

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.
APPELLATE SIDE JURISDICTION

CRIMINAL APPEAL NO. 676 OF 2012

Prasad s/o. Manmatrao Betale,
Age 30 years, Occu. Business,
R/o. ND-116, HUDCO, Nanded,
(Appellant is at present in jail.)

... APPELLANT
(Original Accused)

VERSUS

The State of Maharashtra,
Through the Police Station Nanded (R),
Tq. and Dist. Nanded (M.S.).

(Copy to be served on Public Prosecutor,
High Court of Judicature of Bombay,
Bench at Aurangabad.)

... RESPONDENT

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Mr. R. N. Dhorde, Senior Counsel with Mr. Vikram R. Dhorde, Advocate for
the Appellant.

Mr. K. S. Patil, APP for the Respondent / State.

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

DATE : 03rd March, 2016.

ORAL JUDGMENT: (Per A. V. Nirgude, J.)

. This appeal challenges judgment and order dated 9th November, 2012, passed by the learned Sessions Judge, Nanded, in Sessions Case No.77 of 2011. The Appellant / Accused was convicted for the offence punishable under Section 302 of the Indian Penal Code and was sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.1,000/- with a default clause.

2 The prosecution case, in short, was at about 09:30 pm on 17th January, 2011, the Appellant / Accused stabbed Datta and caused his death. Accused was charge-sheeted and was sent for trial.

3 The prosecution evidence that came on record at the time of trial can be divided into eye-witnesses and Investigating Officer. PW-3 and PW-5 are eye witnesses.

4 PW-3 Nirmala Basavraj Bawage was mother of deceased Datta. She stated that prior to the date of incident on 31st December, 2010, a quarrel had taken place between her son Datta and Appellant/ Accused. It was alleged then that her son had broken

window glass of the house of Appellant. On 17th January, 2011, at about 08:30 pm Datta took meals and thereafter, her daughter Supriya requested Datta to get some books for her. Datta left the house promising her that he would make inquiry at the shop of one Bharade. This shop is at a close distance from the house of deceased. It was about 150 ft. away. Datta went to the shop. At about 09:30 pm when she, her husband and daughter were sitting in the house, a boy came to her house and informed her that Datta was being assaulted by the Appellant/Accused using knife. She and her daughter rushed to the spot and noticed that Datta was lying on the road in injured condition. Blood was oozing from his injuries. She also saw Appellant assaulting Datta with a knife and was saying that Datta was quarreling with him and that he would teach a lesson to him. Appellant also abused her saying as to why she gave birth to such a child. She raised alarm. But though persons had gathered there, no one came forward to her help. In the meantime, Datta's friends Prashant, Gajanann, Dayanand and others came. Thereafter, Appellant left the spot. She then took Datta to hospital. But, Datta expired at 11:00 pm during said night. She then went to the Police Station and narrated the incident more or less in similar fashion, which

was treated as Crime No.14 of 2011.

5 PW-5 Supriya is Datta's sister. She stated that at about 09:00 pm to 09:15 pm on that day, she requested Datta that she was in need of some books. Datta left house for going to Bharade shop. Datta used his motorcycle to go there. After 15 minutes, a boy came to their house, knocked at the door and informed that Appellant assaulted Datta with knife. By the time they opened the door, the boy had left. Her mother rushed towards Bharade's shop. She also followed her. By the time she reached the spot, she saw her mother was crying and saying that Datta should be saved. She was also saying that Appellant should be caught. She was trying to seek help to take Datta to hospital. She saw Appellant assaulting Datta with knife on chest, stomach and other parts of the body. She also saw that Appellant kicked Datta on his chest. She also noticed that the Appellant was in furious mood and though persons were gathered around the incident, no one went forward to rescue Datta. After some time, Datta's friends came there and took him to hospital. All other eye-witnesses, who are PW-9, PW-10, PW-11 and PW-18 turned hostile. Even PW-6 Vijay Bharade, the shop keeper, turned hostile and did not support the prosecution case. The Court thus was left

with only two depositions referred to above for supporting prosecution case. The first question that arises in this appeal is, whether depositions of PW-3 and PW-5 are trustworthy? The answer is in negative.

6 It is brought on record that Appellant too sustained injury during the incident. He sustained injury to his head, which was quite serious and grievous. He suffered a hairline fracture to his skull. Both these witnesses on one hand stated that they saw Appellant assaulting Datta with knife, they did not say that they saw injury on Appellant's head. The nature of injury was contused lacerated wound, which must have bled at the time. Such injury cannot go unnoticed. The injury sustained by the Appellant was quite serious as the blow caused hairline fracture to Appellant's skull. Having regard to the serious nature of this injury, it was necessary for the prosecution to explain as to how the Appellant sustained injury. These witnesses did not explain the injury suffered by the Appellant. In view of this, we have no hesitation to hold that these witnesses having denied the presence of injury on the person of Accused are lying on most material point, and therefore, their depositions are untrustworthy.

7 The second important witness for the prosecution was the Investigating Officer. He stated that during investigation, the Appellant led Police to a spot in his house where he discovered a blade of knife. This witness earlier had occasion to visit the scene of occurrence from where he had seized a broken handle of a knife amongst other things like blood stained earth, sleepers and Datta's motorcycle. This witness also explained as to how he investigated the case, how he sent the dead-body for postmortem and clothes etc. of deceased and Appellant for chemical analysis. He also brought on record C.A. report, which indicated that clothes of both Appellant and Datta were found stained with blood group 'B'. Unfortunately, the blood group of Datta as well as the Appellant was 'B'. This witness admitted that though blade of knife was seized at the instance of the Appellant, it was not sealed. Chemical analysis of the blade showed that it was stained with human blood of group 'B'.

 This witness also stated further that he arrested the Appellant on 19th January, 2011, at 05:00 pm after he was discharged from hospital. From 17th January, 2011 to 19th January, 2011, Appellant was admitted in hospital and was taking treatment for his head injury. The discharge card of the Appellant showed that CT

scan was undertaken of the Appellant's skull and hairline fracture was noticed. While the Appellant was in custody on 20th January, 2011, according to the Investigating Officer, he recorded Appellant's complaint under Appellant's signature. He said that he recorded this complaint as per the Appellant's statement. By bringing this complaint on record at rather belated stage, the prosecution was trying to explain the injury sustained by the Appellant. The question is whether the complaint of the Appellant, which is marked as Exhibit-91 is trustworthy document? The answer is in negative. The complaint was recorded after the Appellant was arrested. He thus was under the thumb of the Investigating Officer, and therefore, the Investigating Officer could have written down anything that was convenient for the other case. The Investigating Officer, in cross-examination, admitted that copy of this FIR, which was sent to the Magistrate's Court did not bear Court's endorsement, which indicates that copy of this complaint was not sent in time to the Magistrate's Court. On perusal of this complaint, it is seen that it contains exculpatory and inculpatory statements. Section 25 of the Evidence Act would make inculpatory part of this statement inadmissible in evidence. But, we are inclined to discard this piece of evidence altogether. The Investigating Officer

could not have recorded this complaint during the investigation of Crime No.14 of 2011. He ought to have asked some other officer to record such complaint before Appellant was discharged from hospital on 19th January, 2011. The Police were aware that the Appellant was admitted in hospital and had sustained grievous injury. While he was still in hospital, his dying declaration or statement ought to have been recorded by an officer, who was not investigating Crime No.14 of 2011. Such officer could have then started investigation and completed it. Such officer then could have come to the Court as prosecution witness for proving Appellant's complaint. If this was not done then the so-called complaint Exhibit-91 deserves to be discarded altogether. We have, therefore, no alternative, but to hold that the prosecution case would depend only on two depositions that is of PW-3 and PW-5. As said above, we discard their depositions being untrustworthy.

8 In the light of this, we must now go to the defence taken by the Appellant during the trial. He suggested all along that during that night he noticed that Datta was being assaulted by unknown persons. He went for rescue and was hit on his head. He thus sustained injury. In view of the fact that the prosecution did not

explain injury on the person of Appellant, it tried to suppress the genesis and origin of the occurrence and thus did not present true version. We, therefore, hold that the defence of the Appellant is rendered probable so as to throw serious doubt on the prosecution case. We, therefore, hold that the Appellant deserves acquittal. Hence the following order :

ORDER

- I. Criminal Appeal No.676 of 2012 is allowed.
- II. The judgment and order dated 9th November, 2012, passed by the learned Sessions Judge, Nanded, in Sessions Case No.77 of 2011, convicting Appellant – Prasad S/o. Manmatrao Betale for the offence punishable under Section 302 of the Indian Penal Code and sentencing him to undergo imprisonment for life and to pay fine of Rs.1,000/-, in default, three months rigorous imprisonment, is hereby set aside.
- III. Appellant – Prasad S/o. Manmatrao Betale is acquitted of the said charge.

- IV. Appellant – Prasad S/o. Manmatrao Betale be released forthwith, if not required in any other crime.
- V. Fine amount if deposited, shall be refunded to the Appellant.

[INDIRA K. JAIN, J.]

[A. V. NIRGUDE, J.]

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