

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 151 OF 2015

WITH

CRIMINAL APPLICATION NO. 839 OF 2015

Dnyaneshwar Tauba Gonde
Age : 52 years, Occ : Agriculture,
R/o Neemkheda, Taluka Phulambri,
District Aurangabad.

..APPELLANT

-VERSUS-

The State of Maharashtra

..RESPONDENT

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Advocate for Appellant : Mr. S.S. Jadhavar
APP for Respondent/State : Mr. V.D. Godbharale

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**CORAM : S.S. SHINDE &
A.I.S. CHEEMA, JJ.**

RESERVED ON : July 22, 2015

PRONOUNCED ON : July 30, 2015

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JUDGMENT (PER S.S. SHINDE,J):-

1. This appeal has been filed by the appellant, aggrieved by the judgment and order dated 15.01.2015 passed by the Additional Sessions Judge, Aurangabad in Sessions Case No. 188/2013, thereby convicting the appellant for the offence punishable under section 302 of I.P. Code and

sentencing to suffer imprisonment for life and to pay fine of Rs. 5,000/-, in default, to suffer further S.I. for six months and further convicting the appellant for the offence punishable under Section 201 of I.P. Code and sentencing him to suffer seven years rigorous imprisonment and to pay fine of Rs. 1000/-, in default to suffer S.I. for one month.

2. The brief facts of the prosecution case, in brief, are as under :-

According to the prosecution case, the incident in question had taken place on 22nd February, 2013. On the day of incident, P.S.O. Wadod Bajar received the information and accordingly he registered A.D. No. 6/2013 and forwarded it to the Police Naik Pungle to carry out the investigation of the said A.D. Accordingly, the concerned Police Naik went to the spot and prepared the spot panchanama and also drawn the inquest panchanama. Dead body was forwarded to Primary Health Center, Wadod Bajar for postmortem and after postmortem, dead body was handed over to informant –

Jitendra, who is son of the deceased. Jitendra went to the Police Station Wadod Bajar and lodged detail complaint against the villagers, namely Kishan Eknath Khetre, Kailas Rambhau Hatkar and Shani Maharaj Bhise. According to the prosecution case as narrated by the informant, the aforementioned persons were threatening the deceased to vacate the gairan land and to leave village. The said persons did lodge a complaint against deceased earlier with an allegation that, the deceased committed mischief by fire with intend to destroy the hutments. The Crime No. I-20/2013 for the offence punishable under sections 302, 201, 506 r/w 34 of I.P. Code came to be registered. A.P.I. Kaple started investigation. He recorded the statements of the witnesses. According to the prosecution case, during the investigation, it revealed that, accused – Dnyaneshwar committed the crime, and therefore, he was arrested. According to the prosecution case, accused Dnyaneshwar made voluntary statement thereby memorandum panchanama was drawn and at his instance, the scarf from the well was recovered. Investigating Officer recorded the statements of eye witness Avantikabai Fuke and

the supplementary statement of informant Jitendra and his mother. Thereafter, investigation was handed over to another Police Inspector and upon completion of the investigation, the charge-sheet came to be filed. The Judicial Magistrate, First Class, Phulambri committed the case to the Court of Sessions and after framing charge and after full-fledged trial, the appellant was convicted for the offence punishable under Section 302 and Section 201 of the I.P. Code. Hence this appeal.

3. The learned counsel appearing for the appellant submitted that, the prosecution has neither proved motive nor chain of circumstances is complete, even then the trial Court convicted the appellant. It is submitted that, name of the appellant was not appearing in the First Information Report. No motive is alleged against the appellant. Therefore, according to the learned counsel appearing for the appellant, the appeal deserves to be allowed. In support of his contention that, the statement made under Section 164 of Cr.P.C. cannot be used as a substantive piece of evidence, he pressed into

service the exposition of the Privy Council in the case of **Brij Bhushan Singh V/s Emperor**¹ and the judgment of the Supreme Court in the case of **Brij Nath Sah V/s State of Bihar**².

4. On the other hand, the learned Additional Public Prosecutor appearing for the State, relying upon the findings recorded by the trial Court and notes of evidence, submits that, the appeal is devoid of any merits, therefore, same may be dismissed.

5. We have given careful consideration to the submissions advanced by the learned counsel appearing for the appellant and the learned Additional Public Prosecutor appearing for the Respondent/State. With their able assistance, we have perused the entire evidence brought on record, so as to re-appreciate the same.

6. Upon perusal of the evidence on record, as

1 AIR (33) 1946 Privy Council 38

2 2010 AIR SCW 3900

alleged by informant-Jitendra, the motive was attributed to three persons, namely Kishan Eknath Khetre, Kailas Rambhau Hatkar and Shani Maharaj Bhise with an allegation that, those three persons were threatening the family of the informant to vacate the gairan land and to leave village. On earlier occasion, a complaint is filed against the deceased by the said persons. Upon careful perusal of the entire evidence brought on record, no specific motive is alleged for commission of offence by the appellant. On the contrary, the evidence on record unequivocally indicates that, the appellant is residing in the same gairan land, wherein the family of the deceased is residing. In fact, the appellant himself is encroacher, and therefore, the aforementioned motive against other three persons cannot be attributed to the appellant. Though the prosecution has claimed that, PW-6 Avantikabai Fuke was eye witness to the incident, she turned hostile and did not support the prosecution case. Therefore, the case of the prosecution rests upon circumstantial evidence. It is true that, where there is a direct evidence, motive loses its importance, however, in case based upon circumstantial evidence, motive assumes

importance.

7. The prosecution examined Bhavarlal Shalikram Chauhan as PW-1. He was examined as witness to the spot panchanama and inquest panchanama. During his cross examination, he did admit that, deceased Ramdas was residing in gairan land since 1986. The dispute between him and villagers was since 7 to 8 years. He also deposed that, he put his thumb impression on the inquest panchanama as per say of the Police. He admitted that, well from which the scarp was recovered does not bear round compound wall. Adjacent to the well, there are residential houses in which peoples are residing. Adjacent to well, there is agricultural land. The house of Avantikabai Fuke is about 40 to 50 feet from the well. The area between the house of Avantikabai and the well is of rough surface and having stones and thorns over it. Upon perusal of the evidence of this witness, during his cross examination, he did admit that, there was dispute between the deceased and the villagers since last 7 to 8 years. No motive can be attributed to the appellant. The appellant and the

deceased were sailing in the same boat, in as much as, the appellant also resides in gairan land as encroacher. Therefore, there was no reason for the appellant to have any grudge on account of not vacating gairan land by the deceased.

8. Prosecution examined Pawan Ramprasad Pandeji as PW-2. According to him, the statement of the accused was recorded in his presence and at his instance, one scarp (Uparne) from the well is recovered. However, during his cross-examination, he did admit that, when scarp was taken out from the well, there was darkness. Adjacent to the well there are residential houses and agricultural land. People used to fetch the water from the said well. Ladies used to wash the clothes near the well. He further stated that, it is true that, villagers use cotton scarf (Uparne) in summer season and cotton scarfs are readily available in the market of village. In the first place, when the dead body was taken out from the well, the scarf must have been there and secondly, as stated by PW-2, many persons had access to the said well and therefore, such recovery of scarf at the instance of appellant loses its importance.

9. The prosecution examined Chakabai Ramdas Bhosale as PW-3. She is wife of deceased Ramdas. In her examination-in-chief, she stated that, the said land at Neemkheda, wherein her family resides, belongs to their family. She received information from her son Jitendra about the death of her husband. She rushed to village Neemkheda. Prior to her arrival, dead body was taken out from the well by the Police and forwarded for the same for postmortem. She saw the dead body in the hospital at Wadod Bajar and found injuries on his neck, as well as on right leg. On the next day, her son Jitendra lodged a report. According to the evidence of this witness, villagers committed murder of her husband. Onkar and Joshi used to come to her house and used to take her husband to consume liquor. They committed murder of her husband on account of land. The Police recorded her statement. She further stated that, the appellant also used to take her husband to consume liquor as well as used to give threats to him. The accused killed her husband. During her cross-examination, she stated that, the land in which her family is residing is gairan land. The said land belongs to her

and her son Jitendra. There was dispute between her family and Kisan Eknath Khetre, Kailash Rambhau Hatkar and Pundlik Bhise @ Shani Maharaj on account of the said gairan land. They used to tell them to evict the land and on that count they used to harass them. Accused Dnyeshwar is also residing in the said gairan land. She admitted that, in her police statement, she has only implicated Kishan Eknath Khetre, Kailas Rambhau Hatkar and Pundlik Bhise @ Shani Maharaj, as accused and not the appellant. Therefore, the evidence of this witness, if considered in its totality, needle of suspicion is pointed against three persons from the beginning and not against the present appellant. It is only before the Court she stated that, the appellant also used to take her husband for consuming liquor and he killed her husband. Neither any motive has been attributed to him. On the contrary, her statement shows that, he was residing in the same gairan land, wherein the family of PW-3 resides.

10. Prosecution examined Jitendra Ramdas Bhosale as PW-4. He stated in his evidence that, he lodged a complaint

in the Police Station Wadod Bajar against Dnyaneshwar, Kishan Khetre and Namdeo that, they used to give threats to his family for vacating gairan land. However, during his cross-examination, he admitted that, accused Dnyaneshwar is residing as their neighbourer in gairan land. Therefore, the entire prosecution case that, due to encroachment by the family of deceased on gairan land and they were not ready to vacate the same, other three persons named hereinabove were involved in murder of deceased Ramdas, would not stand as against the appellant. Hence no motive whatsoever, has been established against the appellant.

11. Prosecution examined Dr. Jagdish Parshuram Savant as PW-5. In his evidence, he stated that, the deceased sustained as many as nine injuries. According to him, cause of death is due to asphyxia due to cardio-respiratory arrest due to strangulation. However, during his cross-examination, he admitted that, if anybody pressed the neck by scarf (Uparne), there will be strangulation marks on the complete front neck. He can not say exactly when the deceased was strangled.

prior to postmortem. According to him, if any person under the influence of liquor fallen down in the well on rock, external injuries mentioned at Serial nos. 1 to 11 in column no.17 can be possible. If any person fall down in the well in which the wires were roped for the electric motor and if he come in contact with those wires with his neck such type of strangulation can happen.

12. Prosecution examined Avantikabai W/o Kondiba Fuke as PW-6. According to the prosecution case, said Avantikabai witnessed the incident. However, during her cross-examination, she stated that, the incident took place prior to one year. On that day, in the morning after lunch she went to Phulambri Court and she does not know what happened thereafter. Therefore, she was declared hostile and was cross-examined by the Public Prosecutor. During her cross-examination, she stated that, Police recorded her statement. She denied the suggestion that, on the day of incident, accused and deceased came to her house and purchased a liquor bottle for Rs. 25/- from her. She denied the

suggestion that, they consumed the liquor adjacent to her house and thereafter started quarreling. She denied that, she separated their quarrel. She denied that, though she intervened in the quarrel, they continued the same. She denied that, thereafter accused Dnyaneshwar round up the scarf to the neck of deceased Ramdas and dragged him towards well which was belonging to Sampat Abaji, and they thrown him in the well. In her cross examination, she further stated that, she went to Phulambri Court on that day. 15 days after the incident, Police called her in the Phulambri Court and at that time, she went in the Court in the evening at 5.00 p.m. Phulambri Court asked her name, village etc. She stated that, it is true that, the Judge also made inquiry with her regarding the incident. She never stated the Court regarding the incident. In cross examination, she further stated that, the portion mark – A dated 02.03.2013 was read over to her and same is not correct. She never stated so before the police. She cannot assign any reason as to why the police recorded the same. She denied that, police had written Portion mark-A as per her say.

She was confronted with her statement, which was recorded by the Magistrate on 25.03.2013. She stated that, portion mark – A in the said statement is not correct and same was not read over to her. She further stated that, she never stated whatsoever is mentioned in the said statement. The said statement is not as per her say. After recording her statement, the thumb impression was obtained. However, she denied the suggestion that, on the say of other villagers, she has changed her version before the Court. During her cross-examination, she stated that, at the time of recording her statement, the Court and Court staff was present in the room. As already observed, PW-6 is the star witness of the prosecution case, in as much as, the prosecution claimed that, she witnessed the incident. However, her evidence does not support the prosecution case.

13. PW-11 Investigating Officer Govind Shobharam Kaple has also admitted in his evidence that, the appellant resides in the same gairan, where the family of the deceased resides.

14. Prosecution examined Dilawar Mohd. Gaus Malidwale, working as Judicial Magistrate, First Class as PW-12, who recorded the statement of PW-6. In his examination-in-chief, he stated that, he made interrogation with PW-6 and accordingly her statement was recorded. However, during cross-examination, he admitted that, he is unable to say whether Avantikabai is the accused before him in the crime under Section 65-E of the Bombay Police Act.

15. We have discussed the evidence of important prosecution witnesses. Position which emerges is that, the prosecution has failed to bring motive on record for commission of alleged offences by the appellant. PW-6 Avantikabai did not support the prosecution case. Therefore, in absence of direct evidence, if the prosecution case is considered in its entirety, there is no circumstantial evidence on record which suggested that, the deceased was last seen in the company of the accused before the incident. The prosecution case fails on both counts i.e. on the count of

absence of direct evidence and also there is no complete chain of circumstance, which would lead to only hypothesis of guilt of accused alone and none else.

16. Feeble attempt of the prosecution to use the statement of PW-6 recorded under Section 164 of the Cr.P.C. as a substantive evidence cannot be accepted or countenanced in view of the judgment of the Privy Council in the case of **Brij Bhushan Singh (supra)**, in which it has been observed that, a statement made under section 164, Criminal P.C. cannot be used as a substantive piece of evidence. The statement can be used to cross-examine the person who made it, and the result may be to show that the evidence of the witness is false. But that does not establish that what he stated out of Court under section 164 is true.

17. The Supreme Court in the case of **Brij Nath Sah (supra)** in para 6 observed thus :-

“6. We have heard the learned counsel for the parties and have gone through the record. We see from the judgments of the Courts below that the only material that has been used against the appellant is the statement under Sec. 164 of the Cr.P.C. This Court in *Ram Kishan Singh v. Harmit Kaur and Another* ((1972)3 SCC 280) : (AIR

1972 SC 468) has held that a statement of 164 Cr.P.C. is not substantive evidence and can be utilized only to corroborate or contradict the witness vis-a-vis, statement made in Court. In other words, it can be only utilized only as a previous statement and nothing more. We see from the record that Suman Kumari was not produced as a witness as she had since been married in Nepal and her husband had refused to let her return to India for the evidence. In this light her statement under Section 164 cannot be used against the appellant. Even otherwise, a look at her statement does not involve the appellant in any manner. The allegation against him is that after she had been kidnapped by the other accused she had been brought to their home, where the appellant was also present. In other words, when she had been brought to the appellant's home the kidnapping had already taken place. The appellant could therefore not be implicated in the offence under Sec. 363 or 366-A of the IPC de hors other evidence to show his involvement in the events preceding the kidnapping.”

18. As laid down by the Supreme Court in the case of Brij Nath Sah (supra), the statement recorded under Section 164 of Cr.P.C. can be used at the most for corroboration and not as substantive piece of evidence. In the present case, as already observed, the prosecution has utterly failed to bring on record the substantive evidence so as to convict the accused. The trial Court, in our opinion, has not properly appreciated the evidence on record, and in particular, the legal position in respect of evidentiary value of statement recorded under Section 164 of Cr.P.C. Therefore, the benefit

of doubt deserves to be given to the appellant.

19. Accordingly Criminal Appeal is allowed and the conviction and sentence of the appellant is hereby quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if any, paid by the appellant be refunded to him. Since the appellant is in jail, he be released forthwith, if not required in any other case.

20. In view of the disposal of the Criminal Appeal itself, nothing survives for consideration in Criminal Application No. 839 of 2015 and accordingly same stands disposed of.

(A.I.S. CHEEMA, J.)

(S.S. SHINDE, J.)

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