

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 613 OF 2012

- | | | |
|----------|---|-------------------|
| 1 | Brahmdev S/o. Bhima Sonwane, Aged 52 Years, Occupation Agriculture, Resident of Kurla, Taluka and District Beed, Now, Undri Pisoli, Taluka Haveli, District Pune | APPELLANTS |
| 2 | Vishnu S/o. Bhima Sonwane, Aged 52 Years, Occupation Agriculture, Resident of Kurla, Taluka and District Beed, Now, Undri Pisoli, Taluka Haveli, District Pune and Lavi, Taluka Malshiras, District Solapur | |

V E R S U S

The State of Maharashtra

RESPONDENT

Mr. Vijay Sharma, Advocate for the Appellants
Mr. K.S. Patil, A.P.P. for the Respondent - State

**CORAM : A.V. NIRGUDE &
INDIRA K. JAIN, JJ.**

DATE : 22nd February, 2016

ORAL JUDGMENT (Per A.V. NIRGUDE, J.) :-

1. This appeal challenges Judgment and Order dated 6th August, 2011, passed by the learned Additional Sessions Judge, Beed, in Sessions Case No. 151 of 2010. The learned Sessions Judge convicted Accused Nos. 1 and 2 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. They were sentenced to suffer life imprisonment and to pay a fine of Rs.2,000/- with a default clause.

2. ***The facts leading to the prosecution case, in short, can be stated as under :-***

Appellants / Accused are brothers. Appellant No.1's daughter Jaishree was married to deceased Dipak. But, soon after the marriage, within few months, Dipak deserted his wife. On 4th September, 2000, at about 07.30 p.m., the deceased was riding his moped and was going towards his house. He was about to pass through village Kerla, the place of residence of accused. Appellant / Accused No.1 stopped the deceased and then took him to his house for a cup of tea where other accused joined them. Thereafter, both the Appellants / Accused assaulted the victim with axe and sickle and caused several injuries on his person. Victim was found lying in front of house of the Appellants / Accused at about 08.30 p.m. Police Patil of the village informed this fact to police of Beed Rural Police Station. Police Sub-Inspector Mr. Kamble received this information and came to the spot immediately. He found victim Dipak in injured condition. He arranged to send Dipak to Civil Hospital, Beed, where Dipak died after few hours.

3. Appellants / Accused were arrested rather belatedly (after 10 years of the incident). Charge-sheet was filed. During the trial, eleven witnesses were examined. Prosecution Witness No.1 - Bhimrao happens to be father of victim Dipak, who stated that after receiving a telephonic call that his son was assaulted etc., he went to the Hospital, met his son and heard from him that the Appellants / accused had assaulted him. Prosecution Witness Nos. 7 and 9 are Police Officers, who brought deceased to the Hospital and recorded his statement in presence of Medical Officer. Prosecution Witness No.8 - Dr. Sanjay Shah is the Medical Officer, who attended the deceased at the relevant time and witnessed recording of the dying declaration. Prosecution Witness Nos. 3 to 5 are panch witnesses. Prosecution Witness No. 10 - Dr. Gangadhar Munde is Atopsy Surgeon. Prosecution Witness No. 11 is Asifkhan Pathan, P.S.I. Beed Rural Police Station, who stated that after 10 years of the incident he could arrest Appellants / Accused.

4. What is surprising in this case is that the prosecution could not bring on record deposition of witnesses, who could have naturally seen Dipak being taken to house of the Appellants / Accused. No witness came forward to state that he or she resided close to the house of the Appellants / Accused and hearing noise of quarrel etc., he or she went to the house of Appellants / Accused and saw the assault taking place. In other words, the prosecution case solely depended on Prosecution Witness Nos. 1, 7, 8 and 9, who tried to prove that the victim Dipak, before his death, stated that the Appellants / Accused were his assailants and none else. The learned Judge of the lower Court believed this part of the prosecution case and convicted the Appellants / Accused.

5. We heard the submissions at length. We perused the record. The question that arose for our consideration is, whether the evidence of dying declaration is sufficient to prove the prosecution case. The submission at Bar that no other circumstances are brought on record besides the dying declaration, is quite relevant. We already noticed this lapse in the prosecution case. We have noticed above that if victim Dipak was by chance stopped by appellant / accused No. 1 at the public street and independent witness could have easily seen them meeting in the public street and thereafter when they walked towards house of Accused No.1 which was situated in neighbourhood, the distance between public street and house of the accused is about 150 feet. As per the prosecution case, victim Dipak and Appellant/ Accused No.1 - Bramhadeo walked up-to Bramhadeo's house. It is rather surprising that there is no witness coming forward to state that he has seen them walking towards the house of the Bramhadeo at about 07.30 p.m. to 08.00 p.m..

Victim Dipak stated that while he was inside the house, he was assaulted. There is no witness who came forward saying that he was residing in neighbourhood and could hear noise of quarrel and rushed to the spot.

As per the scene of offence panchanama, the actual assault took place in court-yard in front of Accused No. 1's house. There are number of houses in vicinity. At least one witness could have been examined, who could have stated that he saw the incident taking place in front of his house or in front of house of Accused No.1.

The panchnama also stated that at so many places, bloodstains were found in this area. Some bloodstains were found even on the moped which the victim used to come to the spot. This circumstance indicated that victim Dipak during assault moved from one place to other and so his blood got spread all over. If the assault took place in such manner, yet no witness came forward to depose that he or she had seen the incident taking place. The time of the incident was also not unusual. It was at about 07.30 p.m. onwards which is a time when most of the villagers came back to their houses. Surprisingly, such witnesses are not examined. Indeed, we find this is a serious lapse in the prosecution case, yet this lapse in our view could not be fatal to the prosecution case.

On perusal of the evidence of Prosecution Witness Nos. 7, 8 and 9, we are fully convinced that these witnesses are truthful and deserve to be believed. They are not interested witnesses. Their presence is natural and the conduct is not blameworthy. We particularly commend the role of Prosecution Witness No.9 - P.S.I. Kishor Kamble, who gave details, as to how he learnt about the incident first on telephone. He stated that as soon as he received telephonic message about the assault and victim being lying in injured condition, he hired a private vehicle to go to the place of occurrence, which was about 15 kilometer away from the police station. He said, after he reached the spot, he met the Police Patil and he also saw the victim lying in the courtyard of house of the accused in injured condition. He then arranged to take the victim to hospital where he met other police constables who were posted at police *chowki* of the hospital. He said, he then took the victim to Casualty, where he requested

the Medical Officer to examine the victim and gave his opinion as to whether he could record victim's dying declaration. He then immediately asked Prosecution Witness No.7 - Arun Dongre to accompany him for recording of dying declaration. Accordingly, he recorded dying declaration in presence of the Medical Officer. Even the Medical Officer clearly admitted that it was Police Sub-Inspector Kishor Kamble, who had brought the victim to the hospital and at his request, he examined victim's position and certified that the victim was in a position to make statement etc. Prosecution Witness No.7 - Arun Dongre supported both these witnesses that it was he, who actually recorded the victim's statement. These three witnesses formed backbone of prosecution case. There were two possibilities that defence could have brought on record, one; that the victim was not in a position to make a statement at all and the Doctor's certification was fraudulent. The second point the defence could have brought, was that the victim was tutored to falsely implicate the accused. But such defence was not taken.

6. Prosecution Witness No.1 - Bhimrao is the father of victim Dipak. He stated that when he learnt about the incident, he rushed to the hospital. He met his son in the hospital and he learnt about the incident from his son. His son told him that it was the accused who had assaulted him with an axe and sickle etc. The defence did not bring on record as to whether Prosecution Witness No.1 could meet victim before recording his dying declaration. There was thus no theory of tutoring. The depositions of Prosecution Witness Nos. 7, 8 and 9 clearly established that it was they who were with victim Dipak all the time till his dying declaration was recorded. Going by their depositions, we are inclined to hold that

Prosecution Witness No.1 probably met his son thereafter. There is nothing on record to indicate that victim or his father had any specific reason for falsely implicating the appellants / accused in this case. On perusal of the dying declaration, which is proved, we found that it was properly recorded and it was as far as possible verbatim. Victim Dipak did not give meticulous details of the incident, but implicated both the accused very clearly. He did not exaggerate the account of the incident. We are, therefore, inclined to believe the prosecution case, which is solely based on dying declaration. We have no hesitation to hold that the dying declaration in this case is genuine, trustworthy and believable. We are, therefore, dismissing the appeal. The appeal stands dismissed.

(INDIRA K. JAIN, J.)

(A.V. NIRGUDE, J.)