

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 147 OF 2013

Santosh Kailash Wagh
Age 22 years, Occ. Labour,
R/o. Indiranagar, Garkheda,
Aurangabad.

...Appellant

versus

The State of Maharashtra
Through Police Station Officer,
Police Station, Osmanpura,
Aurangabad.

...Respondent

.....
Mr. S.B. Narwade, Advocate for the appellant
Mrs. P.V. Diggikar, A.P.P. for the respondent State
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**CORAM : A. V. NIRGUDE AND
V. K. JADHAV, JJ.**

DATED : 29th JUNE, 2016

ORAL JUDGMENT (PER A.V. NIRGUDE, J.)

1. This appeal challenges the judgment and order dated 28.02.2013 in Sessions Case No. 170 of 2010 delivered by the learned Additional Sessions Judge, Aurangabad thereby convicting the appellant for the offence punishable under Section 302 of IPC and sentencing him to suffer R.I. for life and to pay fine of Rs.1500/- i/d R.I. for three months.

2. The prosecution allege that the appellant-accused committed

murder of his friend Jyoti on 26.2.2010 some time at about 8.00 p.m. The prosecution in all examined 10 witnesses and through their depositions, the following facts emerged.

3. P.W.1 Laxman Kharat is the complainant. He was maternal uncle of deceased Jyoti. He said that on that day at about 8.00 p.m. he came home from work. While he was taking wash, he heard commotion in neighbourhood. He went there and found the appellant-accused sitting in the chowk with injuries on his person. He heard him saying that Jyoti was lying across the railway line and she should be saved. Number of people gathered near him. No one knew where Jyoti would be found. P.W.2 Sheelabai, mother of Jyoti then went to police station and informed about the incident to the police. Four police constables came with her to the spot and thereafter all of them started Jyoti's search. At about 9.30 p.m., they found Jyoti lying in a ditch near railway line, which is about 2 kilometers away. It appears from the record that the spot, where Jyoti was found, was more than one kilometer away from the chowk, where the appellant found in injured condition by the witnesses. Jyoti disclosed to the P.W. 1, 4 and 6, who found her there, that the appellant/accused had attacked her. Jyoti was taken to GHATI hospital, where she died at about 11.00 p.m.

4. On the other hand, the prosecution also brought on record through the depositions of P.W. 10 Dr. Satish Deshpande that the accused-appellant's father took him to Kamalnayan Bajaj Hospital in injured condition. P.W.10 Dr. Deshpande wrote down the history as was narrated by the father of appellant-accused. This witness found two stab injuries on abdomen of the appellant-accused. The appellant-accused was admitted to the hospital and treated successfully.

5. The defence of the appellant-accused since beginning was that while he and Jyoti were sitting at isolated place, an unknown person came with knife and attacked both of them. The first question that is required to be decided in this appeal is whether the oral dying declaration of Jyoti to P.Ws. 1, 4 and 6 is worthy of reliance. All three witnesses went in search of Jyoti during that evening and found her lying in a ditch. According to them, they were accompanied by four police constables. They asserted that Jyoti informed to them that it was the appellant-accused, who was her assailant. As said above, Jyoti succumbed to the injuries at about 11.00 p.m. Her body was subjected to post mortem examination. P.W.8 Dr. Sachin Gadge disclosed that Jyoti had sustained 15 stab wounds, out of which, except two of the stabs were found on chest and abdomen of the victim. Dr. Sachin Gadge opined in his cross examination that the

patient who suffered such injuries might die immediately or at least might become unconscious. The Medical Officer also described corresponding internal injuries. He mentioned that victim sustained stabs to both lungs and at least at two places on intestine. In view of serious nature of the injuries sustained by the victim, it is rather difficult to believe version of P.Ws. 1, 4 and 6 that the victim was taking the appellant's name as her assailant.

6. A doctor usually confronted with such questions regarding different possibilities or probabilities may require to express his views one way or the other, depending upon the manner the question was asked. But the answers given by medical witness to such questions need not become the last word on such possibilities. After all, he gives only his opinion regarding such questions. But to discard the testimony of witness on the point simply on the strength of such opinion expressed by medical witness is not conducive to the administration of criminal justice.

7. In the case in hand, the conduct of the prosecution witnesses is highly suspicious. On 26.2.2010 accused Santosh was found in the Punjabai Chowk having sustained injuries on his person in the form of wound by knife. He was loudly telling to the gathering that to go and save Jyoti, who was lying towards opposite side of railway

track. P.W.1 Laxman, who is the complainant in this case, P.W. 2 Sheelabai, who is mother of deceased Jyoti, and in fact, none of the prosecution witnesses bothered to ask accused Santosh as to how he had sustained the injuries and what happened to Jyoti. P.W.1 Laxman, in para 4 of his cross examination, stated that he did not find it necessary to go and ask the accused about the specific spot where Jyoti was lying and also about the assailant, who has assaulted Jyoti. On the contrary, he returned to his house and stayed there till arrival of police. He has further admitted in his cross examination that neither him nor other persons bothered to enquire with the accused. It is surprising that even P.W.2 Sheelabai, who is the mother of deceased Jyoti, has not made any query with the accused about the exact spot of incident where Jyoti was lying in injured condition as also all the details of the incident as well as assailant. Furthermore, it is very unlikely on the part of assailant to request the near relatives of victim to go and save the victim, who is lying in an injured condition. On the other hand, in normal course, the assailant would try his level best to escape unnoticed from the spot.

8. According to P.W.1 Laxman, he himself, one Sulochana Pundlik Barde, Subhash Wahul, Walmik Kharat, Kacharu Magre and four police men started taking search of deceased Jyoti. They found deceased Jyoti lying in a ditch beyond railway track near

Shahnoormiya Dargah. She was demanding water. According to P.W.1 Laxman, deceased Jyoti had disclosed to them that accused Santosh assaulted her by knife by calling why she was not marrying with him. She further told them that accused assaulted her on her abdomen and also caused injuries to himself by the knife and thereafter he left her at the said place and went away.

9. P.W.4 Kacharu has deposed that deceased Jyoti was found near a heap of soil and she was saying water water. At that time, Jyoti stated to them that accused assaulted her by means of knife and accused dealt a knife blow on himself. It is needless to add here that if dying declaration is oral, exact words stated by deceased to the witnesses are of utmost importance. The witnesses if improve upon their statements by varying their versions, their evidence become unreliable. P.W.4 Kacharu has not stated anything about the fact that deceased Jyoti disclosed to them that accused Santosh assaulted her by knife by calling why she was not marrying with him. However, P.W.1 Laxman has deposed about the same. P.W.5 Sulochana Barde, who was also a member of searching team, deposed that when they went beyond railway track, Jyoti was found lying there and blood was on her person. She has further deposed that they lifted her and took her in one rickshaw to GHATI hospital, Aurangabad. She was admitted in the hospital and after examination,

doctor declared her dead. As per the prosecution story, P.W.1 Laxman was accompanied by P.W. 4 Kacharu, P.W. 5 Sulochana, P.W. 6 Subhash and the police persons. P.W. 5 Sulochana had not stated anything about oral dying declaration made by deceased Jyoti in her presence. Neither P.W. 5 Sulochana was declared hostile by the prosecution nor subjected to cross examination. P.W.6 Subhash Wahul has deposed that deceased Jyoti was lying in a ditch and he picked up Jyoti. He further deposed that at that time, Jyoti told them that Santya assaulted her by means of knife. At that time, he asked Jyoti, who is Santya? She told them that Santya means Santosh Wagh. P.W.6 Subhash further deposed that, except that Jyoti did not tell anything to him. The prosecution has not examined any police man, who would be rather independent person to depose about oral dying declaration of Jyoti in his presence. P.W.1 Laxman and P.W. 4 Kacharu are close relatives of deceased Jyoti. It thus appears that the prosecution witnesses 1, 4, 5 and 6 have improved upon their statements by varying their versions. They have deposed about altogether different oral dying declaration of deceased Jyoti. Their evidence therefore, does not inspire any confidence.

10. The second important question in this appeal is whether the prosecution could prove that the appellant inflicted two stab wounds on himself. In other words, whether the injuries found on the person

of the appellant-accused were self inflicted. These injuries were described by P.W.10 who stated that the injuries were deep enough and intestine was protruding from them. The medical papers also indicate that the appellant/accused was treated in the hospital. Surgery took place and after few days, he was discharged. P.W.10 clearly mentioned that he did not mention in his injury certificate that the injuries could be self inflicted. In his cross examination also, he admitted that normally self inflicted injuries would be superficial. On the other hand, he admitted that the injuries found on the person of the appellant-accused were grievous in nature. The injuries found on the person of the appellant were not at one place but they were found at two different places on the abdomen. We have therefore, serious doubt as to whether such injuries were possible by self infliction. The nature of the injuries caused to the appellant, if are not self inflicted, then the appellant succeeds in convincing the Court at least on probability that he too was the victim of the assault, as third person assaulted on both, him and Jyoti. This theory gains further credibility because the prosecution witness unequivocally stated that when they found appellant-accused sitting in the chowk in injured condition, he was telling everyone that Jyoti would be found beyond railway line and he was telling them that they should go and save her. Unfortunately, the prosecution witness did not ask the details to the appellant/accused while he was in injured condition as to what

had happened and how he sustained the injuries. No one came forward to state that the appellant/accused disclosed to him or them that injuries he suffered were self inflicted. There is nothing on record to indicate as to whether the prosecution witnesses, after hearing from the appellant that Jyoti should be saved, really took him seriously. Had they learnt from him about the spot where Jyoti would be found, they could have rushed to the spot earlier. It seems no one asked the appellant-accused as to what caused the injuries to him and what had happened to Jyoti and as to why he was requesting them to save Jyoti.

11. We are therefore, inclined to give benefit of doubt to the appellant. As said above, the injuries sustained by him probably were not caused by self infliction and that the prosecution witness Nos.1, 4 and 6 could not have heard Jyoti's oral dying declaration. The appeal therefore, succeeds. Hence, we proceed to pass the following order:-

ORDER

- I. Criminal appeal No. 147 of 2013 is hereby allowed. The judgment and order dated 28.02.2013, passed by the learned Additional Sessions Judge-4, Aurangabad, in Sessions Case No.170 of 2010 is quashed and set aside.

- II. The appellant Santosh s/o Kailash Wagh is acquitted of the offence punishable under Section 302 of I.P.C. The appellant Santosh s/o Kailash Wagh be released forthwith if not required in any other case. Fine amount, if paid, be refunded to him.

(V. K. JADHAV, J.)

(A. V. NIRGUDE, J.)

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