

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.730 OF 1996

1. Vasudeo Sakhararam Phadke	]	
Aged about 25 years	]	
	]	
2. Kisan @ Balakrishna Nagu Phadke	]	
Aged 36 years	]	
	]	
3. Balaram Bama Bhoir,	]	
Aged 25 years	]	
	]	
All residents of Nandgaon, Taluka Panvel,	]	 Appellants /
District Raigad.	]	(Org. Accused
	]	Nos.1 to 3)

Versus

The State of Maharashtra,		
Thru' Panvel Town Police Station	]	 Respondent

Mr. Sudeep Pasbola, a/w. Mr. Bhavesh Thakur and
Mr. Rahul Arote, for the Appellants/Original Accused
Nos.1 to 3.

Mr. H.J. Dedhia, A.P.P., for the Respondent-State.

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

DATE : 5TH MARCH, 2015.

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

1. The Appellants are the original Accused Nos.1 to 3. They have been convicted by the Court of the Sessions Judge, Raigad, Alibag in Sessions

Case No.58 of 1990 by the Judgment dated 9th December, 1996 for the offence punishable under Section 302 r/w. 34 of the IPC and sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- each, in default to suffer further R.I. for one year. Being aggrieved by their conviction and sentence, they have preferred this Appeal.

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

The incident in question, which gave rise to the present Prosecution case, has occurred on 28th August, 1989, out of the enmity between two rival factions of the Village Nandgaon. The Appellants, along with the co-accused, totally 18 in number, were belonging to the faction of one Suresh Phadke, whereas, deceased Sharad Bhoir and Eknath Bhoir, injured PW-7 Balaram Bhagat and the prosecution witnesses were belonging to the rival faction. On the date of incident, totally three murders took place in the morning itself; first that of Suresh Phadke near M.S.E.B. Office at Village Bhingari on the way to Panvel from Nandgaon; another that of Eknath Bhoir, near the house of Tukaram Mayade; and, third, that of Sharad Bhoir, in the forest land.

3. As per Prosecution case, to take the revenge of the murder of their leader Suresh Phadke, his party men, i.e. the present Appellants and

other co-accused. formed an unlawful assembly and assaulted deceased Eknath, Sharad and PW-7 injured Balaram with various weapons like spears, iron bars, knives, swords, burchis etc. PW-3 Savita Bhoir, the niece of deceased Eknath, when she was returning from the market, at about 8:30 am, saw the Appellants and other co-accused, totally 16 to 17 in number, beating Eknath with sticks, spears, burchis and swords. She rushed to the house of Eknath and informed Eknath's wife PW-4 Tarabai about the incident. PW-4 Tarabai rushed there and, with the help of PW-5 Anita and PW-6 Manda, took injured Eknath to the Municipal Hospital at Panvel. The information of the incident was also given to PW-15 PI Laxman Shinde, who was attached to Panvel Town Police Station. He also rushed to the Municipal Hospital at Panvel. There he recorded the statement of injured Eknath vide Exhibit-79, in which Eknath attributed the cause of injuries to the assault by the Appellants and other co-accused. On his statement (Exhibit-79), Head Constable Salvi registered C.R. No.312 of 1989.

4. Before registration of this C.R., another C.R. No.311 of 1989 also came to be registered at Panvel Town Police Station in respect of the murder of Suresh Phadke and his dead body was also brought at the Municipal Hospital, Panvel. The said C.R. was registered on the intimation given by one Vivek Patil at the Police Station.

5. On the same day, PW-15 PI Shinde went to the spot of incident at about 1 pm. It was shown to him by injured Eknath's son, Rohidas. There he came to know that PW-7 Balaram was also injured in the series of the said incident, due to the assault made by the Appellants and other co-accused. Hence, PW-15 PI Shinde visited the house of PW-7 Balaram and made the Spot Panchanama (Exhibit-76) of the scene of offence at both the places. On the very day, he recorded the statements of 8 to 9 witnesses, including the only eye witness PW-3 Savita, PW-5 Anita and others. The statement of injured Balaram (PW-7) came to be recorded by PSI Rane. Head Constable Kumbhar seized the blood stained clothes of PW-7 Balaram.

6. As condition of injured Eknath became worse, he was taken to the Sion Hospital, Mumbai. However, there he succumbed to injuries at about 3:45 pm. After seizing the clothes on his person and carrying out Inquest Panchanama, his body was sent for postmortem examination.

7. As per evidence of PW-15 PI Shinde, the search of the Accused was taken on that day and on the next day also, but no one was found. On 30th August, 1989, he then recorded the statement of PW-4 Tarabai, Eknath's wife, and his niece PW-6 Manda, before whom Eknath is alleged to have made oral Dying Declaration.

8. On 3rd September, 1989, dead body of Sharad Bhoir was found in the forest land. The Inquest Panchanama was made of the dead body vide Exhibit-71. The Scene of Offence Panchanama was also made by PW-15 PI Shinde and then his dead body was referred for postmortem examination. Ultimately, on 1st October, 1989, present Appellants and some co-accused came to be arrested. During police custody, Appellant No.3-Balaram and the other co-accused Damu Khutale gave a disclosing statement. The Memorandum Panchanamas of the same was made vide Exhibits "80" and "81". At their instance, the weapons of assault, like, one sword each came to be seized under Panchanamas (Exhibits "82" and "83") from the spot at Bridge near Village Palaspe. During the course of further investigation, remaining accused came to be arrested. The seized muddemal articles were sent to the Chemical Analyzer vide requisition (Exhibit-84) dated 29th October, 1989. The C.A. Report is produced at Exhibit-85. After completion of investigation, PW-15 PI Shinde submitted Charge-Sheet in the Court against the Appellants and other co-accused in respect of murder of Eknath and Sharad and attempt to murder of PW-7 Balaram.

9. The Trial Court framed Charge against the Accused vide (Exhibit-1) for various offences punishable under Sections 147, 148, 302, 307, 326, 504 and 506 r/w. 149 of the IPC. Appellant No.2 was further charged with

the offence punishable under Section 25(1) of the Indian Arms Act for the offence of possessing gun without having license. The Accused pleaded not guilty and claimed trial. They raised the defence of false implication on account of enmity and rivalry between the two factions.

10. In support of its case, Prosecution examined in all 16 witnesses. On appreciation of evidence, the Trial Court found that the Prosecution has failed to prove against all the Accused, including the Appellants, the charge of forming unlawful assembly and in prosecution of the common object of that assembly, committing the murder of deceased Sharad and attempting to commit murder of PW-7 Balaram. As such, the Trial Court acquitted all the Accused, including the present Appellants, for the offence punishable under Sections 147, 148, 307, 326 and 504 r/w. 149 of the IPC. Accused No.2 was also acquitted for the offence punishable under Section 25 of the Indian Arms Act. Only original Accused Nos.1 to 3, i.e. the present Appellants, came to be held guilty for the offence of committing the murder of Eknath, in furtherance of common intention and, therefore, they alone were convicted for the offence punishable under Section 302 r/w. 34 of the IPC.

11. State has not preferred any Appeal challenging the acquittal of the Appellants for the murder of Sharad and attempt to commit murder of PW-

7 Balaram and the acquittal of remaining co-accused of all the offences.

12. As a result, this Appeal remains limited only to challenge the correctness of the Judgment of the Trial Court as regards holding the guilt of the Appellants to be proved for the offence of committing murder of Eknath. Hence, the evidence of only those prosecution witnesses, who have deposed about the involvement of the Appellants in the death of Eknath, is of relevance and discussed accordingly in this Appeal.

13. To prove the homicidal death of Eknath, Prosecution has examined PW-16 Dr. Ramrao Kendre, who was attached to Panvel Municipal Hospital, at the relevant time, where Eknath was brought by PW-6 Manda and Sitaram Patil in injured condition at about 10 am. As per the evidence of PW-16 Dr. Kendre, on examination, he found following injuries :-

- (1) *Incised wound over left chin to left side neck posteriorly with cut of vains muscles and herves and bleeding was fresh, size 5" x 1 ½" x bone deep.*
- (2) *Incised wound left fore-arm 1 ½" above the wrist joint with fracture both bones 3" x 1 ½" x bone deep.*
- (3) *Incised wound right parito occipital area with fracture of occipital bone, ½ x 1" x bone deep.*
- (4) *Incised wound right posterior to ear to neck posterior aspect 3 ½" x 1/4" x 1/4".*

(5) *Incised wound left parietal area with sharp cut of fracture skull 2 ½" x 2" x bone deep.*

14. According to him, all the injuries were fresh and caused by sharp weapon within two hours. Injury Nos.1 and 4 were simple, but Injury Nos.3 and 5 were grievous and sufficient in the ordinary course of nature to cause the death. Accordingly, he has issued the Injury Certificate (Exhibit-96) and referred Eknath to the Sion Hospital, Mumbai within ten minutes.

15. Then there is evidence of PW-2 Dr. Vasant Dhalane, who was attached to the Sion Hospital and who has conducted the postmortem examination on the dead body of Eknath. As may be recalled, Eknath has succumbed to those injuries on the very day at about 3:45 pm. As per the evidence of PW-2 Dr. Dhalane, he found following injuries :-

(1) *Incised wound on right occipital region 3" x 1/2" x bone deep.*

(2) *Incised wound on right occipital region with sharp edges size 3" x 1/4" x muscle deep.*

(3) *'C' Shape wound with sharp edges on occipital region, 5" x 1/4" x bone deep.*

(4) *Wound on occipital region of size 4 ½" x 1/2" x bone deep.*

(5) *Injuries on left shoulder 2" in length x 3/4" x bone deep – edges were sharp.*

(6) *Abrasion anterior lateral aspect of right under arm 2 ½" in length.*

- (7) *Print abrasion over lateral aspect of right upper arm 2" in length.*
- (8) *Incised wound with tale of size 2" x 1 ½" x muscle deep. Length of tale 6" over the abdominal right side.*
- (9) *Abrasion over lateral aspect of right fore-arm 2 ¼" in length.*
- (10) *Incised wound over dorsal aspect of first finger, middle finger and little finger of right side.*
- (11) *All structires at 1/3rd level including muscles, blood vessels, nerves and bones were cut. Only lateral aspect is remained of left fore-arm.*

16. On internal examination, PW-2 Dr. Dhalane found following injuries :-

- *Minimal haetotoma seen over occipital region.*
- *On examination of skull, there was fracture over the wall.*
- *There was fracture of left radio ulna at 1/3rd level.*

17. The injuries were antemortem in nature and PW-2 Dr. Dhalane found that there was fracture of left trachea, ulna at 1/3rd level. He has opined that the cause of death was "*shock following multiple injuries*". In his opinion, these injuries were possible by sharp edged weapon. He has prepared the Postmortem Report (Exhibit-57) accordingly and issued it to the Police.

18. As regards the cause of his death and the injuries sustained by him,

there is not much cross-examination and it has to be, therefore, held as proved that Eknath has succumbed to homicidal death due to the injuries sustained on that morning.

19. Now to prove the involvement or complicity of the Appellants in the said incident, in the Trial Court the Prosecution has placed reliance on the evidence of the sole eye witness PW-3 Savita Bhoir and the oral Dying Declaration made by Eknath before his wife PW-4 Tarabai, PW-5 Anita and PW-6 Manda. The Prosecution also relied on the written Dying Declaration of Eknath (Exhibit-79) recorded by PW-15 PI Shinde and on the recovery of the weapons of assault at the instance of Appellant No.3- Balaram.

20. At the outset itself, it has to be stated that as regards evidence of PW-3 Savita, the Trial Court has disbelieved the same and on perusal of her evidence and the reasons given by the Trial Court for not placing reliance on her evidence, we find that no fault can be found in the approach of the Trial Court. Her evidence is bereft of credibility for several reasons, including the time of the incident as given by her, the non-disclosure of the incident by her to anyone, the unnatural conduct on her part and for several such reasons, as given by the Trial Court in its Judgment. Her testimony cannot be said to be of a sterling worth, if

implicit reliance is to be placed on her, she being the solitary eye witness. In such situation, her evidence cannot be relied upon to prove the occurrence.

21. The Prosecution has, therefore, placed emphasis on the written and the oral Dying Declarations of deceased Eknath. As regards written Dying Declaration, Prosecution has proved it through the evidence of PW-15 PI Shinde. It is at Exhibit-79. It is also treated as F.I.R. by PW-15 PI Shinde registering the crime thereon. In this Dying Declaration, deceased Eknath has stated that when he was sitting in the house of his friend, at about 9 am on that day, 10 to 11 persons came there with swords and sticks in their hands. However, he has mentioned only the names of Appellant Nos.1 to 3 and one Natha Bhayde. He has further stated that those 10 to 15 persons assaulted him with swords. Hence, he sustained injuries on his head and cheek. Then his relatives brought him to the hospital. The Trial Court has relied upon this Dying Declaration (Exhibit-79) and as the names of the Appellants were specifically found stated therein, the Trial Court has convicted them.

22. In our considered opinion, however, this Dying Declaration (Exhibit-79) is also bereft of any credibility as it suffers from several flaws and fatal infirmities. The first and foremost infirmity is that there is no evidence that

when this Dying Declaration was made by Eknath, he was in a fit state of mind and physic to give such Declaration. The endorsement of PW-16 Dr. Kendre, who was treating him at the relevant time in Panvel Hospital, is not obtained on the said Dying Declaration. There is also no evidence of PW-15 PI Shinde that when this Dying Declaration was recorded, PW-16 Dr. Kendre was present or at-least he orally certified that deceased Eknath was in a fit condition to give the statement. The evidence of PW-15 PI Shinde is also conspicuously silent about the mental and physical fitness of Eknath to give such statement to prove his own satisfaction about such fitness.

23. As a matter of fact, the evidence of PW-16 Dr. Kendre goes to prove that the condition of Eknath, at the relevant time, was very precarious. As admitted by him, injury Nos.2, 3 and 5 on his person were serious injuries. All these injuries were bleeding. Excessive bleeding was found by him. He has further admitted that when he examined Eknath, he found that Eknath was in a drowsy condition. He was having sweating. He has further opined that after sustaining the injuries, which were found on the body of Eknath, there are chances that he may become unconscious. As per his evidence, considering the serious condition of Eknath, within ten minutes of his admission, he has transferred him to the Sion Hospital. Therefore, his evidence categorically rules out fitness of Eknath, both, physical and

mental, to give the statement. Further, he has admitted that Police did not make any enquiry with him whether he was conscious or not before recording of his statement. He has further admitted that statement of Eknath (Exhibit-79) was not recorded in his presence. It is pertinent to note that Police had, at the same time, recorded the statement of PW-7 Balaram, who was also injured, in the presence of PW-16 Dr. Kendre, as deposed by him. PW-16 Dr. Kendre has also signed on the said statement certifying his fitness. However, the fact that the same procedure was not adopted or followed in the case of Eknath, of obtaining the certification from Doctor about his fitness and recording the statement of Eknath in the presence of Doctor, creates serious doubt about the physical and mental fitness of Eknath to make such statement. On this very ground itself, that of sans any evidence on record about the fitness of Eknath to make such statement, the Dying Declaration (Exhibit-79) has to be discarded and disbelieved.

24. Second fatal lacunae in this Dying Declaration is that there is no evidence proving that it was read over and admitted to be correct by Eknath. Neither the statement (Exhibit-79) bears such endorsement on the Dying Declaration, nor in evidence before the Court. PW-15 PI Shinde has deposed that the said statement was read over to Eknath and he admitted it to be correct. In this respect, we can make useful reference to

the Judgment of the Supreme Court in ***Shaikh Bakshu and Ors. Vs. State of Maharashtra, (2008) 1 SCC (Cri.) 679***, and of the Division Bench of this Court in ***Shivaji Tukaram Potdukhe Vs. State of Maharashtra, 2004 ALL MR (Cri.) 3220***, and in ***Abdul Riyaz Abdul Bashir Vs. State of Maharashtra, 2012 (3) Bom. C.R. (Cri.) 329***, that;

“to rule out any remote infirmity, it is necessary that there has to be an endorsement that the contents were read over and admitted to be true and correct. The said column cannot be treated as an empty formality since the Deponent is not available for cross-examination. Hence, it is a material inherent infirmity in the Dying Declaration and, therefore, such Dying Declaration cannot inspire confidence of the Court. When the Dying Declaration was not read over to the Deponent and hence not admitted by the Deponent to be correct and recorded according to her say, then such a Dying Declaration cannot be a foundation for sustaining the conviction.”

25. On these two grounds, in our considered opinion, implicit reliance cannot be placed on the Dying Declaration (Exhibit-79). It is also pertinent to note that the Dying Declaration refers to 15 to 16 assailants, but names of only 4 assailants are mentioned therein. The Trial Court has disbelieved the Dying Declaration as regards the 4th assailant, but accepted only part of the Dying Declaration to convict the Appellants, which also, in our

opinion, makes it necessary to disbelieve the evidence relating to written Dying Declaration.

26. As regards oral Dying Declaration, Prosecution has placed reliance on the evidence of PW-4 Tarabai. She is wife of deceased Eknath. As per her evidence, when her son Rohidas informed her that Eknath was lying with bleeding injuries, near the house of Tukaram Mayade, she went to that place along with Rohidas. She made enquiry with Eknath about the names of the assailants and he disclosed her the names of Appellant Nos.1, 2 and 3 and two other persons by name Damu and Shama. He further told her that he was assaulted by 17 to 18 assailants by sword, spears, iron pipes etc. Then, as per the directions of her husband Eknath, she went to the Police Station. On the way, she met PW-6 Manda and she requested her also to accompany her to the Police Station. Then both of them went to the Police Station and informed the Police. By that time, her son Rohidas and her daughter-in-law PW-5 Anita brought injured Eknath also in auto-rickshaw to the Police Station. Without giving intimation to the Police, immediately by the auto-rickshaw they went to Municipal Hospital at Panvel. As per her evidence, in the auto-rickshaw, her husband Eknath again disclosed the names of the assailants as Savalaram, Bhagwan, Ram, Eknath, Gajanan, Bharat etc., i.e. the names of the co-accused, who are already acquitted.

27. Thus, as per her evidence, there are in all two oral Dying Declarations made by Eknath; first, at the spot when he took the names of the present Appellants and two more co-accused, whereas, secondly, in the auto-rickshaw, when he took the names of six other assailants, who are the co-accused and who are acquitted by the Trial Court. Now, as per evidence of PW-6 Manda, when enquiry was made in the auto-rickshaw with Eknath, he took the names of the present Appellants and several other co-accused, totally 17 to 18 persons. Thus, her evidence is not consistent with the evidence of PW-4 Tarabai so far as the names of the assailants are concerned.

28. Now cross-examination of both these witnesses is relevant. PW-4 Tarabai has admitted that she did not disclose to anybody, except the Police, the names of assailants, as given to her by Eknath. Her statement has been recorded on 30th August, 1989 i.e. after two days. Further, she has admitted that when she went to the spot, after being informed by her son Rohidas, she was knowing the names of the assailants, which again raises a serious question about her coming to know the names of assailants from the oral Dying Declaration of Eknath. Further, she has admitted that Eknath has taken the first names of the assailants and not their full names and, therefore, she cannot say how many persons are in the village by name Kishya, Washya, Balaram, Damya and Shama. Thus,

as her husband has not disclosed the full names of the assailants with their father's names and surname, it cannot be said that the persons who are referred in the Dying Declaration by Eknath are none other than the Appellants and the other co-accused. Further, if her husband has disclosed the names of the assailants at the spot itself, there is no reason why she again made enquiry about it in the auto-rickshaw. She has herself admitted the said fact, by stating that there was no special reason for her to make such enquiry with him in auto-rickshaw, when he had already disclosed the names of the assailants to her on the spot. Further, she has stated that her husband told her in the auto-rickshaw the names of the assailants as Ram Bhoir, Bhagvan Bhoir, Savalaram Patil, Gajanan Patil, Eknath Patil and Bharat Borkar. It is significant to note that all these co-accused have already been acquitted. Name of none of the Appellants is appearing in the oral Dying Declaration, alleged to be made in the auto-rickshaw. Therefore, this evidence of oral Dying Declaration creates serious doubt, as the names stated by her and by PW-6 Manda also not tallying with each other.

29. The Prosecution has also placed reliance on the oral Dying Declaration made before PW-5 Anita in the auto-rickshaw. However, once the oral Dying Declaration made before PW-4 Tarabai is disbelieved, as PW-5 Anita was admittedly with her in the said auto-rickshaw, her

evidence also about the said Dying Declaration cannot be accepted. Though she has stated that when she saw Eknath lying in the pool of blood, she made enquiry and Eknath disclosed some names to her, there is no corroborating evidence coming to that effect. Moreover, in her cross-examination, she has admitted that she cannot say how Police had recorded the full names of the assailants, though only first names were given by Eknath in his statement. Further, she has admitted that before entering into the witness box, her statement recorded by Police was read over to her. The Trial Court has also, therefore, disbelieved her evidence about the oral Dying Declaration. As a matter of fact, the Trial Court has disbelieved even the evidence relating to the oral Dying Declaration made before PW-6 Manda also. The Trial Court has placed reliance only on the oral Dying Declaration made before PW-4 Tarabai and we have already pointed out the serious lacunae in respect of the said oral Dying Declaration also.

30. The law is fairly well settled that the evidence relating to oral Dying Declaration is the weak form of evidence and hence it is unsafe to base reliance on the oral Dying Declaration without any supporting and corroborating evidence. Learned Counsel for the Appellants has in this respect placed reliance on ***State of Rajasthan Vs. Shravan Ram & Anr., (2013) 12 SCC 255***, to submit that oral Dying Declaration is not only a

weak type of evidence but even the written Dying Declaration, which is a statement made under Section 161 of the Code of Criminal Procedure, as it is made before the Police, like in the present case, also cannot be accepted without corroboration to strengthen the evidentiary value of such Dying Declaration.

31. In the instant case, there are multiple Dying Declarations and the law is also well settled that when there is plurality of Dying Declarations, it requires that all those Dying Declarations should be consistent throughout, at-least in material particulars. In the instant case, as regards the crucial aspect of the names of the assailants, the Dying Declarations are not consistent. At some stage, oral Dying Declaration takes the names of different assailants, whereas, in written Dying Declarations, only the names of 5 assailants are mentioned. In such situation, to pick and choose only some assailants and to convict them on the basis of such Dying Declarations, is not the correct and legal way of appreciation of evidence. It will not be a correct and proper approach also. Therefore, in the instant case, in our considered opinion, the oral Dying Declarations have to be excluded from consideration as no implicit reliance can be placed on them.

32. Then there remains only one incriminating piece of evidence on

record on which the Prosecution wants to place reliance i.e. recovery of one sword at the instance of Appellant No.3-Balaram. As per the evidence of PW-15 PI Shinde, at the instance of present Appellant No.3-Balaram and the other co-accused Damu, one sword each was recovered under Memorandum Panchanamas (Exhibits "80" and "81") and Seizure Panchanamas (Exhibits "82" and "83"). Panch Witness to the said recovery i.e. Panch PW-14 Haribhau Patil is declared hostile and has not supported the Prosecution case. There is also no evidence as it is not deposed by PW-15 PI Shinde that the sword was seized and sealed with wax. The C.A. Report (Exhibit-85) also does not disclose that the blood stains of the deceased Eknath were found on the sword, recovered at the instance of Appellant No.3-Balaram. Hence, necessary connecting link being not established, mere recovery of the sword, even if held to be proved, is of no relevance to implicate the Appellants with the offence.

33. The net result, therefore, is that there are several loose ends in the case put up by the Prosecution. The evidence brought on record cannot be called as of a convincing, cogent and forthright nature to place reliance thereon to prove the guilt of the present Appellants to be proved beyond reasonable doubt. Hence, this Appeal deserves to be allowed accordingly.

34. Consequently, the Criminal Appeal is allowed. The Judgment of

conviction and sentence recorded by the Trial Court against Appellant No.1-Vasudeo Sakharam Phadke, Appellant No.2-Kisan @ Balakrishna Nagu Phadke and Appellant No.3-Balaram Bama Bhoir, is quashed and set aside. All these Appellants are hereby acquitted for the offence punishable under Section 302 r/w. 34 of the IPC. Their Bail Bonds stand cancelled.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]