

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.704 OF 1995

Bapu Shivaji Kamble,	]	
Age 21 Years, Occ.: Painter,	]	 Appellant /
R/at Upper Indiranagar,	]	(Original Accused
Bibvewadi, Pune – 411 037.	]	No.2)

Versus

State of Maharashtra	]	 Respondent
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ALONG WITH
CRIMINAL APPEAL NO.717 OF 1995

Dilip Gajendra Sonawane,	]	
Age 20 Years, Occ.: Painter,	]	 Appellant /
R/at Upper Indiranagar, Otta,	]	(Original Accused
Bibvewadi, Pune.	]	No.1)

Versus

State of Maharashtra	]	 Respondent
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Mr. Ujwal R. Agandsurve for the Appellant in
both the Criminal Appeals.

Smt. V.R. Bhosale, A.P.P., for the Respondent/State.

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

DATE : 26TH MARCH, 2015.

ORAL JUDGMENT [Per Dr. Shalini Phansalkar-Joshi, J.] :

1. Both these Appeals are arising out of the one and same Judgment of Additional Sessions Judge, Pune, dated 17th October, 1995, in Sessions Case No.85 of 1995. Hence, they are being decided by this common Judgment. Appellant Dilip in Criminal Appeal No.717 of 1995 is original Accused No.1, whereas, Appellant Bapu in Criminal Appeal No.704 of 1995 is original Accused No.2. Both of them are convicted for the offence punishable under Section 302 r/w. 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.500/- each, in default to suffer R.I. for three months.

2. Facts, as are necessary, for deciding these Appeals can briefly be stated thus :-

On 28th October, 1994 at about 10:30 pm, PW-2 Narayan Ozarkar, who runs a shop in the name of 'Suraj General Stores' near Dandekar Bridge, after closing his shop, came outside and started chit-chatting with PW-9 Manohar Gaikwad and some other persons. At that time, he heard the shouts of '*save me..save me..*'. Hence, he and PW-9 Manohar saw from the Dandekar Bridge and they found that one person was lying down and four other persons were inflicting blows on him with the weapons in their hands. Therefore, PW-2 Narayan and PW-9 Manohar rushed to the

help of that person. Seeing them, the assailants ran away from the spot. PW-2 Narayan then gave information of the incident to the Dattawadi Police Chowky.

3. On the receipt of this information, PW-11 PSI Ravindra Pisal, who was in-charge of Dattawadi Police Chowky, came to the spot and sent the injured Balu Lokhande to Sassoon Hospital along with Police Constable Shingote. In the Hospital after verifying from the Doctor that injured Balu was in a fit condition to give statement, the requisition was made to PW-7 Mahendra Vakil, Judicial Magistrate, First Class, for recording his Dying Declaration. Accordingly, Dying Declaration (Exhibit-44) came to be recorded in the night at about 1 am. As from the Dying Declaration, the names of the assailants were transpired, PW-11 PSI Pisal lodged complaint for State against the Accused vide Exhibit-73 and registered C.R. No.424 of 1994 on the said complaint.

4. Further investigation of the said C.R. was taken over by PW-10 PI Subhash Kamble. He arrested the Accused on 31st October, 1994. On 1st October, 1994, during police custody, at the instance of Accused No.4- Dashrath, since acquitted, a sickle came to be seized along with his blood stained clothes under Panchanama (Exhibit-57), whereas, at the instance of Accused No.1 Dilip, on 2nd November, 1991, knife came to be seized,

along with his blood stained clothes, as per Memorandum Panchanama (Exhibit-58) and Seizure Panchanama (Exhibit-59). On 6th November, 1994, at the behest of Accused No.2 Bapu, knife came to be seized along with his blood stained clothes, under Section 27 of the Evidence Act, under Seizure Panchanama (Exhibit-61). On the same day, the blood samples of the Accused were collected for the purpose of grouping and then all the seized muddemal articles were sent to Chemical Analyzer vide requisition letter (Exhibit-62). During the course of further investigation, the statements of witnesses came to be recorded and after completion of investigation, Charge-Sheet came to be filed in the Court of Judicial Magistrate, First Class, Pune on 9th February, 1995.

5. On the case being committed to the Sessions Court on 16th February, 1995, the Trial Court framed charge against all the four Accused vide Exhibit-2. The Accused pleaded not guilty and claimed trial, raising the defence of simple and total denial.

6. To bring home the guilt of the Accused, Prosecution examined in all 11 witnesses and on appreciation of their evidence, the Trial Court acquitted original Accused No.3-Solapuri Ajya @ Vinayak Mahadeo Dhavare and original Accused No.4-Dashrath Mahadeo Ghode; whereas Trial Court held the guilt of the present Accused Nos.1 and 2 to be proved

beyond reasonable doubt, hence convicted them for the offence punishable under Section 302 r/w. 34 of the IPC and sentenced them, as aforesaid.

7. This Judgment of the Trial Court is being challenged in these Appeals by the learned Counsel for the Appellants, whereas, supported by the learned A.P.P. for the Respondent-State. In our considered opinion, before adverting to the rival submissions advanced by them, it would be useful to refer to the evidence on record.

8. To prove the homicidal death of Balu, Prosecution has led the evidence of PW-6 Dr. Shrikant Chandekar, who has conducted postmortem examination on his dead body. He found as many as 8 external stab injuries on the vital parts of the body of Balu, corresponding with the internal injuries to his heart, ribs and lungs. According to him, these injuries were sufficient in the ordinary course of the nature to cause the death. In his opinion, the cause of the death was *“traumatic and haemorrhage shock due to multiple thorax injuries associated with other injuries”*. Accordingly, he has issued the Postmortem Report (Exhibit-40). He has further opined that these injuries can be caused by pointed sharp weapons.

9. The Prosecution case is based on the ocular account as well as the Dying Declaration. However, none of the eye witnesses examined by the Prosecution has supported its case, including PW-2 Narayan and PW-9 Manohar. PW-3 Chokoba Bhosale, who was doing the business of fruit vendor near the spot of incident, was also declared hostile. Though all these three witnesses are cross-examined by learned A.P.P., nothing worthwhile is elicited in their cross-examination to prove the Prosecution case.

10. As a result, the entire thrust of the Prosecution case is on the Dying Declaration of the deceased, which is recorded by PW-7 Mahendra Vakil, the Judicial Magistrate, First Class, in the presence of PW-8 Dr. Ramnath Jadhav. This Dying Declaration is at Exhibit-44. According to the evidence of PW-7 Mahendra Vakil, on the requisition of the Police on that night, at about 12:50 am, he went to Sassoon Hospital. There injured Balu was admitted in I.C.U. He verified from PW-8 Dr. Ramnath Jadhav, who was on duty, as to whether injured was in a condition to give the statement. After PW-8 Dr. Ramnath Jadhav examined injured and made endorsement that he was in a fit condition to give the statement, he recorded the statement of Balu, in which Balu stated that Accused No.1- Dilip assaulted him with sickle below Dandekar Bridge, along with Yamunabai's son i.e. Accused No.2- Bapu, Dilya and Pakya of Solapur

were also with Accused No.1-Dilip. When PW-7 Mahendra Vakil asked him what was the cause of assault, he said that there was no such cause of assault. As per the evidence of PW-7 Mahendra Vakil and PW-8 Dr. Ramnath Jadhav, the thumb impression of injured Balu was obtained on the Dying Declaration (Exhibit-44) and its recording was completed at about 1:10 am.

11. In cross-examination of PW-7 Mahendra Vakil, Judicial Magistrate, First Class, a material admission is elicited that, though he was aware that the Dying Declaration is required to be read over to the patient and an endorsement to that effect is required to be made, he had neither read over the said Dying Declaration to the deceased, nor made any endorsement to that effect. In our considered opinion, this constitutes a major lacunae and infirmity in the Dying Declaration, which goes to the root of the matter; in view of the law laid down by the Apex Court in ***Shaikh Bakshu & Ors. Vs. State of Maharashtra, (2008) 1 SCC (Cri) 679***, wherein it is held that when there is no mention in the Dying Declaration that it was read over and explained to the deceased, then it clearly constitutes a fatal lacunae in the Dying Declaration and such Dying Declaration becomes bereft of credence. In this authority, the Trial Court and High Court had concluded that even though it was not stated in the Dying Declaration that it was read over and explained to the Accused, it

has to be presumed that it was read over and explained to the Accused. The Supreme Court, however, held that this view is clearly unacceptable, as it amounts to surmises and conjectures.

12. The Division Bench of our own High Court has also, in the case of ***Abdul Riyaz Abdul Bashir Vs. State of Maharashtra, 2012 ALL MR (Cri) 2188***, categorically held that, to rule out any remote infirmity in the Dying Declaration, it is necessary that there has to be an endorsement that the contents of the statement were read over and admitted to be true and correct. Considering the fact that Deponent is not available for cross-examination, this requirement of reading over the contents of the statement and Deponent admitting it to be correct is most significant and non-observance thereof is a material inherent infirmity in the Dying Declaration. Such Dying Declaration, therefore, cannot become foundation for sustaining the conviction. In the present case, therefore, the written Dying Declaration (Exhibit-44) is required to be excluded from consideration, in view of this fatal infirmity therein.

13. The Prosecution has, hence, tried to place reliance on the oral Dying Declaration of injured Balu before his mother PW-1 Sushila Lokhande. She has deposed that when she came to know that her son was admitted in the hospital, she rushed there. Her son Balu then told her

that Accused No.1-Dilip, Accused No.2-Bapu and some other persons assaulted him. He further told her that Accused No.2-Bapu gave him a blow of gupti on his abdomen, whereas, Accused No.1-Dilip gave him a blow on his hand with a sickle. He gave the names of the other two persons as Accused No.3-Solapuri Ajya @ Vinayak and Accused No.4-Dashrath, who also gave him blows of weapons. However, in her cross-examination, it is brought on record that she had not stated in her statement recorded by Police anything about this oral Dying Declaration made by Balu before her. She has further admitted that she did not tell Police that Balu told her that Accused Bapu, Dilip and other persons assaulted him; Accused Bapu gave him the blow of gupti and Accused Dilip gave him the blow of sickle. In such situation, her evidence before the Court, being in the nature of improvement, has absolutely no value and cannot be relied upon.

14. Except for these Dying Declarations, there is no other evidence on record to implicate the Accused in the said offence. Though Prosecution has relied upon the recovery evidence of the weapons of assault, at the instance of the present Accused, both Panch Witnesses PW-4 Rajesh Marne and PW-5 Ravishankar Bansode were declared hostile and have not supported the Prosecution case. Apart from that, there is no evidence proving that the weapons were wrapped and sealed with wax and they

were in the same condition till they were examined by the Chemical Analyzer. The C.A. Reports also go to prove that the results of the grouping of the blood found thereon were inconclusive.

15. Resultantly, in the absence of any incriminating evidence brought on record against the Accused, it has to be held that the Prosecution has failed to bring on record any incriminating material against the Appellants. Consequently, both the Criminal Appeals are allowed and the conviction and sentence of the Appellants is hereby quashed and set aside and they are acquitted of the offence with which they were charged and convicted. Fine, if paid by them, be refunded to them. Their Bail Bonds stand cancelled.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]