahab, father of Hambirrao, was murdered by his brother Akram. Akram was then murdered and for his murder Rajaram and Hambirrao were charge-sheeted but it appears that in the trial they were acquitted. A complaint

was filed by the accused against Hambirrao and his two brothers for an offence under Sections 323 and 324, Indian Penal Code with respect to a quarrel which took place about two or three years before the date on which the offence charged in this case was committed. That quarrel arose out of a dispute relating to a piece of land belonging to the accused. In that complaint Hambirrao and his two brothers were convicted by the trial Magistrate and sentenced to pay fine. Against the conviction and sentence passed, an appeal was preferred to the Court of Sessions at Sangli and the order of conviction was con-finned by the Court of Session some time in July 1954. It appears that Hambirrao had submitted an application on 25-12-1953, at the Police Station, Budagaon, in which he stated that he was apprehending danger from the accused and his two brothers and requested that enquiries be made and that he be given protection. Rajaram, the elder brother of Hambirrao had also submitted a similar application on 10-7-1954, stating that he was apprehending danger from the accused and his two brothers. That application was sent to the Police for enquiry and the statement made by Shivaji, brother of Hambirrao, was recorded. For some time before 20-9-1954, the accused and his two brothers used to shadow Hambirrao and his two brothers. About 8 or 10 days before 20-9-1954. Hambirrao ran into the house of one Tarabai Maula Bubhale. He was chased into the house of Tarabai by Abasaheb, brother of the deceased. Hambirrao jumped over the hedge into the adjoining house and made good his escape. The accused came into the house following his brother, Abasaheb. Tarabai enquired of the accused as to why he and his brother had come into her house. It is the case for the prosecution that Abasaheb, Tarabai enquired of the accused as to why he and his brother had come into her house. It is the case for the prosecution that Abasaheb, brother of the accused, stated to Tarabai that no murder would be committed in her house and thereafter Abasaheb left Tarabai's house accompanied by his brother, the accused. Abasaheb was at the time of this incident armed with a sickle. On 20-9-1954, which was a bazar day in the village of Mhaisal, a police havaldar came to the Chavadi to intimate that the Muddemal in Criminal complaint No. 1099/1953 (which presumably was the complaint filed against Hambirrao) should be taken away. Shivaji, Hambirrao and Abasaheb were called to the Chavadi at about 4-30 P. M. and were given intimation to take away the Muddemal. After receiving intimation Shivaji returned home. Hambirrao went to the bazar and chatted with one Bhagwan. Thereafter he was returning to his house with a Ghagar filled with water on his shoulder. When Hambirrao reached the road in front of the house of one Dhulappa Chaugule, the accused approached him from the opposite direction, passed him and suddenly turned round and caused injuries to Hambirrao with a 'Jambiya'. At that time one Kamalabai was on the road leading her she-buffaloes to the village well. She saw Hambirrao being struck with 'Jambiya' by the accused. One Babu son of Dhulappa, came out of his house when he heard a commotion on the road in front of his house saw the accused stabbing Hambirrao, and went back into his house and informed his father Dhulappa, who was resting on the verandah. Dhulappa also came out and saw the accused causing injuries to Hambirrao, who fell on the ground near the village drain. Dhulappa intervened and requested the accused to desist from causing further injuries stating that Hambirrao was nearly dead.

About this time several other persons, Tarabai, Shirpatrao Powar, Khandu Krishna and Babu

Kothiwala, were on the road and saw the accused causing injuries to Hambirrao. The accused then left with the 'Jambiya' in his hand. The clothes of the accused were blood-stained. The accused hid the 'Jambiya' in the fold of his 'dhoti' and he proceeded towards his house. He was then seen by one Yesabai Krishna. Babu Kothiwala and Dhulappa Chaugule went to the house of Shivaji and told him what had happened. Shivaji went to the spot where Hambirrao was lying dead, and he then went to the Police Patil and gave information about the commission of the offence of murder of Hambirrao by the accused. The complaint filed by Shivaji was recorded. It appears that in that complaint Shivaji was described as an eye-witness to the commission of the offence by the accused and his two brothers. The Police Patil then drafted the first information which was despatched to the Budgaon Police Station. In the meanwhile it appears that the accused went to a field across a streamlet known as Gavandar Odha and met one Babu Kalavat. He smoked a bidi there and told Babu Kalavat that he the accused had killed Hambirrao. Thereafter the accused went away towards his field. The Police Sub-Inspector having received information, about the commission of the offence from the report of the Police Patil registered an offence under Section 302 read with Section 34, Indian Penal Code against the accused and his two brothers and arrived at Mhaisal at 4-0 A.M. on 21-9-1954. He immediately commenced investigation and recorded the statements of a large number of witnesses. The dead body of Hambirrao was sent to the dispensary at Niraj for postmortem examination. 'Panchnamas' were made of the scene of offence and enquiry was started against the accused. It appears that the accused was not found at his place. Constables were sent to villages nearby tout the accused could not be traced. A warrant under Section 75, Criminal Procedure Code was issued by the First Class Magistrate, Sangli, against the accused and on 29-12-1954, the house of Madhavrao Bhausahab Desai was raided by the Sub-Inspector and the accused was arrested at 2-0 A.M. on that day. On enquiry the accused showed his willingness to point out the place where, he stated, he had thrown away the knife and on 8-1-1955 in the presence of Panchas the accused dug up a place near the streamlet Gavandar Odha and he took out a blood stained knife. A 'panchanama' was made and the earth was found to be stained with blood. Mud which was found encrusting the knife was also taken possession of. The blood-stained knife and the mud were sent to the Chemical Analyser for his report. The Chemical Analyser reported that the mud was stained with human blood but on the knife, though found to be stained with blood, the elements were so disintegrated that its origin could not be determined. After the certificate of the Chemical Analyser was received by the Sub-Inspector, he submitted a charge-sheet against the accused in the Court of the Judicial Magistrate F.C. Sangli for an offence under Section 302, Penal Code. It may be mentioned that on investigation it was found that there was no substance in the charge made against the two brothers of the accused and, therefore, proceedings against them were dropped.

3. The Judicial Magistrate committed the case against the accused to the Court of Session at Sangli. The case was tried against the accused With the aid of Assessors by the Learned Additional Sessions Judge with the result already stated by me. In support of the prosecution case the prosecution examined 5 persons who claimed to be eyewitnesses. They were Kamalabai (ex.

4) Dhulappa Dosappa Chaugule (Ex. 9), Babu Dhulappa Chougule (Ex. 10), Tarabai (Ex. 11) and Khandu Krishna Pawar (Ex. 14). Kamalabai was the main prosecution witness. (After narrating the evidence of these witnesses His Lordship proceeded further).

4. Now the testimony of these witnesses does not appear to have been substantially shaken in cross examination on the material part of the prosecution case. It is true that Kamalabai had not stated before the police that she had shouted out on seeing Hambirrao being injured. But in view of the condition of Kamalabai it appears that her testimony was made as concise as possible. As many as four witnesses deposed to the fact that they heard Kamalabai shouting and that they came out of their house. The normal reaction of Kamalabai would be that on hearing the frightful incident in her presence she would shout out.

We are, therefore, prepared to believe the testimony of the witnesses Dulappa, Babu, Tarabai and Yesabai that they heard Kamalabai shouting and that they came out of their respective houses. Three of these witnesses and the witness Khandu saw the actual assault on Hambirrao. Babu's testimony was sought to be challenged on the ground that even though he has stated that he had seen a woman on the road he had not given the name of Kamalabai. Babu appears to have told the Police in his statement which was recorded on 21-9-1954, that he heard the shouts of a woman and he saw the woman on the road. It is true that he did not give the name of that woman. Mhaisal appears to be a small village and it is not unlikely Babu knew the name of Kamalabai, but the mere fact that he did not give the name of Kamalabai before the police as the person whom. he saw on the road when he saw the accused causing injuries to Hambirrao is not a circumstance which affects the testimony of this witness. It is also true that though Dhulappa had stated in his evidence before the Court that he went and caught hold of the hand of the accused, no such statement was made by him before the committing Magistrate or before the Police. It appears that the story of the witness Dhulappa that he went to the-accused and caught hold of his hand and attempted to persuade the accused to desist from causing any injuries to Hambirrao is an improvement upon his story and to the extent to which the improvement had been made the story may not be reliable. We are however, not prepared to hold that the entire story of Dhulappa is a concoction. In any event, the story of the prosecution is not sought to be supported only on the testimony of Dhulappa. In so far as Dhulappa says that he saw the accused causing injuries to Hambirrao he appears to be corroborated by Kamalabai and two other witnesses.

5. Witness Tarabai Shripatrao, it appears, was asked whether she had stated before the police that she had seen the accused giving 4 or 5 blows on the chest of Hambirrao. She stated that she had so stated but on a reference to the Police statement it appears that no such statement was made. It appears, however, that a very involved question was asked to this witness in cross-examination. What the precise statement of the witness before the police regarding the injuries caused by the accused to the deceased is, however, not clear from the record. Even if the statement made by Tarabai before the police creates some doubt as to her testimony, the remaining evidence in our view is sufficient to justify the conviction of the accused. Against the evidence of the witness Khandu it was pointed out that before the police and the committing Magistrate's Court he had

not stated that he had seen Tarabai on the road. He also does not appear to have stated before the police that he had seen two or three blows given by the accused to the right side chest of the deceased Hambirrao. It also appears to have been pointed out that the witness did not make any attempt to come near the dead body of Hambirrao which was lying on the road. The witness has frankly stated that he got frightened and he went to his house. The learned Judge considered the testimony of the witness. Notwithstanding the infirmities which were pointed out, he was prepared to accept the testimony of Khandu and we see no reason for disagreeing with the view of the learned trial Judge. In our view the criticism directed against this witness does not at all detract from the value which attaches to his testimony.

6. Against Yesabai nothing appears to have been suggested either in the cross-examination or in the arguments before the learned Sessions Judge. She appears to be an old woman about 60 years of age and she has not attempted to improve upon her story. Immediately after the commission of the offence she has seen the accused going towards his house with blood-stains on his person and his right hand in the folds of his dhoti.

7. The oral evidence of the witnesses is corroborated by several circumstances. There is the evidence relating to the extra-judicial confession made by the accused in the presence of Babu Eslavat. The witness Babu has stated that in the evening on the day on which Hambirrao was murdered the accused had come into his field when he was working and at that time he had conversation with the accused and the accused told him that he had killed Hambirrao. The story of the witness was challenged on the ground of improbability and on no other ground. It does not appear that the witness is either interested in Hambirrao or his brothers or is inimical to the accused. The sole ground of improbability does not appeal to us as a ground for rejecting the testimony of this witness. It appears that before the learned Sessions Judge a suggestion was sought to be made that the words used by the accused were not correctly reproduced by the witness in the witness box. It appears that in the police statement the witness had used two sentences whereas in the Court of Session he used only one sentence but the purport of what the witness stated appears to be the same, viz. that the accused had made a confession before the witness that he the accused had killed Hambirrao. The learned Judge appears to have been impressed by the testimony of this witness and he stated that he was prepared to believe this testimony notwithstanding the slight variation in the version given before the police and before the Court. There is again the circumstance that after 20-9-1954, in spite of the efforts made by the police to trace him the accused was not arrested. It was only after a warrant was issued that the accused was arrested in the house of Madhavrao Bhausahab Desai at about 2-0 A.M. on 26-12-1954. From the evidence of the Sub-Inspector it appears that enquiry was made in several villages for the accused but he could not be traced. There is also the evidence, that on 8-1-1955, the accused pointed out a knife from the Gavandar Odha. The mud which was encrusted on the knife was found on examination to contain traces of human blood. It is true that the blood which was found on the knife itself was such that the ingredients could not be identified as human blood. It is also in the evidence of Yesabai and other witnesses I have referred to that at the time

when the accused left the scene of offence his clothes were blood-stained. From all this evidence it appears that there is clear and cogent evidence which establishes the guilt of the accused beyond reasonable doubt. The assessors and the Judge in the Court below have accepted the evidence and no ground has been made out before us which would justify us in disagreeing with the view taken by the Court below.

8. Then remains the question of sentence. As we have pointed out earlier the learned Sessions Judge sentenced the accused to suffer transportation for life and ordered him to pay a fine of Rs. 500. It is difficult to appreciate why the learned Sessions Judge in a case where he sentenced the accused for an offence of murder should have imposed a sentence of fine. The offence was not one which was committed for pecuniary gain. The sentence of fine for an offence of murder appears to be wholly inapposite. That, however, is not the only infirmity in the sentence passed by the learned Sessions Judge. When an accused person is convicted of an offence of murder the normal sentence to be imposed is the sentence of death. If the Sessions Court does not impose the sentence of death, reasons must be assigned for not imposing that sentence. It is true that there is a certain amount of discretion vested in the Court of first instance to impose or not to impose the death sentence. But the discretion must be judicially exercised. If there are circumstances which in the view of the Court of Session justify it in not imposing the death sentence, normally this Court would not interfere with the exercise of that discretion. Even if the grounds given by the Court of first instance for imposition of the lesser sentence may not appear satisfactory and even if this Court may take a different view, this Court does not ordinarily interfere with the discretion exercised by the Court of first instance. But in the present case, in our view, there appears to be no exercise whatever of the discretion vested in the trial Court. The learned Sessions Judge has himself pointed out that the offence was committed in broad daylight and it was a calculated cold-blooded and pre-meditated murder. That characterisation of the offence by the learned Sessions Judge appears to be amply supported on the evidence. From the evidence of Tarabai Maula Bubale it appears that an attempt was made on the life of Hambirrao about 8 or 10 days before 20-9-1954, by the accused and his brother, Hambirrao, however, luckily escaped on that day. On account of enmity between the two families of the accused and the deceased it appears that the accused was seeking an opportunity to kill Hambirrao. On the day on which offence was constituted nothing appears to have transpired which might conceivably have given any provocation to the accused which incited him to commit this offence. It, therefore, appears to have been a cold-blooded murder carried out with premeditation. The deceased Hambirrao was going from the well towards his house with a Ghagar on his shoulder. At that time suddenly the accused came from the opposite direction, passed him, took out a jambiya and caused injuries to Hambirrao as a result of which he died on the spot. A large number of injuries appears to have been caused on the person of Hambirrao. There were according to the medical evidence as many as sixteen injuries on the person of Hambirrao and all those injuries appear to have been caused by a sharp pointed instrument. The description given by the medical officer and in the post-mortem notes shows that a large number of injuries were very deep some of which pierced the lungs of the deceased. It, therefore, shows that the accused

was not satisfied merely by causing one or two injuries but mercilessly stabbed Hambirrao so as to cause his death on the spot. Normally an offence of this character where the only cause for committing that offence may be previous enmity would merit the death sentence. The learned Sessions Judge, had, however, thought that there were certain circumstances which justified him in not imposing the death sentence. In para 24 of his judgment he has pointed out that each side, i.e. the side of the complainant and the accused, was trying to wreak vengeance upon the other and that the attempt made upon the life Hambirrao about a week prior to 20-9-1954 the day on which Hambirrao was murdered, and that Hambirrao escaped luckily, on that occasion. He then pointed out that Hambirrao and his two brothers were convicted for an offence under Sections 323 and 324, Indian Penal Code and at that time sickles were used and in the view of the learned Sessions Judge the accused and his two brothers escaped death. Then he pointed out that there had been murders in the family of the deceased and that 'if luck had been with Hambirrao and his two brothers they might have caused the death of the accused and his two brothers'. He also observed that the accused and his two brothers were in danger of their lives and that was not a "happy circumstance" in a village like Mhaisal. The learned Judge then stated that he deprecated a calculated and premeditated murder on a bazar day. Then he asked himself somewhat rhetorically the question whether the accused must be hanged because he was successful in wreaking vengeance, and in the view of the learned Judge' to hang the accused would, under the circumstances, not be quite just'. The accused and his two brothers, in the view of the learned Judge, were in danger of their lives from Hambirrao and, therefore, he thought that it was an extenuating circumstance Which should be justly be taken into consideration and, therefore, the Court would be justified in imposing a lesser sentence.

9. With respect to the learned Sessions Judge, we are unable to follow the line of reasoning adopted by him. We must also observe that there is no evidence on the record of the case which would justify us in accepting the view propounded by the learned Sessions Judge that the accused and his two brothers were in danger of their lives. It is true that about two or three years before the commission of this offence, Hambirrao and his two brothers were charged with having committed offences under Section 323 and Section 324, Indian Penal Code and they were convicted in the month of May 1954 of the offence. No evidence is pointed out to us, however, to support the view taken by the learned Sessions Judge that in the commission of the offence any sickles were used. But assuming that the learned Sessions Judge is right in holding that in the commission of that offence sickles were used, having regard to the fact that the trial Magistrate imposed a mere sentence of fine upon Hambirrao and his two brothers was confirmed in the Court of Session. There is no evidence on the record that a lenient sentence notwithstanding the gravity of the offence was imposed. That is also a ground for holding that the offence committed by Hambirrao and his brothers was a minor offence even it sickles were used.

The assault committed upon the accused and his two brothers two or three years before the date on which the present offence was committed cannot justify the view that the accused and his brothers were in danger of their lives. No other evidence has been pointed out by Mr. Sawant, who appears on behalf of the accused, which would justify us in accepting the view expressed by the learned Sessions Judge that the accused and his brothers at the relevant time were in danger

of their lives. We ourselves have gone through the record with the assistance of the learned Assistant Additional Government pleader and the learned Advocate for the accused but we have not been able to find any evidence which would justify the view taken by the learned Sessions Judge. That an attempt was made upon the life of Hambirrao a week before the date on which the offence was committed can definitely not be an extenuating circumstance in favour of the accused. There being, therefore, no evidence about any provocation about the time when the offence was committed, we may consider the other extenuating circumstances suggested by the learned Sessions Judge and that is that the accused was justified in wreaking vengeance and that, according to the learned Sessions Judge, should be a ground for not passing the death sentence. We cannot countenance the view expressed by the learned Sessions Judge. If with a view to take the law into his own hands and to wreak vengeance upon the deceased Hambirrao, the accused deliberately planned the murder of Hambirrao and carried into execution that plan in the manner disclosed by the prosecution evidence, we should have thought that the proper sentence to be imposed in such cases should be the death sentence and not the lesser sentence of transportation for life. If the accused chose, as the learned Sessions Judge appears to have held, to take the law into his own hands with a view to wreak vengeance for some supposed grievance or wrong we think the circumstances in which the offence was committed were such that death sentence was the only and proper sentence which should be inflicted upon the perpetrator of the crime.

We have carefully and anxiously considered all the evidence and we have given the fullest consideration to all the circumstances mentioned by the learned Sessions Judge. We have also looked at the record to ascertain whether there are any other circumstances which are not mentioned by the learned Sessions Judge in the course of his judgment but we are unable to hold that this is a case in which the lesser sentence can be imposed upon the accused. In our view there has been no real exercise of the discretion vested in it by the Court below. We therefore, set aside the sentence of fine passed against the accused and the sentence in default and we enhance the sentence of transportation for life imposed by the learned Sessions Judge upon the accused to sentence of death. We, therefore, direct that the accused be hanged by the neck till he is dead.

Order accordingly.