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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 633 OF 1995

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| 1. Naresh Madhukar Thombre
Age about 30 years. | - Appeal dismissed as abated. |
| 2. Gajanan Dhondur More
Age about 43 years. | |
| 3. Nathuram Shankar Thombre
Age about 37 years. | |
| 4. Vijay Shankar More
Age about 33 years
All residents of Phugarwadi
Tal: Rohe, Dist. Raigad | - Appeal dismissed as abated |

.. Appellants
(Org. Accd. Nos.1 to 4)

Vs.

State of Maharashtra

.. Respondent

Mr. Niranjana Mundargi for appellants.
Mrs. U. V. Kejriwal, APP for State.

CORAM: P. V. HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, JJ.

DATED : FEBRUARY 05, 2015.

ORAL JUDGMENT [Per P. V. Hardas, J.]:

1. The appellants/ Original Accused Nos.1 to 4, who stand convicted for offence punishable under Section 302 read with Section 34 of the Indian Penal Code and sentenced to imprisonment for life and each accused to pay a fine of Rs.1500/-, in default of which to undergo further

RI for six months, by the Additional Sessions Judge, Raigad-Alibag, by judgment dated 31/10/1995, in Sessions Case No. 39 of 1992, by this appeal question the correctness of their conviction and sentence.

2. At the out-set, Mr. Niranjan Mundargi, learned counsel for the appellants, has tendered before us death certificates of Original Accused No.1 – Naresh and Original Accused No.4 – Vijay. The said death certificates are taken on record and marked Exhibit “X” and Exhibit “X1” for the purpose of identification. As per the death certificates, Original Accused No.1 – Naresh expired on 22/1/2005, while Original Accused No.4 – Vijay expired on 7/3/2012. In the light of the death certificates of these two accused i.e. Original Accused No.1 – Naresh and Original Accused No.4 – Vijay, the appeal filed by them is dismissed as abated. Present appeal, therefore, questions the correctness of the conviction and sentence of Appellants/Original Accused No.2 – Gajanan and Original Accused No.3 – Nathuram.

3. Facts, as are necessary for the decision of this appeal may be stated thus:-

PW 8 – PSI Shriram Patole, who, on 13/10/1991, was attached to the Roha Police Station and was on duty, recorded the report of PW 3 – Mahadeo at Exh. 20. PW 3 – Mahadeo informed about seeing the dead body of deceased Pandurang in the forest by the side of the road near the Tambodi village. An entry in that behalf was taken in the station diary. PW 8 – PSI Patole, accompanied by the Police Patil, proceeded to the scene of the incident and noticed the dead body of deceased Pandurang. The dead body was lying at a distance of two furlongs from village Ohol. The police constable was kept on guard for guarding the dead body. Villagers were also noticed to have assembled at the scene of the incident. PW 8 – PSI Patole returned back to the Police Station along with PW 3 – Mahadeo and scribed the report of PW 3 – Mahadeo at Exh.20. On the basis of the said report, he registered an offence vide Crime No. 45 of 1991 under Section 302 read with Section 34 of the IPC. He thereafter returned back to the scene of the incident and drew the inquest panchanama of the dead body of deceased Pandurang on the next day. The inquest panchanama is at Exh. 24. The dead body was then referred for postmortem examination to the Roha Primary Health Centre. A scene of the incident panchanama was also drawn in the presence of panchas at Exh. 25. The scene of the incident was pointed out by PW 5 – Jai. This scene of

the incident was different from the spot where the dead body was found. From the scene of the incident, one basket, a sickle and plates were seized. Further investigation was then handed over by PW 8 – PSI Patole to PW 9 – API Bapu Desai.

PW 9 – API Bapu Desai, who was in-charge PSI at Roha Police Station, was entrusted with the investigation of Crime No. 45 of 1991. On 13/10/1991, PSI Patole had arrested accused no.1 – Naresh and accused no.2 – Gajanan. From the eye witness PW 4 – Pithi, PW 9 – API Desai learned about involvement of the other two accused and accordingly arrested accused no.3 – Nathuram and accused no.4 – Vijay under arrest panchanamas. The Medical Officer was requested to draw the blood sample of the accused and sample of the finger nails. On 19/10/1991, during custodial interrogation, accused no. 4 – Vijay expressed his readiness to point out the place where the clothes and a sickle had been concealed by him. Accordingly, the memorandum was reduced into writing in the presence of panchas at Exh. 27. Similarly, accused no.3 – Nathuram also expressed his willingness to point out the place where his clothes had been concealed. A memorandum was drawn in the presence of panchas at Exh. 28. Accued No.1 – Naresh also expressed his willingness to point out

the place where his clothes had been concealed. A memorandum was accordingly drawn in the presence of panchas at Exh. 29. Accused No. 2 – Gajanan expressed his willingness to point out the place where he had concealed his shirt. A memorandum was accordingly drawn at Exh. 30. The accused led the police and the panchas and pursuant to the memorandum, the various articles were seized under panchanamas at Exhs. 26A, 28A, 29A and 30A. Accused No.1 – Naresh had also expressed his willingness to point out the place where a stick had been concealed. A memorandum was accordingly drawn at Exh. 32. Accused No.1 – Naresh led the police and panchas and accordingly a stick was seized under panchanama at Exh. 32A. The seized property was then referred to the Chemical Analyzer under requisition at Exh. 36. Further to the completion of investigation, a charge-sheet against the appellants was submitted.

Postmortem on the dead body of deceased Pandurang was performed by PW 2 – Dr. Rajeshree Jagtap, who noticed the following external injuries:-

- (i) CLW on left frontal scalp 7 cm x 2 cm. oblique bone deep.

- (ii) CLW on right parietal region vertical 5 x 1.5 cm. bone deep.
- (iii) CLW on lower lip 2.5 cm x ½ cm. x 1 cm. deep.
- (iv) Contusion over chest right side and serotum.

According to PW 2 – Dr. Jagtap, internal injuries correspondent to external injuries and injury no.1 was sufficient in ordinary course of nature to cause death. According to PW 2 – Dr. Jagtap the cumulative effect of all the injuries was sufficient to cause death. She, therefore, opined that deceased Pandurang had died due to cardio respiratory failure due to haematoma and injury to brain. The postmortem report is at Exh. 18.

4. On the case being committed to the Court of Sessions, trial court vide Exh. 1 framed charge against the appellants for offence punishable under Sections 302 r/w 34 and 201 r/w 34 of the IPC. The accused denied their guilt and claimed to be tried. Prosecution, in support of its case, examined 9 witnesses. The trial Judge disbelieved the evidence regarding the discovery of the weapons and placed implicit reliance on the testimony of the two eye witnesses i.e. PW 4 – Pithi and PW 5 – Jai.

5. We have heard Mr. Niranjana Mundargi, learned counsel for the

appellants and the learned APP for the State 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 prosecution witnesses.

6. PW 3 – Mahadeo, brother of deceased Pandurang, deposes that his deceased brother, who was residing separately, had not returned home from his agricultural field on 12/10/1991. He, therefore, started searching for his brother and while searching, had gone to field Navashet which was at a distance of 2 miles from his house. While searching for his brother, he met one Nirabai Janu Mhatre, who informed him that she had seen the dead body of Pandurang. Nirabai also informed him the place where she had seen the dead body. Accordingly, on 13/10/1991, PW 3 – Mahadeo went to the place which was described by Nirabai and noticed the dead body of his brother Pandurang. Deceased Pandurang had sustained several injuries. Accordingly, a report was lodged with the police at Exh. 20. According to Mahadeo, his brother Pandurang was manufacturing and selling illicit liquor. According to Mahadeo, Pandurang had informed him that accused no.1 – Naresh had brandished a knife and had given a threat of killing Pandurang.

7. In cross-examination, he has admitted that since last 2 to 3 days, the process of harvesting of the crop was going on. He has also admitted that the dead body of Pandurang was lying 20 to 25 ft. from the kachha road. Omission has been elicited that he had not stated in his report at Exh. 20 about accused no.1 – Naresh brandishing knife and threatening Pandurang.

8. Prosecution has relied on the testimony of PW 4 – Pithi, who deposes that she was acquainted with deceased Pandurang and on the day of the incident Pandurang had come to her house. Certain labour had also come in search of liquor. Pithi had informed the labour that liquor was not available and, therefore, she could not sell liquor to them. According to her, in the meantime, the appellants came from the side of the house of her daughter. When asked to identify the appellants, PW 4 – Pithi was unable to identify the appellants from a distance of 10 to 12 ft. In order to identify the accused, she was required to go near them and thereafter identified the accused. According to her, the labour had also asked Pandurang to provide them liquor but Pandurang had replied that he did not have any liquor with him. There was a quarrel between the appellants and deceased

Pandurang. Accused No. 4 – Vijay was armed with a sickle, while accused no.1 – Naresh was armed with a knife. Accused no.2 – Gajanan was armed with a stick, while accused no. 3 – Nathuram was unarmed. According to Pithi, all the accused started assaulting deceased Pandurang in her courtyard. Accused No. 4 – Vijay dealt a blow of sickle on the side of head of Pandurang, while accused no. 2 – Gajanan dealt a blow of stick on the head near the ear. According to Pithi, she requested the accused not to assault deceased, but the accused had threatened that they would commit her murder and set her hut ablaze.

9. In cross-examination, she has admitted as correct that she and her two daughters were distilling liquor and were selling the liquor. She has admitted that at the time of the incident it was dark and has admitted that her visibility was affected on account of old age. She has also admitted that deceased had also demanded liquor from her. An omission has been elicited that she had not stated that accused no.2 – Gajanan gave a blow of stick on the head near the ear. Similarly, an omission has been elicited that she had not stated that accused no.1 – Naresh had given a blow of stick on the neck, while accused no. 4 – Vijay had given a blow of sickle on the head of deceased Pandurang. Omission is also elicited that she had

not stated about the threat given by the accused.

10. Prosecution has examined PW 5 – Jai, daughter of PW 4 – Pithi, who deposes that on 12/10/1991 she was present in the house of her mother Pithi. In the afternoon, deceased Pandurang had come with certain people from village Kavatachya for engaging labour for harvesting the crop. According to her, these persons had come for the purpose of buying liquor. PW 4 – Pithi had informed them that liquor was not available and, therefore, they went away. Thereafter the appellants came to the hut of PW 4 – Pithi and asked deceased Pandurang to give them liquor. Pandurang replied tht he had no liquor. There was an altercation between deceased Pandurang and the appellants. Accused No. 3 – Nathuram caught deceased Pandurang, while accused no. 2 – Gajanan gave a blow of stick to Pandurang. Accused No. 4 – Vijay gave a blow of sickle on the head of Pandhurang, while accused no.1 – Naresh assaulted deceased Pandurang with a slap. Naresh was armed with a knife. According to Jai, she and her mother attempted to intervene, but the accused threatened them.

11. In cross-examination, she has admitted that deceased Pandurang was also distilling and selling illicit liquor. She has further admitted that

when the accused had come to the house, she and her mother were inside the house, cooking food. She has denied the suggestion that she had not overheard the abuses exchanged between the deceased and the appellants. Omission has been elicited that she had not stated about accused no. 3 – Nathuram holding deceased Pandurang, while accused no.2 – Gajanan gave a blow of stick. Omission is also elicited that she had not stated in her previous statement that accused no. 4 – Vijay assaulted Pandurang with a sickle and that accused no. 1 – Naresh slapped deceased Pandurang. Omission is also elicited that she had not stated in her previous statement about accused giving threats to her.

12. PW 5 – Jai states that accused no. 3 – Nathuram had held deceased Pandurang, while accused no. 2 – Gajanan had assaulted Pandurang with a stick. The overt act ascribed to accused no. 3 – Nathuram is not deposed to by PW 4 – Pithi. Apart from the variation in the testimony of these witnesses, omission on vital aspect i.e. the overt act is also elicited in the evidence of these witnesses.

13. Perusal of the evidence of PW 2 – Dr. Jagtap reveals that deceased Pandurang had not sustained any injury due to stick on the head

near the ear. The deceased had sustained an injury i.e. contusion on his chest. None of the witnesses had deposed about accused no.2 – Gajanan giving any stick blow on the chest. Apart from that, we find that there is an omission in the testimony of both the eye witnesses about accused no.2 –Gajanan assaulting deceased with a stick. Thus, in our opinion, no reliance can be placed on the evidence of the eye witnesses regarding the overt act ascribed to accused no. 2 – Gajanan. Admittedly, accused no. 3 – Nathuram was unarmed and PW 4 – Pithi does not ascribe any overt act to him. The overt act ascribed to accused no. 3 – Nathuram by PW 5 – Jai has been elicited as an omission. The trial court has disbelieved the discovery of the weapons and the clothes at the behest of the accused. We thus find that the evidence of the eye witnesses cannot be implicitly relied upon without corroboration. There is no corroboration whatsoever to the evidence of the eye witnesses. We thus find that PW 4 – Pithi and PW 5 – Jai fall in the category of eye witnesses on whom implicit reliance cannot be placed, but whose evidence can be relied upon, if corroborated. We also find that there is no other evidence which would corroborate the version of these two witnesses. In our opinion, therefore, the appellants would be entitled to be given the benefit of doubt.

14. Accordingly, Criminal Appeal filed by Appellant-Original Accused No.2 – Gajanan Dhondu More and Appellant-Original Accused No.3 – Nathuram Shankar Thombre is allowed and the conviction and sentence of the appellants/Original Accused Nos.2 and 3 is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by the appellants/Original Accused Nos.2 and 3, be refunded to them. Their bail bonds stand cancelled.

Since Appellant-Original Accused No.1 – Naresh Madhukar Thombre expired on 22/1/2005 and Appellant-Original Accused No.4 – Vijay Shankar More expired on 7/3/2012, appeal filed by them is dismissed as abated.

(DR. SHALINI PHANSALKAR-JOSHI,J.)

(P. V. HARDAS,J.)