

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

Criminal Application No. 6274 of 2014

The State of Maharashtra,
Through Police Station officer,
Police Station, Shirur Anantpal,
Taluka : Nilanga,
District : Latur.

.. Applicant
(Original complainant)

versus

1. Dnyandeo Ganpati Malwade,
Age : 34 years,
Occupation : Agriculture,
2. Ganpati Tipanna Malwade,
Age : 65 years,
Occupation : Agriculture,
3. Sambhaji Pandharinath Malwade,
Age : 55 years,
Occupation : Agriculture,

All R/o. Mushirabad,
Taluka : Latur.
4. Tukaram Gyanba Kutwade,
Age : 70 years,
Occupation : Agriculture,
R/o. Sonwati, Taluka : Latur.
5. Pravin Kamrao Malwade,
Age : 45 years,
Occupation : Agriculture,
R/o. Davan Hipparga,
Taluka : Deoni.
6. Waman Kamrao Malwade,
Age : 58 years,
Occupation : Agriculture,
R/o. as above.

7. Sharad Kantrao @ Suryakant Ghume,
Age : 25 years,
Occupation : Agriculture,
R/o. Halki,
Taluka : Shirur Anantpal.
8. Haribhau Dnyanoba Gurme,
Age : 34 years,
Occupation : Agriculture,
R/o. Ari, Taluka : Shirur Anantpal.
9. Nilesh Shivaji Malwade,
Age : 24 years,
Occupation : Agriculture,
R/o. Mushirabad,
Taluka : Latur.
10. Karan Chandrapalsinh Gahirwar,
Age : 20 years,
Occupation : Driver,
R/o. Halki,
Taluka : Shirur Anantpal.

.. Respondents
(Original accused)

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*Mrs. S.G. Chincholkar, Additional Public Prosecutor,
for the applicant - State.*

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**CORAM : S.S. SHINDE &
A.M. BADAR, JJ.**

DATE : 12TH FEBRUARY 2015

COURT'S ORDER (Per A.M. Badar, J.) :

1. By this application, the State is praying for leave to file appeal challenging the judgment and order dated 28-8-2014, passed by the

learned Additional Sessions Judge, Nilanga, thereby acquitting respondents / accused of the offences punishable under Sections 147, 148, 302, read with Section 149, and under Section 120(B) of the Indian Penal Code.

2. Heard the learned Additional Public Prosecutor appearing for the applicant - State and perused the record and proceedings including the deposition of witnesses and documentary evidence placed on record by the prosecution.

3. The learned Additional Public Prosecutor vehemently argued that in this case, the prosecution has proved motive for commission of crime. There is evidence of recovery of blood stained axe and stick at the instance of accused no.1 Dnyandeo and accused no.3 Sambhaji, respectively. Upon chemical analysis of those articles, blood of Group 'O' which was blood group of deceased Tulshiram; was found on those weapons. According to the learned Additional Public Prosecutor, accused no.1 has made extra judicial confession to PW 6 Gayabai w/o. Tulshiram Samdarle, widow of the deceased, by stating soon after the incident, that 'तुझे कुंकू पुसून आलो'. As such, according to the learned Additional Public Prosecutor, with these circumstances, the prosecution has established its case and, therefore, the learned Additional Sessions Judge was wrong in acquitting respondents / accused.

4. We may note brief facts leading to the prosecution of respondents / accused. Undisputedly, Tulshiram's dead body was found on a bridge located in the vicinity of village Kamalga on Shirur Anantpal -

Latur road in the night hours of 8-2-2011. It is prosecution case that on 8-2-2011, Tulshiram s/o. Ganpati Samdarle had been to Nilanga for obtaining certified copies of some documents. Joint family of deceased Tulshiram was having agricultural land admeasuring more than 30 Acres. It was standing in the name of his cousin Laxman s/o. Tukaram Samdarle. From the year 1952, there was dispute in respect of Gat No. 494 admeasuring about 12 Hectares from this land with respondent - accused no.2 Ganpati and respondent - accused no.6 Waman. This dispute over agricultural land, according to the prosecution case, prompted respondents - accused to conspire and by forming unlawful assembly, indulge in rioting and committing murder of deceased Tulshiram on 8-2-2011.

5. We noted that the prosecution case is solely resting on circumstantial evidence as there is no eye witness to the incident in question. We may add that in cases where the evidence is of circumstantial nature, circumstances from which inference of guilt of accused persons is drawn, needs to be established firmly and cogently by adducing satisfactory evidence. Further, all facts so established should be consistent with sole hypothesis of guilt of the accused and inconsistent with his innocence. The chain of circumstances needs to be so firmly established that it must be shown from the circumstances so proved that in all human probability, the act must have been caused by none else than accused persons. Let us test the evidence adduced by the prosecution on this touchstone.

6. At the outset, we shall consider evidence in respect of motive attributed to respondents - accused for eliminating Tulshiram. The cause

behind murder is stated to be dispute over agricultural land. For proving motive, the prosecution is relying on evidence of PW 1 Chandrakant s/o. Tulshiram Samdarle (Sagar) / son of deceased, as well as evidence of PW 5 Sheshrao s/o. Tukaram Samdarle, cousin of deceased Tulshiram. It is in the evidence of PW 5 Sheshrao, that soon before the incident in question, accused Ganpati s/o. Tipanna Malwade, Waman s/o. Kamrao Malwade, Sambhaji Malwade, Pravin Malwade, Tukaram Kutwade and Dnyandeo Malwade had been to the agricultural field of the prosecution party for ploughing the same. This witness is not attributing any untoward incident on this aspect. Careful perusal of cross examination of this witness shows that he was on inimical terms with accused persons. This witness PW 5 Sheshrao is an accused in criminal trial with an allegation that he burnt house of accused no.2 Ganpati. Said accused had filed 3 - 4 criminal cases against this witness. With such hostile attitude of the witness, we do not find it safe to rely on evidence of PW 5 Sheshrao to infer motive.

7. Now, let us consider evidence of PW 1 Chandrakant s/o. Tulshiram Samdarle in respect of motive. His cross examination is relevant on this aspect. From cross examination of PW 1 Chandrakant, it is seen that the land in respect of which there was alleged dispute, was standing in the name of Laxman - his cousin uncle. This civil dispute at the instance of Laxman went up to Supreme Court and Laxman lost far back i.e. about two years prior to the incident in question. From cross examination of PW 1 Chandrakant, it is clear that there was no litigation whatsoever between deceased Tulshiram and accused persons, much less, civil dispute. Thus, when pending civil dispute with Laxman - cousin of the deceased was over prior to two years and that too in favour of accused

persons, we do not find that this evidence is sufficient to show that land dispute impelled respondents - accused to hatch a conspiracy and to kill Tulshiram. True it is, that in cases relating to circumstantial evidence, motive for commission of crime assume great importance and absence of motive puts the court on guard to scrutinize the evidence closely to ensure that surmises, conjunctures and suspicion do not take place of proof, but in the case at hand, scanty evidence of the prosecution does not allow us to say that the prosecution has proved motive behind the crime.

8. Now, let us examine evidence regarding voluntary disclosure statement of respondent - accused no.1 Dnyandeo and respondent - accused no.3 Sambhaji, recorded under Section 27 of the Evidence Act leading to the recovery of an axe and stick respectively, stained with blood of blood group of deceased Tulshiram. Section 27 of the Evidence Act prescribes that a fact can be discovered by the Police pursuant to the information elicited from the accused persons while in custody. Essence of Section 27 is that discovery of relevant fact should be in consequence to the information received from the accused while in Police custody. In the case in hand, murder of Tulshiram is allegedly committed on 8-2-2011 and according to the prosecution case, recovery at the instance of these two accused persons was made on 14-2-2011. PW 4 Nagnath s/o. Baburao Chalmale, a Panch witness to the recovery of axe and stick, has turned hostile and, therefore, prosecution has sought to prove recovery relying on the evidence of PW 7 - Balasaheb s/o. Laxmanrao Deshmukh, Police Inspector. It is in his evidence that at the instance of respondent - accused no.1 Dnyandao and respondent - accused no.3 Sambhaji, these weapons were recovered as they were found to be kept below bridge on Shirur

Anantpal - Latur road.

9. We have our own doubts regarding this recovery. This recovery is from the spot where dead body was found prior to about six days. The spot Panchanama at Exhibit 77 proved by PW 3 Malappa s/o. Namdeo Chatre - Panch witness, shows that the spot was carefully inspected by the investigator. Recitals in the spot Panchanama shows that no incriminating articles were found on the spot of the incident. However, six days thereafter the prosecution is coming with a case that from under the bridge where the dead body was found, an axe and and stick came to be recovered at the instance of accused no.1 Dnyandeo and accused no.3 Sambhaji. This is a circumstance which cast shadow of doubt on alleged recovery.

10. Let it as it may, evidence of PW 7 - Balasaheb Deshmukh, Investigating Officer does not show that he had packed axe and stick found on the basis of disclosure statement of accused persons. His evidence does not show that he has sealed those articles after packing the same. Even the recovery Panchanamas at Exhibits 96 and 97 do not contain such recital. In other words, there is no evidence of sealing those articles. The prosecution has not adduced any link evidence by examining carrier of those articles to show that they were in sealed condition when they were delivered to the office of Chemical Analyzer. A Division Bench of this Court, in the case of *State of Maharashtra Vs. Prabhu Barku Gade*, reported in *1995 CRI. L.J. 1432*, has held that when there is no evidence to show that the articles recovered were duly sealed and that when there is no evidence that those were delivered to the Chemical Analyzer in sealed

condition, such evidence of recovery is of no use to the prosecution. The question is not whether those articles were tampered, but the question is whether there was possibility of tampering of those articles. As such, this possibility is not ruled out by the prosecution and, therefore, it cannot be said that the prosecution has proved recovery of weapons which ultimately proved to have been used in the commission of crime because of finding of blood of group 'O' which was the blood group of the deceased.

11. Now, let us examine evidence regarding extra judicial confession coming from mouth of PW 6 - Gayabai, widow of deceased Tulshiram. It is in her evidence that when her son Chandrakant had gone to the spot of incident on receipt of telephonic message and when she was standing at the door of her house, respondent - accused no.1 Dnyandeo passed therefrom and uttered, 'तुझे कुंकू पुसून आलो', meaning thereby, he has committed murder of her husband. It is, thus, clear that the prosecution is alleging making of extra judicial confession by respondent - accused no.1 Dnyandeo in the night intervening 8-2-2011 and 9-2-2011 to none else but to the widow of the deceased. It is well settled that evidence regarding extra judicial confession is considered to be a weak piece of evidence. However, if the evidence regarding extra judicial confession comes from the mouth of a person who appears to be unbiased, not even remotely inimical to the accused persons and who has no motive for attributing untruthful statement implicating accused persons, then extra judicial confession can be relied upon. In the case at hand, PW 6 - Gayabai cannot certainly be said as unbiased witness as the case is murder of her husband. At this juncture, it is relevant to note that evidence of her son PW 1 - Chandrakant shows that after witnessing dead body of his father

Tulshiram, he had returned to his house in that night and had met his mother PW 6 Gayabai. Neither PW 1 - Chandrakant nor PW 6 - Gayabai are stating that PW 6 Gayabai has disclosed this extra judicial confession to her own son PW 1 Chandrakant so as to inform him the cause of death of her husband and his father. This is a conduct which cannot be attributed to a prudent person. Moreover, evidence of PW 6 Gayabai as well as evidence of PW 1 Chandrakant do show that Police Officer was regularly visiting their village Mushirabad for about 8 to 10 days thereafter in order to investigate this crime and to trace out as to who has committed the crime of murder of Tulshiram. Despite this fact, PW 6 Gayabai has not disclosed what was heard by her from accused no.1 Dnyandeo to Police in order to show that accused no.1 Dnyandeo is assailant of her husband. Statement of PW 6 Gayabai was recorded after 12 days of the incident. Till that day she kept mum. In the wake of this evidence, we see no reason to rely on extra judicial confession coming on record from widow of the deceased.

12. There is one more aspect which cast a shadow of doubt on prosecution case. According to the prosecution, deceased Tulshiram was done to death by an axe as well as stick by accused persons. PW 8 - Dr. Balaji Kashinathrao Devangre had conducted autopsy on dead body of Tulshiram. Apart from fracture injuries to his forearms as well as ribs, cut lacerated wounds were found on head and right eye of deceased Tulshiram, by PW 8 Dr. Balaji Devangre. In the course of evidence, seized axe was shown to this Doctor in order to ascertain whether the injuries found on dead body could have been caused by that axe. Though in chief examination, Dr. Balaji Devangre has stated that the injuries found

on dead body were possible due to axe, his cross examination makes the matter clear. In cross examination, Dr. Balaji Devangre has admitted that the axe shown to him is having sharp edge and can be termed as heavy cutting object. He admitted that a blow of this axe will cause chop and deep wound but no such chop deep wound was found on the dead body. Spot Panchanama reveals that the dead body was found in night hours on centre of the road. PW 8 - Dr. Balaji Devangre has admitted in cross examination, that the injuries found on dead body were possible because of road traffic accident. In the wake of this evidence, it cannot be said that the axe recovery by the prosecution was a weapon used for commission of crime in question.

13. In the result, we do not find that the impugned judgment and order of acquittal recorded by the learned Additional Sessions Judge, Nilanga, is a result of perverse appreciation of evidence or that the view taken is not a possible view.

14. For the foregoing reasons, the Application is rejected. Consequently, leave to file appeal is refused.

(A.M. BADAR)
JUDGE

(S.S. SHINDE)
JUDGE

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