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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 541 OF 2008**

Shrihari Eknath Suryavanshi	]
Age 33 years, Occ: Agri.	]
Residing at Palus, Tal. Palus,	]
Dist. Sangli	]
(At present lodged in Sangli	]
District Jail)	].. Appellant
	[Ori. Accused]

Vs.

1) The State of Maharashtra	]
At the instance of Palus	]
Police Station	]
2) Ajit Bhosale	]
Age 22 years, Residing at	]
Bambavade, Tal. Palus,	]
Dist. Sangli	].. Respondents

....

Dr. Yug Mohit Chaudhary Advocate along with Ms. Parijat
Bhardwaj for the Appellant
Mrs.G.P. Mulekar A.P.P. for the State

....

**CORAM : SMT.V.K.TAHILRAMANI AND
SHRI.K.R.SHRIRAM, JJ.**

DATED : AUGUST 13, 2015

ORAL JUDGMENT: [PER SMT. V.K. TAHILRAMANI, J.]

1 This appeal is preferred by the appellant-original
accused against the judgment and order dated 17.5.2008

passed by the learned Ad-hoc District Judge-1 and Additional Sessions Judge, Sangli in Sessions Case No. 16 of 2007. By the said judgment and order, the learned Sessions Judge convicted the appellant under Section 302 of IPC and sentenced him to life imprisonment and fine of Rs.1,00,000/- in default R.I. for two years.

2 The prosecution case, briefly stated, is as under:

(i) Deceased Sarjerao was residing at village Bambavade in District Sangli along with his wife, daughter, son P.W. 3 Ajit, sister Chingubai and his mother. Sarjerao had two brothers i.e. Vilas and Anandrao. Vilas was adopted by his aunt viz. Hausabai Pawar. After death of adopted father of Vilas, Vilas received the property i.e. Gat Nos. 55 and 672. Vilas had one daughter namely Janabai. Janabai got married to the appellant in the month of March, 2004. This marriage was against the wishes of Vilas. Within eight days of the marriage, Vilas executed sale-deed in respect of Gat Nos. 55 and 672 in favour of Ajit. Thereafter Vilas started residing with the family of Sarjerao. The appellant was demanding half share in Gat Nos.

55 and 672. On account of this, there was dispute between the family of Sarjerao and the appellant.

(ii) Incident occurred on 9.10.2006. On that day, Sarjerao was taking Soyabean in his bullock-cart to sell the same at the shop of Arihant Shah at Palus. P.W. 3 Ajit son of Sarjerao was following Sarjerao on his bicycle. After selling the Soyabean, they were returning back. Ajit who was on his bicycle was little ahead of Sarjerao. When they reached near Sankpal locality, the appellant came on motor-cycle in front of Ajit. The appellant asked Ajit why they have taken half the share of Soyabean crop and he gave threats to Ajit that he would kill all of them. The appellant then took out sickle from his bag, however, at that time, P.W. 2 Anilkumar came to the spot. On seeing him, the appellant put the sickle back in the bag and went away on his motor-cycle. In the meanwhile, Sarjerao who was in his bullock-cart, crossed the Maruti temple and he was near Akbar garage. At that time, Ajit saw that the appellant had parked his motor-cycle at the backside of the bullock-cart. Then the appellant boarded the bullock-cart from the backside and he assaulted Sarjerao with the sickle in his

hand. Thereafter the appellant ran away with the sickle. Ajit then boarded the bullock-cart and he brought the bullock-cart upto Sana Servicing Centre. At that time, Balasaheb Bhanudas Sankpal and Ajit Sankpal were passing by on motor-cycle. Balasaheb came near them. Sarjerao told Balasaheb that his son-in-law Shrihari had assaulted him with a sickle and he told Balasaheb to inform about the same at his (Sarjerao's) house. Accordingly, Balasaheb went to the house of Sarjerao. Thereafter, Vilas the brother of Sarjerao, Hanmant (P.W. 4) and Kisan Bhosale came there. Hanmant brought Jeep. They put Sarjerao in the Jeep. Then Hanmant, Sarjerao, P.W. 3 Ajit and others proceeded in the Jeep to Palus Police Station. At the police Station, Yadi was given to them and they were referred to the Rural hospital at Palus. Police reached the Rural hospital at Palus. In the hospital, dying declaration (Exh. 41) of Sarjerao was recorded. In the said dying declaration, Sarjerao stated that the appellant had assaulted him with sickle and caused him injuries. The said dying declaration was treated as F.I.R. Initially the offence under Section 307 of IPC came to be registered. Thereafter the investigation commenced. Sarjerao expired on 9.10.2006 at about 11.10 p.m. After the death of

Sarjerao the offence was converted to Section 302 of IPC. The dead body of Sarjerao was sent for post-mortem. During the course of investigation, the statement of Ajit was recorded. The appellant was arrested. Blood stained sickle and blood stained clothes were recovered at the instance of the appellant. After completion of investigation, the charge sheet came to be filed. In due course, the case was committed to the Court of Sessions for trial.

3 Charge came to be framed against the appellant under Section 302 of IPC. The appellant pleaded not guilty to the said charge and claimed to be tried. The defence of the appellant is that of total denial and false implication. After going through the evidence adduced in the present case, the learned Judge convicted and sentenced the appellant as stated in para 1 above. Hence, this appeal.

4 We have heard the learned counsel for the appellant and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned counsel for the parties,

the judgment delivered by the learned Judge and the evidence on record, for the below mentioned reasons, we are of the opinion that there is no cogent, convincing and reliable evidence to show beyond reasonable doubt that the appellant committed the murder of Sarjerao.

5 To sustain the conviction, the prosecution has mainly relied on the evidence of P.W. 3 Ajit who is the son of the deceased. Ajit has stated that he was residing at Bambavade village along with sister, mother, father (deceased Sarjerao), his aunt Chingubai (his father's sister) and his father's mother. Sarjerao had two brothers i.e. Vilas and Anandrao. Vilas was adopted by his aunt viz. Hausabai Pawar. His elder uncle Vilas was also residing with them. After death of adopted father of Vilas, Vilas received property i.e. Gat Nos. 55 and 672. Vilas had one daughter namely Janabai. Janabai got married to the appellant Shrihari in the month of March, 2004. This marriage was against the wishes of Vilas. Within eight days of the marriage, Vilas executed sale-deed in respect of Gat Nos. 55 and 672 in favour of P.W. 3 Ajit. The appellant was demanding half share in Gat Nos. 55 and 672. On account of this, there

was dispute between family of Sarjerao and the appellant. Ajit has stated that Janabai and Shrihari had come to their house for demanding half share in the land. At that time, Shrihari had given threats that if half of the land was not given to them, he will kill all of them. 15 days prior to the incident, the appellant told Ajit that he will take half of the Soyabean out of the Soyabean planted in the said land.

In relation to the incident, Ajit has stated that on 9.10.2006 his father was taking Soyabean to the shop of Arihant Shah situated at Palus for selling the same to Arihant Shah. His father Sarjerao was driving the bullock-cart and Ajit proceeded ahead on bicycle. They received an amount of Rs.6646/- after selling the Soyabean. Out of the said amount, Rs.6000/- was given to them by cheque and Rs.646/- was given to them in cash. Then they started proceeding back to their village at about 4.30 p.m. Sarjerao was driving the bullock-cart and Ajit proceeded ahead on his bicycle. Ajit has stated that when they reached near Sankpal locality, the appellant who was on motor-cycle, came infront of him. The appellant asked why they had taken half the Soyabean crop. Then the appellant gave threats that he would kill all of them. The

appellant took out iron sickle from the bag, however, at that time, P.W. 2 Anilkumar was passing by. When the appellant saw Anilkumar, he kept the sickle back in the bag. Ajit has stated that as the appellant was in angry state of mind and Ajit's father Sarjerao was coming from Palus side, he (Ajit) followed the appellant for about 1 km. When he was near Akbar garage, he saw his father Sarjerao. He also saw that the appellant had parked his motor-cycle and the appellant had boarded the bullock-cart from its backside and he assaulted Sarjerao with the sickle in his hand. Thereafter the appellant ran away with the sickle. Ajit then boarded the bullock-cart and he brought the bullock-cart upto Sana Servicing Centre. At that time, Balasaheb Bhanudas Sankpal and Ajit Sankpal were passing-by on motor-cycle. Balasaheb came near them. Sarjerao told Balasaheb that his son-in-law Shrihari had assaulted him with a sickle and he told Balasaheb to inform about the same at his (Sarjerao's) house. Accordingly, Balasaheb went to the house of Sarjerao. Thereafter, Vilas the brother of Sarjerao, Hanmant (P.W. 4) and Kisan Bhosale came there. Hanmant brought Jeep. They put Sarjerao in the Jeep. Then Hanmant, Sarjerao, P.W. 3 Ajit and others proceeded in

the Jeep to Palus Police Station. At the police Station, Yadi was given to them and they were referred to the Rural hospital at Palus. Police reached the Rural hospital at Palus. In the hospital, police recorded the statement of his father Sarjerao and went away. The Doctor suggested that they should take Sarjerao to the civil hospital at Sangli. However, on the way, they took their father to the hospital of one Dr. Ingalkar. Dr. Ingalkar also suggested that they should take Sarjerao to the civil hospital in Sangli. Then they admitted Sarjerao in the civil hospital Sangli, where Sarjerao expired at 11.10 p.m.

6 The learned counsel for the appellant submitted that P.W. 3 Ajit is the only eye witness who has been examined in this case. Ajit is a highly interested witness as he is the son of deceased Sarjerao. Mr. Chaudhary pointed out that to establish that Ajit was with Sarjerao at the time of the incident, the reason given by Ajit for accompanying Sarjerao is that on 9.10.2006 they were going to the shop of Arihant Shah situated at Palus to sell Soyabean. His father Sarjerao was driving the bullock-cart and he was following him on bicycle. Ajit has not given any reason why he was traveling separately if both of

them were going to the shop of Arihant Shah at Palus to sell Soyabean. Ajit has further stated that they received a cheque of Rs.6000/-. Mr. Chaudhary pointed out that in the cross-examination of Ajit, it is elicited that the cheque was issued in the name of Ajit, which seems highly unlikely because Ajit has admitted in his cross-examination that he did not have any bank account. Another reason put forward to disbelieve the story given by P.W. 3 Ajit is that he has admitted that on the next day of bringing Soyabean in the house, they had sold it. Ajit has further stated that they sold Soyabean twice i.e. once on the next day of bringing the Soyabean to the house and second time after the rituals relating to the death of his father were over. It is pertinent to note that Ajit has stated that prior to 15 days of the incident, prepared Soyabean was brought to the house. This shows that Soyabean was sold about two weeks prior to the date of the incident. In such case, there was no question of Ajit and Sarjerao going on 9.10.2006 to sell Soyabean. Even assuming that deceased Sarjerao was going to sell Soyabean on 9.6.2010 it is highly unlikely that P.W. 3 Ajit would have accompanied deceased Sarjerao because at that time, his examination was going on and two papers of the

examination were already over. This is admitted by Ajit in his cross-examination. Ajit has further admitted that on the day of the incident also, there was examination. Ajit was 17 years of age at the time of the incident. If the examination was going on, in natural course, it was expected that Ajit would be sitting at home studying for his examination instead of accompanying his father Sarjerao to go to Palus to sell Soyabean. No reason at all is given why it was necessary for Ajit to go with Sarjerao to Palus to sell Soyabean.

7 Another circumstance which shows that P.W. 3 Ajit was not present at the time of the incident is that he has stated that due to assault, his father sustained injuries on his back and back of the head, whereas no such injuries were found on the dead body of Sarjerao. Moreover, the conduct of Ajit is also highly unnatural. He has admitted that he did not raise any alarm on witnessing the incident which is admitted by him in paragraph 13 of his evidence. His evidence further shows that the incident had occurred near Akbar garage and Sana Servicing Centre, however, Ajit did not call any person from Akbar garage or Sana Servicing Centre to seek their help.

8 The entire prosecution case mainly rests on the oral evidence of P.W. 3 Ajit who claims to be an eye witness to the murder of his father Sarjerao. We have already pointed out various infirmities in the evidence of P.W. 3 Ajit. It is not necessary to reiterate them, but it will be sufficient if we refer only to one infirmity which, in our opinion, is of a very serious nature. Though according to P.W. 3 Ajit he saw the murderous assault on his father by the appellant, he did not mention the name of the appellant to the police till the next day morning though the incident according to the prosecution took place on 9.10.2006 at about 5.15 p.m. Moreover, Ajit claims that immediately after the incident, his father was put in a vehicle and they went to the police station at Palus with his injured father. However, the evidence of Investigating Officer P.W. 9 A.S.I. Pingale shows that before recording of statement of injured, no information about the incident was received in the police station. Thus this shows that though Ajit went to the police station with his father Sarjerao, he did not disclose to the police that he had witnessed the incident and that he had actually seen the appellant assaulting his father with sickle.

This silence on the part of Ajit is another reason to disbelieve his evidence. The evidence of Ajit shows that his statement was recorded on the next day i.e. on 10.10.2006 at about 11 a.m. Thus, Ajit has not mentioned the name of the appellant to the police till 11 a.m. of the next day though the incident has occurred at about 5.15 p.m. on 9.10.2006. Ajit has further stated that police had also come to the hospital i.e. rural hospital at Palus, however, at the hospital also, there is no evidence to show that Ajit has stated to the police about witnessing the incident. If Ajit had really witnessed the incident, he would at the first instance when he went to the police station, have informed the police about it, or at least when the police reached the Rural hospital at Palus, Ajit would have stated to the police about witnessing the incident. In such case, on noticing that Ajit is an eye witness, his statement would have immediately been recorded. The fact that Ajit told the police about the involvement of the appellant on the next day is a very serious infirmity which destroys the credibility of his evidence.

9 The final nail in the coffin as far as the credibility of

P.W.3 Ajit is concerned, is that P.W. 3 Ajit has stated he has not stated about the incident to any other person before the police recorded his statement. Ajit has further stated that police recorded his statement at about 11.00 a.m. on 10.10.2006. It may be reiterated that the incident occurred on 9.10.2006 at about 5.15 p.m. The learned counsel for the appellant placed reliance on the decision of the Supreme Court in the case of **State of Orissa Vs. Mr. Brahmanand Nanda**¹. In the said decision, the Supreme Court observed that the entire prosecution case mainly rests on the evidence of P.W. 6 who claimed to be an eye witness to the murder. The Supreme Court further observed that the High Court rejected her evidence. It was further observed that it was not necessary to reiterate the reasons given by the High Court but it will be sufficient if only one infirmity is referred which in the opinion of the Supreme Court, was of a most serious character. According to this witness, she saw the murderous assault by the accused, she did not mention the name of the accused as the assailant for a day and half. The murder was committed in the night of 13th June, yet, she did not come out with the name of the accused till the morning on 15th June..... It was held by

1 1976 SCC (Cri.) 596.

the Supreme Court that "This is a very serious infirmity which destroys the credibility of the evidence of this witness."

10 Thereafter, Mr. Chaudhary placed reliance on the decision of this Court in the case of **Ashraf Hussain Vs. State of Maharashtra**². He placed reliance on para 11 of the said decision which is as under:

"11. Another circumstance which militates against the claim of both the eye-witnesses of having seen the incident is the delay in their interrogation under Section 161 Cr.P.C. Suraj Paste admitted in his cross-examination that after lodging of the F.I.R. he was not straight away interrogated at the Police Station and it transpires from the record that Mahesh Tilekar was interrogated under Section 161 of Cr.P.C. two days after the incident i.e. on 22.7.1992. No cogent explanation has been offered by the prosecution for this delay in recording their statements under Section 161 Cr.P.C. In this context, it would be useful to refer to the observations of Their Lordships of the Apex Court in paragraphs 15 and 18 of the judgment reported in AIR 1979 SC 135: (1979 Cri.LJ 51) (Ganesh Bhawan Patel Vs. State of Maharashtra which are to the

² 1996 Cri.L.J. 3147

following effect:

'15..... Delay of a few hours, simpliciter, in recording the statements of eye-witnesses may not by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eye-witnesses to be introduced.'

'18..... Normally, in a case where the commission of the crime is alleged to have been seen by witnesses who are easily available, a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses'."

11 In the present case, it is seen that not only the statement of the sole eye witness who was examined in this case was recorded the next day at about 11 a.m. though the incident occurred on the earlier day at about 5.15 p.m., in addition, this witness has categorically admitted that he had not stated about the incident to any other person before the police recorded his statement. The evidence of P.W. 3 Ajit

shows that he was residing at Bambavade along with his sister, his father (deceased), his mother, his father's sister Chingubai and his grand-mother i.e. his father's mother. In normal course, as the other inmates of the house were not eye witness to the incident, Ajit would have discussed about the incident with the other family members. But the fact that he has not done so and kept quiet about the incident till his statement was recorded by the police points out to the fact that his evidence cannot be relied on.

12 Thereafter the learned counsel for the appellant has placed reliance on the decision of the Supreme Court in the case of ***Alil Mollah and another Vs. State of W.B.***³. He pointed out that in the said case also, the eye witness did not raise any alarm when his master was being assaulted. In the case of Alil (supra), the statement of the eye witness was recorded by the police on the next day in the afternoon. Moreover, the eye witness admitted in his cross-examination that neither at his home nor in the village did he disclose what he had seen in the evening of 4.2.1982 to anyone. In view of the delay in recording the statement, relationship with the

³ (1996) 5 SCC 369

deceased and the unexplained silence on the part of the witness, the Supreme Court observed that "he did not appear to be wholly reliable witness." Mr. Chaudhary pointed out that the facts in the present case are similar to those of **Alil Mollah**. Mr. Chaudhary stated that in the present case also the sole eye witness did not raise any alarm or shouts, when he saw his father being assaulted. The statement of the sole eye witness was recorded belatedly for which there is no explanation and this witness has not disclosed to anyone about the incident till the next day. Hence, the decision in the case of **Alil Mollah (supra)** would apply on all fours in the present case.

In addition to the above mentioned unnatural conduct of P.W. 3 Ajit, it is further brought to our notice that when Sarjerao was taken to the hospital, Ajit did not enter the hospital. Ajit has admitted that he did not know what sort of treatment was given to his father by the Doctor as he was outside. He did not know whether his father was put on cot in the hospital. The evidence shows that all the time Sarjerao was in the hospital, Ajit remained standing outside the hospital. Ajit has further admitted that he did not make any enquiry with the Doctor about the physical condition of his father. If actually

Ajit was accompanying Sarjerao, he would have informed the police when they came to the hospital about witnessing the incident. Moreover, Ajit would have also been at the side of his father when treatment was given to his father and Ajit would have definitely made enquiry with the Doctor about the condition of his father. The fact that Ajit did not do so, in fact, points out to the fact that Ajit, as urged by the the learned counsel for the appellant, was not present in the hospital or even when the incident occurred.

13 Thereafter the prosecution has placed reliance on the dying declaration Exh. 41 which was recorded by P.W. 10 ASI Shelke. First of all the dying declaration Exh. 41 does not bear any time of recording the same. It is further pertinent to note that the dying declaration Exh. 41 bears the endorsement that "patient is fit since start to end and patient is in a conscious state". According to the prosecution P.W.6 Dr. Lokhande is the Doctor who examined Sarjerao and gave his opinion that he was in a fit condition to give a statement. However, P.W. 6 Dr. Lokhande has stated that he has not given any such endorsement and the endorsement on Exh. 41 is not in his

handwriting. P.W. 10 ASI Shelke who recorded the dying declaration Exh.41, has stated that he has not mentioned of his own accord about the condition of the patient. He has further stated that on the dying declaration there is no endorsement of Doctor about the condition of the patient. In such case, it is a great mystery about who wrote those lines on the dying declaration. This raises suspicion about the authenticity of the dying declaration Exh. 41.

14 Another reason which raises doubt in the mind about the dying declaration is that P.W. 3 Ajit has stated that his father used to sign. P.W. 8 Dr. Shah who conducted the post-mortem, has stated that there were no injuries on right hand fingers or palm of the deceased. The post-mortem notes do not show any fracture of the right hand. In such case, why the deceased did not sign on the dying declaration and his thumb impression was taken, has remained unanswered. This further affects the reliability of the dying declaration.

15 Moreover, as far as the dying declaration is concerned, according to P.W. 10 ASI Shelke, the dying

declaration was recorded in the Rural hospital at Palus. However, P.W. 6 Dr. Lokhande has stated that the patient was not taken inside the hospital and when the patient was in the Jeep, he advised them to take the patient to Sangli. It is pertinent to note that P.W. 6 Dr. Lokhande who was attached to the Rural hospital Palus, has stated that when Sarjerao was brought to the Rural hospital at Palus, he was in semi-conscious state and he was unable to speak. This averment of Dr. Lokhande raises grave doubt about the genuineness of the dying declaration Exh. 41.

16 Lastly, as far as the dying declaration Exh. 41 is concerned, Mr. Chaudhary has pointed out that ASI Shelke has admitted that the dying declaration was recorded in the handwriting of police constable Waghmode. Mr. Chaudhary pointed out that constable Waghmode has not been examined. He submitted that in such case, the dying declaration cannot be relied on. In support of this contention, he has placed reliance on the decision of the Supreme Court in the case of **Govind Narain and another Vs. State of Rajasthan**⁴. Mr. Chaudhary placed reliance on the observations made in

⁴ 1993 Supp. (3) Supreme Court Cases 343

paragraph 14 of the said judgment in relation to dying declaration. The relevant observations are as under:

"We find that no reliance can be placed on the document Exh. P-3 for the simple reason that the scribe of the document, Shri. Jagdish Narain Constable, for reasons best known to the prosecution, was not examined at the trial and the defence therefore, had no opportunity to cross-examine him. Mohammed Ali PW 4 has failed to explain the cause for non-production of Jagdish Narain. We are, therefore, in agreement both with the trial court and the High Court, that there are sufficient reasons on the record to justify the discarding of the alleged dying declaration contained in Ex. P-3 and we do not place any reliance on the same."

In the present case also the scribe is not examined for reasons best known to the prosecution hence, the above decision would apply to the facts of the present case.

17 Thereafter the prosecution is relying on the evidence of P.W. 2 Anilkumar to show the motive for the appellant to commit the crime. The evidence of Anilkumar shows that on 9.10.2006 at about 5 p.m. when he was going from his house

to another house, he saw the appellant sitting on his motor-cycle. The appellant was talking loudly with Ajit (P.W.3). The appellant got down from the motor-cycle and took out a sickle from his bag. The cross-examination of this witness shows that his averment that the appellant was talking loudly with Ajit, is an omission. So also his averment that the appellant got down from the motor-cycle and took out a sickle from the bag, is also an omission. Thus, looking to the improvements made by this witness in his evidence, we are of the opinion that his evidence does not inspire confidence. No doubt the evidence of P.W. 3 Ajit also shows the motive for the appellant to commit the crime. However as stated earlier, P.W. 3 Ajit is an interested witness and he had enmity with the appellant. Enmity is a double-edged sword because of which, a person can kill another or an innocent person can be falsely involved. However, we have already discussed in detail about why we are not inclined to place reliance on the evidence of Ajit, one of the major reasons being that though according to him he witnessed the incident which took place on 9.10.2006 at about 5.15 p.m., he did not disclose about it to anyone till the police recorded his statement the next day at 11 a.m.

18 The prosecution has also relied on the evidence of P.W.4 Hanmant to show that oral dying declaration was made by Sarjerao to him in the jeep when Sarjerao was taken to the hospital. According to Hanmant, Sarjerao's son-in-law Shrihari (appellant) had assaulted him with a sickle. Mr. Chaudhary pointed out that this dying declaration was made to Hanmant when Hanmant was taking injured Sarjerao to the hospital in a jeep and according to P.W. 3 Ajit he was also in the jeep along with his father & Hanmant. However, Ajit has not stated about any statement being made by his father while he was being taken in the jeep to the hospital. This raises doubt about the evidence of P.W. 4 Hanmant that Sarjerao had made oral dying declaration to him when he was being taken in the jeep to the hospital.

19 In connection with the evidence of P.W.4 Hanmant, we would again like to advert to the evidence of P.W.3 Ajit. Ajit has stated that immediately after the incident, Balasaheb Bhanudas Sankpal and Ajit Sankpal were passing-by on motor-cycle. On seeing them, his father Sarjerao called Balasaheb

Bhanudas Sankpal and told Balasaheb to inform about the incident of assault to his house i.e. Sarjerao's house. P.W. 4 Hanmant has stated that at about 5.15 p.m. Balasaheb Bhanudas Sankpal came on motor-cycle and after learning about the incident, he (Hantmant) went to Sana Servicing Centre. It is pertinent to note that Hanmant has nowhere stated that Balasaheb Bhanudas Sankpal told him that deceased told him that the appellant had assaulted him with a sickle. Hanmant claims that he found Sarjerao in an injured condition, hence, he brought a Jeep and Sarjerao was put in the said Jeep and Sarjerao made oral dying declaration to him in the Jeep. We have some doubt about the veracity of the evidence of Hanmant because, Hanmant has stated that he first took Sarjerao to the police station at Palus where Hanmant personally narrated about the incident to the police. However, the Investigating Officer P.W.9 API Pingale has stated that no one informed about the incident and before recording of the statement of injured Sarjerao, no information was received about the incident in the police station. Had Hanmant been really informed by Balasaheb that the accused had assaulted Sarjerao or had Sarjerao made an oral dying declaration to

Hanmant that the appellant had assaulted him with a sickle, Hanmant would have definitely stated so to the police when they went to the police station. The evidence of P.W. 9 API Pingale clearly shows that no one informed them about the incident and the first time they came to know about the incident was when the statement of Sarjerao was recorded. It is pertinent to note that Hanmant has stated that the police officer in Palus police station recorded his statement and while giving Yadi, police made enquiry with him about the incident and reduced the information given by him (Hanmant) in writing. In such case, if an oral dying declaration was made by Sarjerao, Hanmant would have definitely informed the police that the appellant had assaulted Sarjerao with a sickle, which information would be the first information report but no such first information report or the statement of Hanmant was recorded on 9.10.2006. This shows that the evidence of Hanmant cannot be relied upon.

20 In view of the above facts an inference can also be drawn that Hanmant had not stated to the police about the assault by the appellant because he himself was not aware of

any such incident of assault by the appellant on Sarjerao or it may be that Hanmant had given an entirely different story which did not suit the prosecution, hence, the statement given by Hanmant was suppressed. In any event, we do not think it safe to rely on the evidence of Hanmant.

21 Lastly, reliance was placed by the prosecution on the circumstance of recovery of blood stained sickle, bag, blood stained pant and shirt at the instance of the appellant. Reliance is placed on the evidence of P.W. 1 panch witness Sanjay Pawar to support the recovery of these articles at the instance of the appellant. Thereafter reliance is placed on the CA report Exh. 55 which shows that the sickle, bag, pant and shirt recovered at the instance of the appellant were stained with blood of 'B' group. As far as this circumstance is concerned, it is pertinent to note that Memorandum and Panchnama relating to recovery of these articles (Exhs. 30 and 31) does not make any mention of sealing of these articles at the spot. Useful reference may be made to the decision of the Supreme Court in the case of **Amarjit Singh @ Babbu Vs. State of Punjab**⁵, wherein the Supreme Court has held that non-

⁵ 1995 Suppl (3) SCC 217

sealing of the articles at the spot is a serious infirmity because the possibility of tampering with the said articles cannot be ruled out. The same view was followed in two decisions of the Division Bench of this Court in the case of **Ashok Premji Nirbhawane Vs. State of Maharashtra**⁶ and **Rajaram Limbaji Babar Vs. The State of Maharashtra**⁷. In such case, we are not inclined to place reliance on the recovery of articles at the instance of the appellant.

22 On going through the evidence on record, we are of the opinion that the prosecution has failed to prove its case against the appellant beyond reasonable doubt.

23 In the result, the following order is passed:

ORDER

- (i) The appeal is allowed;
- (ii) The judgment and order dated 17.5.2008 passed by the learned Ad-hoc District Judge-1 and Additional Sessions Judge, Sangli in Sessions Case No. 16 of 2007 convicting and

⁶ in Cri.Appeal No. 886 of 2012 dated 11.4.2014

⁷ in Cri.Appeal No. 899 of 2005 dated 17.1.2014

sentencing appellant - Shrihari Eknath Suryavanshi under Section 302 of IPC is set aside. The appellant is acquitted thereunder;

(iii) The appellant be set at liberty forthwith, if not required in any other case;

(iv) Fine amount if any paid, be refunded to the appellant.

[K.R.SHRIRAM, J.]

[SMT. V.K.TAHILRAMANI, J.]

Kandarkar