

**IN THE HIGH COURT OF JUDICATURE AT
BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 118 OF 2013

- 1] Namdeo s/o Mahadeo Akangire
Age 49 years, Occupation : Agri

- 2] Mahadeo s/o Punda Akangire
Age 72 yrs, Occu. Agri.,

- 3] Dhananjay s/o Namdeo Akangire
Age 18 yrs, Occ. Agri.

- 4] Mangalbai w/o Namdeo Akangire
Age 45 yrs, Occ. Household
All r/o Mahadeowadi, Tq. Ahmedpur
Dist. Latur .. APPELLANTS

Versus

State of Maharashtra
(Copy to be served on GP of
High Court Bench at Aurangabad .. RESPONDENT

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Shri R.S. Deshmukh h/f Shri V.D. Gunale, Adv. for
appellants.

Shri P.P. More, APP for respondent State
Shri M.D. Narwadkar, Adv. to assist P.P.

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**CORAM : P.V.HARDAS AND
N.W.SAMBRE,JJ.**

DATED : 19TH JUNE, 2015

ORAL JUDGMENT [PER P.V.HARDAS,J.] :-

The appellants who stand convicted for offence punishable under Section 302 r.w. 34 of I.P.C. and sentenced imprisonment for life and to pay fine of Rs.1000/- each, in default of which to undergo further R.I. for one month by the Additional Sessions Judge, Ahmedpur by judgment dated 2/3/2013 in Sessions Case No.6/2012, by this Appeal challenge their conviction and sentence.

2] The facts as are necessary for the decision of this Appeal may briefly be stated thus :

P.W.10 P.I. Dadahari Chaure who was attached to police station Ahmedpur was on duty on

17/11/2006 received application filed by P.W.7 Daivshala at Exh.56. Prior to the receipt of the said application Accidental Death has been registered and thereafter, during enquiry of the Accidental Death, report of P.W.7 Daivshala was recorded at Exh.57, on the basis of which an offence punishable under Section 302, 201 r.w. 34 of I.P.C. was registered vide Crime No.206/2011. The investigation of the said Crime was entrusted to P.W.10 P.I. Chaure. P.W.10 P.I. Chaure recorded statements of witnesses and referred the viscera to the chemical examination. The appellants/accused were arrested and after completing the investigation, submitted a charge sheet against the accused. It appears that inquest panchanama of the dead body of deceased Vijaykumar was drawn vide Exh.39. During investigation, clothes of deceased were seized in the presence of panchas at Exh.43. A scene of the incident panchanama was also drawn in the presence of the panchas at Exh.45. The dead body had

been referred for post mortem examination and post mortem examination was conducted by P.W.8 Dr.Peddawad.

3] P.W.8 Peddawad noticed following external injuries on the dead body of deceased Vijaykumar.

1] Abrasion/laceration on left side of neck of size $\frac{1}{2}$ x $\frac{1}{2}$ cm.

2] Laceration injury to the left upper eyelid 3 x $\frac{1}{2}$ x 2 cm and lower eyelid at lateral epicanthus of size 2 x $\frac{1}{2}$ x 2 cm.

3] Lacertation injury to left lateral epicanthus, 2 x $\frac{1}{2}$ x 7 cm.

4] Cutting injury to the right ear lobe (Pinna) of size 1 x $\frac{1}{2}$ cm. Cutting and separated and missed.

5] Abrasion to the middle upper and lower lip, of size $\frac{1}{2}$ x $\frac{1}{2}$ cm.

He noticed Bruises and Hemorrhage over neck region under the skin on neck with fracture of hyoid bone broken ends inwards margin. He opined that all the injuries were ante-mortem injuries and according to him, the probable cause of death was due to strong suffocation or vagal inhibition due to throttling. Post mortem report is at Exh.59.

4] On the case being committed to Court of Sessions, trial Court vide Exh.28 framed charge against the appellants for offences punishable under Section 302 r.w. 34 and 201 r.w. 34 of I.P.C. The accused denied their guilt and claimed to be tried. Prosecution in support of its case, examined 10 witnesses. The entire prosecution case revolves around the evidence of P.W.4 Rekha wife of deceased Vijaykumar and P.W.7 Daivshala mother of deceased Vijaykumar. Prosecution has also relied on the evidence of P.w.9 Pandurang.

5] We have heard learned counsel for the appellants and the learned A.P.P., and in order to effectively deal with the submissions advanced before us by the learned counsel for the parties, it would be useful to refer to the evidence of the witnesses.

P.W.4 Rekha wife of deceased Vijaykumar deposed that she was married to Vijaykumar about four years prior to the incident. Rekha alongwith her husband deceased Vijaykumar, her parents-in-law and her daughter was residing at Mahadeowadi. She further deposed that P.W.9 Pandurang was cousin of her husband who was owning agricultural land at village Mahadeowadi. Pandurang was in need of money and therefore, was willing to sell one acre of land for raising money for marriage of his daughter. Father in law of Rekha, Bapurao acted as mediator in the transaction. The price for which Pandurang was willing to sell the

land was fixed by Pandurang at Rs.4,50,000/-. Accused No.1 Namdeo who was desirous of purchasing the land was not willing to purchase the land for the said amount and instead, had offered Rs.2,50,000/-. P.W.9 Pandurang was unwilling to sell the land for the price quoted by accused no.1 Namdeo. The land was ultimately sold to someone else at the price fixed by P.W.9 Pandurang.

Rekha further deposed that about few days prior to Diwali of the previous year, accused nos.1 to 4 had come to her house and had kicked and given fist blows to her husband Vijaykumar on the ground that father of Vijaykumar had allowed the cattle to stray in their field. Bhanudas Yelmate and others rescued Vijaykumar. Rekha has admitted that no report was lodged about the incident though the accused had threatened to kill Vijaykumar within four months.

According to Rekha, on 12/11/2011, in the morning deceased Vijaykumar had gone to Shirur Tajband for selling milk. Vijaykumar returned home at about 8.45 to 9.00 a.m. Thereafter, Vijaykumar took a pot with him and went towards the well which was situated in the field of Tukaram and Nagnath Chame for fetching water. After some time, Rekha and her mother in law P.W.7 Daivshala followed Vijaykumar. According to Rekha, distance between her and Vijaykumar was walking distance of about 5 to 10 minutes. Rekha heard cry and therefore, rushed towards her husband and noticed the appellants assaulting Vijaykumar. Vijaykumar had fallen on the ground and accused no.1 was assaulting Vijaykumar on his face with a stone while accused no.3 Dhananjay sat on chest of Vijaykumar and was pressing his neck. Accused no.4 Mangalbai sat on the legs of Vijaykumar in order to hold the legs. Accused no.2 Mahadeo held hands of Vijaykumar. P.W.4 Rekha and P.W.7 Daivshala cried

for help and on hearing their cry, accused threw Vijaykumar in the well and fled away. On hearing cries of Rekha and Daivshala, P.W.9 Pandurang and other villagers gathered at the spot and other relatives had also arrived at the spot. Police also arrived and thereafter, the dead body of Vijaykumar was taken out of the well and panchanama was drawn.

6] In cross examination, she has admitted that about 100 villagers had arrived at the spot but Rekha could not name them. She has admitted that the police also arrived after about half an hour or one hour. According to Rekha police had not made any enquiry with them at the spot of the incident. She has admitted that neither her father in law nor her mother in law P.W.7 Daivshala narrated the incident to the police. She admits that her mother in law had lodged report of the incident after eight days. She has admitted that police had recorded her statement after eight days of

the incident. Rekha has also admitted that she had not narrated the incident to her father in law. She then admits that she had not narrated the incident to anyone except the police. The reason given by Rekha was that she was not “feeling well”. She has admitted that the transaction of sale of the land had taken place about 1½ years prior to the incident. She has admitted that as the cattle of her father in law had strayed in the field of the accused, accused had assaulted Vijaykumar.

7] Prosecution has examined P.W.7 Daivshala mother in law of P.W.4 Rekha and mother of deceased Vijaykumar. P.W.7 Daivshala has deposed on the line similar to that of P.W.4 Rekha. Daivshala however, states that accused has assaulted her son Vijaykumar on earlier occasion. Accused had stated that because father of Vijaykumar had not mediated for selling the land to the accused, accused were assaulting Vijaykumar. Incidentally we may state that this is not

the reason given by P.W.4 Rekha. According to P.W.4 Rekha the accused had assaulted her husband Vijaykumar as the cattle had strayed in their field.

In respect of the incident, she deposed that accused no.1 had assaulted Vijaykumar with a stone on his forehead, while accused no.3 Dhananjay sat on the chest of vijaykumar and pressed his neck. Accused no.2 Mahadeo held hands of Vijaykumar while accused no.4 Mangalbai sat on the legs of Vijaykumar and held his legs. She then deposed that the accused had thrown Vijaykumar in the well under assumption that Vijaykumar was dead. She deposed that on hearing the cries, P.W. 9 Pandurang arrived there and she claims that on enquiry from Pandurang, she had narrated the incident to him. She has also admitted that her husband Bapurao had also arrived at the scene of the incident after the police had arrived at the scene of the incident. According to her, on seeing the dead body,

she felt giddiness, became unconscious and for 4 to 5 days she did not understand anything. She then deposed that on 17/11/2011 she regained consciousness and narrated the incident to her husband Bapurao and alongwith her husband Bapurao she went to the police station and lodged report at Exh.56. She also deposed that on 20/11/2011, police had called P.W.4 Rekha and her husband and had recorded their statements. She has identified her signature on the report at Exh.57. In cross examination, she has admitted that the well is situated in the field of Nagnath and Tukaram and the well water was being fetched by all the villagers. She has admitted that there are steps to the well for descending in the well. She has admitted that she had seen assault on Vijaykumar from a distance of 100 ft. She has admitted that she had narrated the incident to P.W.9 Pandurang. She has admitted that the police arrived at the scene of the incident at about noon. She has admitted that she had

seen the police but had not narrated the incident to the police. She had admitted that she does not recollect whether she had narrated the incident to her husband. She has admitted that she does not know as to who had scribed the report. She has admitted that she does not recollect the place where the report was scribed. She then admits that the report was typed at the police station but could not tell the name of the police who had typed the report. The omission is elicited that she has not stated that she had informed the incident to P.W.9 Pandurang. An omission is elicited that she has not stated that the accused had thrown the pot in the well. She however, admits that the pot was floating on the well water. She has admitted that there was a dispute between her family and the family of the accused on account of boundaries of the field.

8] This witness in order to explain delay in informing police about the incident claims that she was

“not feeling well”. This witness however, categorically stated that she had informed the incident to P.W.9 Pandurang. In respect of the witness not feeling well about 5 days from the incident, evidence of this witness is not supported by P.W.4 Rekha. In fact, the witness claims that she was unconscious and had regained consciousness only on 17th when she had gone to the police station and lodged the report at Exh.56. Prosecution has made no attempts at placing on record medical certificate of the hospital where she normally ought to have been admitted, if she was unconscious for five days. No papers regarding treatment are brought on record. In fact, P.W.4 Rekha does not support P.W.7 Daivshala that Daivshala was unconscious for about 5 days. It is extremely difficult to believe that if Daivshala and P.W.4 Rekha were eye witnesses to the incident, they would not inform the incident to Bapurao father of deceased Vijaykumar. While P.W.4 Rekha was wife of Vijaykumar, Daivshala was mother of Vijaykumar. It is

extremely unnatural that these two ladies would maintain a stoic silence for a period of 5 days and not intimate Bapurao husband of P.W.7 Daivshala. We therefore, find that the behaviour of these eye witnesses is extremely unnatural. Even Daivshala claims that she had informed the incident to P.W.9 Pandurang, yet no disclosure was made by P.W.9 Pandurang to the police, though Pandurang was present at the scene of the incident. In fact, no report had been lodged at all till 17th and the police were not aware about the homicidal death. It is extremely difficult to believe that these close relatives of deceased Vijaykumar would not disclose the incident to the police if they had witnessed the incident.

9] Prosecution has examined P.W.6 Suryakant who had reached the scene of the incident subsequent to the incident. Suryakant deposed that on hearing the discussion in the village, he had gone to the well and had noticed the mother and wife of deceased

Vijaykumar to be present there. He also noticed that Rekha and Daivshala were crying. Suryakant claims that police had arrived there and as the body was floating on the water, and since rope was lying there, on suspicion about the presence of the dead body in the well, police removed the dead body with the aid of hook and rod, and bamboo stick. In cross examination he has admitted that about 100 villagers had gathered there. He has admitted that Bapurao was not present when he had gone near the well. He has also admitted that Nagnath Chame was also not present at the well.

10] Prosecution has examined P.W.9 Pandurang cousin of deceased Vijaykumar and nephew of P.W.7 Daivshala. Pandurang deposed about his desire of selling one acre of his land at Rs.4,50,000/- and not agreeing to sell the land to the accused for Rs.2,50,000/-. He has also deposed that the accused declined to purchase his one acre land for Rs.4,50,000/-

and therefore, he sold his land to one Kachru for Rs.4,50,000/- through mediation of Bapurao. He then deposed about the accused assaulting deceased Vijaykumar just prior to the Diwali festival of the previous year and accused threatening Vijaykumar to commit his murder as the land of Pandurang had not been sold the accused.

In respect of the incident, he deposed that on 12/11/2011, at about 9.30 to 10 a.m. he was grazing his cattle in his field and had heard cry of P.W.4 Rekha and P.W.7 Daivshala. On rushing there, he noticed the four accused running away towards their field. Rekha and Daivshala were weeping and informed him that the accused after throttling Vijaykumar had thrown him in the well. Pandurang also raised cry and on hearing his cry, Nagnath and Tukaram also arrived at the scene of the incident. Pandurang claims that he informed the incident to Bapurao father of Vijaykumar on phone.

According to Pandurang, after some time, Bapurao also arrived at the scene of the incident and thereafter, police also arrived there. He was confronted in cross examination with portion marked "A" from his statement in respect of assault on Vijaykumar, prior to Diwali that he had been informed on the next day by Bapurao on phone. He has denied to have stated portion marked "A" in his statement. He has admitted that the dead body had drowned in the well water but the pot was floating on the water. He has admitted that Bapurao is his real uncle and he had attended the funeral of Vijaykumar. Statement of this witness was recorded after 8 to 10 days of the incident. He has admitted that before his statement was recorded, he had not narrated the incident to any one.

11] We thus, find that the evidence of P.W.4, P.W.7 and P.W.9 is wholly unnatural. None of these witnesses claim to have disclosed the incident to

anyone. Though P.W.7 Daivshala claimed that she had informed P.W.9 Pandurang and Pandurang also deposes in the same line, yet none of the witnesses took any efforts at disclosing the incident to the police when the police had arrived at the scene of the incident. Police were present at the scene of the incident as inquest panchanama and scene of the incident panchanama were drawn. Neither Rekha, Daivshala nor Pandurang informed the police that they had witnessed the incident and had seen the accused assaulting deceased and throwing him in the well. This unnatural conduct of the witnesses affects the credibility of the witnesses at having witnessed the incident. Assuming that Rekha and Daivshala on seeing the incident may have been perturbed yet no one prevented them from informing the incident to the police, either on the next day or informing the incident to other relatives. P.W.9 claims to have informed incident to Bapurao father of deceased Vijaykumar, yet even Bapurao did

not inform the police about the incident. This unnatural conduct of the witnesses leads to an irresistible inference that none of these witnesses had witnessed the incident and were not aware as to how deceased Vijaykumar had died.

12] Prosecution has examined P.W.8 Dr.Peddawad who deposed in cross examination that on the same day on which he performed post mortem he had issued provisional cause of death certificate to the police, which was received by P.S.I. Rathod. Post mortem on the dead body of deceased Vijaykumar was performed on 12/11/2011 and concluded at 6.30 p.m. The post mortem thus was conducted on the day of the incident itself and the provisional cause of death certificate was received by the police on the same day.

13] Mr.R.S.Deshmukh, learned counsel for the appellants has urged before us that no reliance can be

placed on the testimony of the eye witnesses as well as testimony of P.W.9 Pandurang on account of a total silence maintained by them for a period of about 5 days. It is also urged before us by learned counsel for appellants that these accused have been involved in the crime only on the basis of suspicion on account of the previous enmity or strained relations between them. Learned A.P.P. has urged before us that the evidence of the eye witnesses is corroborated by medical evidence and therefore, the evidence of these witnesses deserve to be accepted despite the delay in disclosing the incident to the police. Learned A.P.P. has placed reliance on the judgment of Supreme Court in the case of **Tara Singh and others V/s The State of Punjab reported in AIR 1991 S.C. 63.**

14] It is true that the delay simplicitor as a factor is no ground to reject the belated disclosure made by witness provided there is satisfactory explanation for the

belated disclosure. In the present case, as pointed out by us, eye witnesses to the incident were not strangers or passers-by but were the wife and mother of the deceased Vijaykumar. Both these witnesses claimed that they had witnessed the incident. On hearing their cries, after arrival of P.W.9 Pandurang they had informed the incident to Pandurang. Panduranga in turn claimed that he had informed the incident to Bapurao father of deceased Vijaykumar. The disclosure was made prior to the arrival of the police yet when the police had arrived at the scene of the incident and the dead body was taken out of well, and inquest panchanama and spot panchanama was drawn, no disclosure was made by any of the witnesses to the police that they had witnessed the accused committing crime. Even on the next day or thereafter, no disclosure was made by the witnesses to the police. P.W.7 Daivshala claims that she was not feeling well and thereafter was unconscious and regained her

consciousness only on 17th i.e. 5 days after the incident. The said explanation is not corroborated by P.W.4 Rekha who is her daughter in law and residing in the same house. Prosecution has also made no attempts at corroborating the aforesaid explanation by examining the doctor who must have treated her for her unconsciousness. In fact, explanation given by P.W.7 Daivshala is wholly unacceptable. Daivshala speaks about arrival of the police and yet claims no disclosure made to them. The police were in dark and were not aware of the assailants till the report at Exh.56 was filed on 17th i.e. 5 days after the incident. The unexplained delay and the unnatural conduct and behaviour of the witnesses affect their credibility at having witnessed the incident. Such belated disclosure particularly after the post mortem findings are disclosed, would not gather any strength. The evidence of infirm witnesses is not strengthened by any corroboration. We find the evidence of these witnesses to be wholly unreliable and the medical

evidence cannot be said to corroborate the evidence of the witnesses. Prosecution was aware as to the cause of death and therefore, possibility of these witnesses claiming accused as the assailants on suspicion though they had not seen the incident, cannot be ruled out and in fact strengthens possibility and we find that implicit reliance cannot be placed on the testimony of these witnesses. A reference may usefully be made to the judgment of the Supreme Court in the case of **State of Orissa V/s Mr.Brahmananda Nanda reported in (1976) 4 S.C.C. 288**, wherein, Supreme Court found that unexplained delay of 1½ days in disclosing the incident by solitary witness affects credibility of the witness. In our opinion also, in the present case, the unexplained delay of 5 days by these witnesses in informing the police about the incident would adversely affect their credibility. The judgment of the Supreme Court on which learned A.P.P. has placed reliance would not apply to the facts of the present case as the

delay in informing the police was of few hours only. The incident had occurred at 5 p.m. and the F.I.R. was lodged at 8.45 p.m. particularly when the police station was situated at a distance of 6½ miles. In that background therefore, the Supreme Court came to the conclusion that delay as a factor would not indicate fabrication and Court could not have rejected prosecution version on account of delay. The ratio of the aforesaid judgment in our opinion would not apply to the facts of the present case.

15] Thus, after careful consideration of the evidence on record, in our opinion, implicit reliance on the evidence of P.W. Rekha, P.W.7 Daivshala and P.W.9 Pandurang cannot be placed for sustaining the conviction of the appellants. The appellants in our opinion, would be entitled to be given the benefit of doubt.

16] Criminal Appeal is allowed and the conviction and sentence of the appellants is hereby quashed and set aside and they are acquitted of the offences with which they were charged and convicted. Fine if paid be refunded to them. Since appellant nos. 1 and 3 are in jail, they be released forthwith, if not required in any other offence. Appellant nos.2 and 4 are on bail. Their bail bonds stand cancelled.

[N.W.SAMBRE,J.]

[P.V.HARDAS,J.]

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