

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 87 OF 2016

Kisan Bhamtya Pawara
Age: 32 years, Occu: Agri,
R/o: Sabalapanicha Andharpada,
Tq. Shahada, Dist. Aurangabad. ... Appellant

Versus

The State of Maharashtra
Through Police Station Officer,
Police Station, Mhasawad, Tq. Shahada,
District Nandurbar. ... Respondent

.....
Mr. Krishna Pratap Rodge, Advocate for the Appellant (appointed)
Mr. A. M. Phule, APP for the Respondent-State.
.....

**CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

**RESERVED ON : 10 JULY 2023
PRONOUNCED ON : 27 JULY 2023**

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. By way of instant appeal, by invoking Section 374 of the Code of Criminal Procedure [Cr.P.C.], the appellant is taking exception to the judgment and order of conviction passed by learned Additional Sessions Judge, Shahada in Sessions Case No. 55 of 2014 which was passed on 17.10.2015 thereby holding accused guilty for the offence punishable under Sections 302, 324 and 323 of the Indian Penal Code [IPC] and sentencing him to suffer rigorous imprisonment for life.

CASE OF PROSECUTION IN TRIAL

2. PW8 Rehama had an affair with Lakdya Ohlya Pawara, who is nephew of accused. Because of said affair, Rehama married Lakdya as per customs and rituals prevailing in their community. Husband and father-in-law of informant Bonibai [PW2] i.e. mother of Rehama had opposed said marriage. Resultantly, Rehama was not sent to cohabit with Lakdya. Accused was insisting for sending Rehama back to cohabit with his nephew Lakdya and according to prosecution, at times he used to issue threats. On 07.06.2014, PW2 Bonibai was present in the house along with her father-in-law Arshya. Accused Kisan visited the house of informant. He was holding *dengara* (wooden stick). Initially he started abusing and questioning Arshya as to why Rehama was not sent to cohabit. Deceased Arshya allegedly told him that said marriage between Rehama and Lakdya is not acceptable. Getting annoyed by the same, appellant Kisan assaulted Arshya on head with *dengara*, as a result of which, he collapsed. He had sustained bleeding injury. He had died on the spot and therefore occurrence was reported to Mhasawad Police Station, on the strength of which crime no. 34 of 2014 was registered. After investigation, police filed challan. On committal of case, learned Additional Sessions Judge, Shahada conducted trial. After appreciating oral and

documentary evidence on behalf of prosecution, learned trial Judge accepted the case of prosecution and held that charges are proved and thereby convicted and sentenced appellant-accused for above offences.

Precisely such judgment and order of conviction is now sought to be assailed before this Court on various grounds mentioned in the appeal memo.

SUBMISSIONS

On behalf of the appellant:

3. According to learned Advocate for the appellant, there is apparently false implication. It is submitted that there is no direct eye witness and evidence of PW2 Bonibai [informant] is full of contradictions, omissions, material improvements. Learned Advocate submitted that there are allegations of assault by means of weapon stick [*dengara*] and therefore, by no means said article can be said to be deadly weapon. He would submit that according to the informant, deceased had taken meals at around 8.30 p.m., whereas, autopsy doctor has found that there was semi digested food. Taking into account alleged time of occurrence and above said evidence of autopsy doctor, it is impossible to accept the version of PW2 Bonibai

about occurrence being taken place **in the night of 07.06.2014 at 8.30 p.m. to 9.00 p.m.** He invited our attention to para 3 of the examination-in-chief of PW2 Bonibai wherein she has deposed about seeing accused in the light of torch, and would submit that this fact was not stated by her in the FIR. He also invited our attention to the answer given by PW2 Bonibai in para 7 of her cross wherein she has admitted that accused had no relations with Lakdya and Ohlya and thus further submitted that there is no motive behind alleged occurrence.

4. It is further pointed out that in the FIR, it is stated that brother-in-law of informant Bonibai, namely Rustam, was out for labour work, however, he is claimed to be a witness to the inquest panchanama. Consequently, learned Advocate questions that when he was out for labour work, how is he shown as witness to inquest panchanama. Therefore, learned Advocate submitted that entire story is fabricated.

5. Taking us through the evidence of PW3 Livka, it is submitted that even his testimony is doubtful because according to him, deceased was hit on forehead but there was no injury noticed by autopsy doctor at such site. So, it is submitted that ocular account is

contrary to medical evidence. That, different witnesses are giving different locations of site of assault. Learned Advocate pointed out that if at all there was assault on head, then there ought to have been blood stains on the shirt of deceased, but no blood has been detected in spite of analysis. Resultantly, it is submitted that, evidence of prosecution is not reliable and trustworthy and not inspiring confidence. It is further pointed out that PW2 informant Bonibai has deposed in her substantive evidence about presence of her children, who were 10 to 15 years of age at the time of incident, however, none of her children was examined by prosecution. While concluding, he submitted that prosecution has only relied on interested witnesses and no independent witnesses lending corroboration is examined by prosecution. According to him, with such quality of evidence learned trial Judge ought not to have recorded guilt and hence he prays for allowing the appeal.

On behalf of State:

6. Canvassing in favour of the judgment under challenge, learned APP would point out that there is direct eye witness account. Motive is also established through informant. Appellant had been to the house of deceased getting armed with heavy wooden log. After abusing and quarreling, he had hit deceased on the vital part like

head. Death has taken place instantaneously. FIR is lodged promptly. That, death is shown to be homicidal one. In view of reliable and direct eye witness, prosecution has succeeded in establishing the charges and learned trial Judge has committed no error whatsoever in holding the case of prosecution as proved. Consequently, he prays for dismissal of the appeal.

7. Being the first appellant court and the last fact finding court, we have carefully re-appreciated, re-analyzed and re-examined the entire evidence. It is emerging that in support of its case, prosecution has examined as many as 15 witnesses who can be categorized as under:

Translator :

PW1 Kirma Kalshya Valvi
who translated the version of witnesses from tribe language to Marathi.

Eye Witnesses :

PW2 Bonibai Nanjya Pawara [informant],
daughter-in-law of deceased

PW3 Livka Arshya Pawara,
son of deceased

PW4 Gavlya Janglya Pawara
acquaintance of both, accused and deceased.

PW5 Saysing Narya Pawara,
nephew of deceased.

Pancha Witnesses :

- PW6** Sardar Vaharya Chaudhary and
PW7 Birsing Virsing Pawar
 Pancha to memorandum and recovery
- PW9** Bhaidas Jahangir Pawara
 Pancha to inquest panchanama

Medical Experts :

- PW10** Dr. Suresh Palusing Thakare
 Autopsy doctor
- PW11** Dr. Vijay Badhu Patil
 Medically examined and treated injured witness PW3 Livka
- PW12** Dr. Govind Sajan Shelte
 Certified about fitness of PW3 Livka to give statement

Police Officials :

- PW13** Ganpat Sukram Bhil, Police Head Constable
 Recorded report lodged by PW2 Bonibai.
- PW14** Amrut Namdev Patil, P.S.I.
 Second Investigating Officer
- PW15** Hiralal Bhika Chaudhary, P.S.I.
 First Investigating Officer

Other witness :

- PW8** Rehama Nanjya Pawara
 Grand-daughter of deceased and daughter of informant.

8. Before ascertaining whether case of prosecution has been proved from the testimony of so called direct eye witnesses, in view of

charge under Section 302, it is first to be seen whether death of Arshya is homicidal or not. For finding answer to that extent, we need to visit evidence of autopsy doctor PW10 Dr. Thakare.

9. At Exhibit 31 the medico legal expert **PW10** Dr. Thakare stated about receiving dead body of Arshya Tejala Pawara on 08.06.2014. After going through the inquest, he claims to have undertaken postmortem over the dead body of a 65 years old man. After narrating the condition of the dead body, he stated that on external examination he came across CLW over left parieto temporal region of scalp with bleeding and gave its size as 3 X 1 X deep to over skull with fracture on palpatory examination. He described the injury to be grievous one and according to him, age of the injury was within 24 hours. He gave cause of injury by hard and blunt object. According to him, the injury was *ante mortem* in nature. According to him, on internal examination of head, he came across CLW over left parieto temporal region of scalp with bleeding. In his opinion, probable cause of death was due to fatal brain trauma. He identified the postmortem report authored by him at Exhibit 32 and he further stated that Article-B *dengara* (wooden stick) is capable of causing injury noticed by him and it could result into death.

In cross, **PW10** Dr. Thakare, autopsy doctor is questioned about nature of clothes over deceased and about time taken for rigar mortis to appear over dead body. He has admitted that after taking meals, the same passes in the intestine after four hours and he has noticed yellowish digested secretion present in stomach. He answered that after 4 to 24 hours, death might have been caused. He also admitted that injury noticed by him as mentioned in column no.17 is possible if a person falls in a valley on a hard and blunt substance.

10. On carefully analyzing the above medico legal expert's evidence, it is seen that doctor has noticed CLW with bleeding injury ad-measuring 3 X 1 X deep over left parieto temoral region of scalp. Doctor has also noticed fracture and according to him, said injury is possible by Article *dengara* (wooden stick) which was confronted to him in the witness box. The impact of the injury has been stated by him i.e. on conducting internal examination. He has spoken about brain haemorrhage with heamatoma over left cerebral hemisphere. He is very categorical about death due to said injury. Though there is cross, there is mere suggestion that said injury is possible on account of fall in a valley. However, there is nothing on record nor there is anything to show that deceased fell in a valley. Bleeding injury is attributed by doctor to vital organ like head. Deceased was said to be

around 65 years of age. Therefore, there is no reason to doubt the medico legal expert's evidence. We are convinced that here, death of Arshya is only because of head injury as a result of assault with *dengara* which is a heavy wooden log.

11. Now, having accepted that death of Aashra was homicidal one, it is to be further seen whether, as alleged by prosecution, appellant herein is the author of the said fatal head injury. As stated above, prosecution has ascertained about availability of eye witness account.

12. **PW2** Bonibai [informant] in her evidence at Exhibit 11, after stating about annoyance of appellant, who is uncle of Lakdya, for not sending PW8 Rehama to cohabit with Lakdya, stated that marriage between Rehama and Lakdya was not acceptable and therefore Rehama was not allowed to go to cohabit with Lakdya. According to this witness, around 9.00 p.m. accused assaulted her father-in-law by means of *dengara* (wooden stick) on head and he died on the spot. At that time she herself and her deceased father-in-law and her children were present. This witness stated that hearing her shouts, her brother-in-law Livka [PW3] rushed to the spot and asked appellant why he assaulted Arshya. At that time, appellant assaulted Livka with stick on his chest and back saying that "*tulahi pahije*". Livka became

unconscious. Appellant also chased this witness but she managed to run away. This witness claims that houses in their locality are situated at long distance and therefore, in spite of her raising shouts, nobody came there and therefore, next day morning she lodged report.

Para 4 of her cross is devoted to the location of spot and its surroundings. In para 5, by giving suggestions, answers are brought to the extent of nature of marriage ceremony in Adiwasi community. Thereafter she is asked at what time the incident took place and at what time they all took meals and slept and what were the ages of her children. She has answered that on the next day morning, villagers had gathered and there was discussion amongst them on the point of lodging report. Then she is questioned about marriage between Rehama and Lakdya. She is asked whether she had informed police about assault on Livka and he becoming unconscious and at what site she was assaulted. She admitted that she had informed police about seeing the occurrence in the light of torch. The suggestion is put that article stick i.e. *dengara* is readily available in the forest. Rest all suggestions are denied.

13. **PW3** Livka stated that his father Arshya was residing with his younger brother Nanjya and he and his brother were residing separately. He also stated that Rehama was married with Lakdya s/o Ohlya and accused is cousin brother of Ohlya. That, after marriage, Rehama did not go to the house of her husband for cohabitation as according to her, her marriage was performed forcibly and that she did not wish to go for cohabitation. Witness stated that only because Rehama did not go for cohabitation, assault was made. According to him, the incident took place on the Saturday night. At that time, he was in his own house and he heard shouts “*mariv mariv*” which in Marathi means “मारले मारले”. Then he stated that, so he rushed to the house of his father and he saw his father floundering on the ground due to blow on his forehead. This witness stated that he questioned accused for assaulting his father and so accused assaulted him also with *dengara* (wooden stick) on stomach and back and so he fell down and became unconscious. He stated that at the time of incident, his father and Bonibai were present. He identified Atricle-B *dengara* and the clothes of accused as well as deceased.

In cross, he is asked whether he is able to read, write, speak and understand Marathi. He admitted that his father was suffering

from asthma and had walking problem. He denied that police had not made inquiry with him about the incident. Omissions are brought in para 4 of his cross about informing police about Rehama being taken forcibly even when she was not desirous, about Rehama not going for cohabitation and hence assault was made, about assault on forehead of deceased, deceased floundering on ground and he hearing shouts “*mariv mariv*” (मारले मारले). The rest is all denial.

14. **PW4** Gavlya stated that he knew Rehama, who is daughter of Bonibai and Rehama was married with Lakdya. That, after marriage, Rehama was residing with her father. Regarding the incident, he stated that on 07.06.2014 at about 8.30 p.m. while he was in his house, he heard shouts of Bonibai and so he went there. According to him, Bonibai informed about Kisan (appellant) assaulting. He saw Arshya had sustained injury on his head. He saw that due to assault by means of *dengara*, one piece of *dengara* was broken off and lying on the ground. Accused had assaulted deceased by means of *dengara* and thereafter accused assaulted Livka on chest and so Livka fell down. He stated that Livka was facing in the opposite direction and had not seen this witness. He stated that Arshya died on the spot due to assault and thereafter, accused went away. This witness claims that he took Livka to Government Hospital at Mhasawad. Then he again

stated that assault was made on Livka and Arshya for the reason of Rehama. He also identified the *dengara* (wooden stick).

Material cross on the point of occurrence is in para 5 of the cross and omissions are brought about informing police regarding Bonibai raising shouts and therefore he going to the spot and about Bonibai informing about assault by Kisan, about assault by use of *dengara* and its one piece falling on the ground, about Livka facing opposite direction and therefore this witness not visible to him, about he taking Livka to Mhasawad hospital. In further cross, he has stated that his house is situated at three hours walking distance from Shahada-Toranmal road. He denied that house of informant is about two to three kms. from his house. He denied he had accompanied Livka on previous dates in the case. He admitted that there was discussion with Livka about deposition and he is accordingly deposing. He admitted that he saw the article *dengara* for the first time and that such sticks [*dengara*] are lying in the forest. He flatly denied that he never witnessed the incident and that he is falsely deposing.

15. Another witness is **PW5** Saising. His evidence at Exhibit 18 shows that after marriage of Rehama, she was residing with her

father and because Rehama was forcibly married, she was not ready to go for cohabitation. He stated that accused and Ohlya were threatening for not sending Rehama for cohabitation. Regarding occurrence, he has stated that he was in the house and he heard shouts of Bonibai and so he went to the spot along with Gavlya. He also marked presence of appellant Kisan and according to him, Arshya was lying there. They were standing behind Livka. Kisan was opposite to them. This witness stated that Livka asked accused as to why accused assaulted his father and at that time, according to this witness, assault was made by means of *dengara* on the chest of Livka, as a result of which he fell down and accused again gave blow of *dengara* on his back. Thereafter, accused ran away from the spot. At that time, Bonibai came from backside of the house. Arshya had sustained injury on his forehead and he had died on the spot. Therefore, this witness went to *Karbhari* and informed him about the incident.

In cross, questions are put about relations, about Rehama eloping with Lakdya, meeting of panchas being held and about performance of marriage. This witness has answered and admitted that after narrating the incident to Karbhari, he came to the house of Bonibai and at that time villagers, who had received the message, had

gathered there. He denied about Karbhari informing police. Omissions are brought in para 5 about Rehama being taken away forcibly, accused issuing threats, Nanjya taking money but not sending Rehama for cohabitation, about Bonibai shouting “मारले मारले” and about he to be at the back of Livka and accused to be opposite to him, about Livka asking accused as to why his father was assaulted and thereafter, accused assaulting Livka by *dengara*.

16. **PW6** Sardar Choudhary and **PW7** Birsing are the panchas to memorandum and discovery under Section 27 of the Evidence Act. They have not supported the prosecution.

17. **PW8** Rehama, who is a minor, has stated that one and half months prior to the incident, she was married with Lakdya and she went to cohabit with him. According to her, the marriage was against her wish and also against the wish of her family members. Lakdya had taken her away forcibly. She had come back to her parents' house and she was residing with them and she did not go for cohabitation as a result of which, accused used to issue threats to kill for not going to cohabit with Lakdya. According to her, she had been for labour work. She learnt from her mother about accused giving threats and she learnt about the incident from one Ramesh Hutarya.

Omissions are brought in para 4 of her cross about informing police regarding marriage being performed against her wish, family members of Lakdya abusing and that Lakdya, Pangibai, Pohalya, Rikamibai and Bhamtya coming to take her.

Therefore, her testimony is hearsay evidence.

18. On carefully analyzing the above testimonies, it is emerging that it has been brought consistently from above witnesses that marriage of Lakdya with Rehama was against her wish and therefore, she had left his company and had come to reside with her parents. PW8 Rehama and her mother Bonibai are consistent about threats being given by accused. Therefore, in our opinion, there is motive behind the occurrence. Evidence of PW2 Bonibai, PW3 Livka, PW4 Gavlya and PW5 Saysing shows that Arshya had suffered head injury. It is true that witnesses are stating about assault being made on forehead, whereas autopsy doctor noticed injury on left parieto temporal region of scalp. However, it is to be noted that the alleged incident has taken place in the night. Taking into consideration such minor contradictions about exact site of assault, entire story about coming armed with dengara and hitting deceased Arshya on head

would not be rendered doubtful. PW2 Bonibai, PW3 Livka and PW4 Gavlya are marking presence of each other on the spot of assault. PW3 Livka is an injured witness. He has questioned accused for assaulting his father, upon which he was assaulted. Therefore, evidence of these witnesses cannot be discarded. More particularly, nothing damaging is brought in their cross-examination. In our opinion, the manner of suggestions put clearly shows that there is no serious dispute about accused going armed with *dengara* (wooden stick), questioning, threatening and abusing Arshya and thereafter mounting assault on the head. No doubt there are omissions, but they are not material or on the point of actual occurrence and assault. Therefore, in our considered opinion, the so called direct evidence of prosecution inspires confidence. Evidence of PW2 informant Bonibai and PW3 Livka is itself sufficient to accept the case of prosecution. We have already held that prosecution had established death of Arshya to be homicidal one.

19. We have gone through the judgment under challenge. In our opinion, learned trial Judge has correctly appreciated the so called ocular account of prosecution. So called omissions and contradictions are rightly held to be insignificant and not material. Findings have been supported by assigning sound reasons. No perversity is brought

to our notice so as to cause interference. Hence, finding no merit in the appeal, we proceed to pass the following order:

ORDER

- I. The appeal is hereby rejected.
- II. We quantify the fees of the appointed Advocate at Rs.10,000/- to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[ABHAY S. WAGHWASE, J.]

[SMT. VIBHA KANKANWADI, J.]

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