

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.115 OF 2000

Bharat Baburao Kolekar
Age 51 years, Occupation Agri.,
R/o Kolekarwadi, Post Bukanwadi,
Taluka and District Osmanabad ... APPELLANTS

VERSUS

The State of Maharashtra,
through P.S.O., Bhoki,
Taluka and District Osmanabad ... RESPONDENTS

.....
Shri R.G. Hange, Advocate for appellant
Shri S.J. Salgare, A.P.P. for respondent/ State
.....

WITH

CRIMINAL APPEAL NO.109 OF 2000

1. Sanjay s/o Subhash Kolekar,
Age 22 years, Occ. Agriculture
2. Abhiman s/o Bhagwan Kolekar,
Age 40 years, Occu. Agriculture
3. Dattu s/o Subhash Kolekar,
Age 23 years, Occu. Agriculture
4. Subhash s/o Bhagwan Kolekar,
Age 54 years, Occu. Agriculture,

All R/o Kolekarwadi, Taluka and
District Osmanabad ... APPELLANTS
(Orig.Accused No.2 to 5)

VERSUS

The State of Maharashtra,
(Copy to be served on the
Public Prosecutor, High Court of
Judicature of Bombay, Bench at
Aurangabad)

... RESPONDENT

.....

Shri M.P. Tripathi, Advocate for appellants
Shri S.J. Salgare, A.P.P. for respondent/ State

.....

WITH

CRIMINAL APPEAL NO.110 OF 2000

1. Kalidas Babu Kolekar,
Age 47 years, Occ. Agriculture
2. Vasant s/o Babu Kolekar
Age 50 years, Occu. Agriculture
3. Devidas s/o Babu Kolekar,
Age 37 years, Occu. Agriculture

All R/o Kolekarwadi, Post :
Bhokanwadi, Taluka and
District Osmanabad

... APPELLANTS
(Orig.Accused No.1, 7 & 8)

VERSUS

The State of Maharashtra,
through P.S.O., Dhoki,
Tq. & Dist. Osmanabad
(Copy to be served on the
Public Prosecutor, High Court of
Judicature of Bombay, Bench at
Aurangabad)

... RESPONDENT

.....

Shri P.B. Gapat, Advocate for appellants
Shri S.J. Salgare, A.P.P. for respondent/ State

.....

CORAM: T.V. NALAWADE AND
 SUNIL K. KOTWAL, JJ.

Date of reserving judgment : 26th July, 2017

Date of pronouncing judgment : 18th August, 2017.

JUDGMENT (PER SUNIL K. KOTWAL, J.) :

1. These appeals are filed by original accused No.1 to 8 against the judgment and order passed by 2nd Additional Sessions Judge, Osmanabad, convicting all the accused for the offences punishable under Sections 147, 148, 149, 324 read with Section 149 of the Indian Penal Code. Prosecution case in brief is that, accused persons are relatives of informant Shrimant Nivrutti Kolekar and other witnesses. They all live at village Kolekarwadi, Taluka Osmanabad. On account of agricultural land, accused and informant are on inimical terms. On 5/7/1992, at about 8.30 p.m., the informant Shrimant Kolekar (P.W.1) was taking his dinner at his residence. That time, all accused persons came in front of his house while abusing. Accused No.7 Vasant was holding axe and others were holding sticks in their hands. Accused No.3 shouted from outside and challenged the informant to come out of the house. When informant Shrimant (P.W.1) went outside the house, all accused started assaulting him by stick, axe as well as by stones.

Accused No.7 Vasant inflicted stone blow on the head of informant. He also inflicted axe blow on the body of informant. That time, Smt. Prayagbai w/o Bhimrao Kolekar (P.W.3) reached on the spot and intervened. At that time, Prayagbai (P.W.3) sustained injury on her hand due to the axe blow by accused No.7 Vasant. Bali Goroba Kolekar, Subrao Kolekar, Nivrutti Daji Kolekar (P.W.2), Venkat Nivrutti Kolekar rushed on the spot to rescue the informant Shrimant. They were assaulted by accused persons by sticks. Informant and other witnesses sustained injuries. Therefore, informant went to Police Outpost, Ter at about 10.00 p.m. and lodged report (Exh.56) against the accused persons. Police referred injured persons to P.H.C., Ter. Dr. P.R. Kulkarni (P.W.4) examined the injured and issued Medico Legal Certificates (Exhibits 69 to 75). During the course of investigation, P.S.I. Shri V.D. Kulkarni (P.W.5) prepared spot panchanama (Exh.87), seized blood stained clothes of informant Shrimant (P.W.1), Vishnu Khande (Exh.88 and 89) on 9/7/1992. The investigating officer also seized sticks from accused (Exh.91). After completion of the investigation, charge sheet was filed in the Court of Chief Judicial Magistrate, Osmanabad. As counter, Sessions Case No.94/1993 was pending before the Sessions Judge, Osmanabad, this case was also committed to Sessions Court, Osmanabad for its trial along with Sessions Case

No.94/1993.

2. Charge (Exh.24) was framed against accused No.1 to 8 for the offence punishable under Sections 147, 148, 323, 324 read with Section 149 of the IPC. Accused pleaded not guilty and claimed trial.

3. Defence of the accused is that, on the date and time of the incident, the informant party assaulted the accused persons by sticks, cycle chain and hunter, resulting into death of Baburao Bhagwan Kolekar. Even accused sustained injuries at the time of assault by informant party. Defence of the accused No.6 was of alibi.

4. After considering the evidence placed on record, learned trial Court convicted the accused No.1 to 8 for the offences punishable under Sections 147, 148, 324 read with Section 149 of the IPC. Accused were sentenced to suffer rigorous imprisonment for one year and to pay fine of Rs.1000/- each for commission of the offence punishable under Section 148 of the Indian Penal Code. No separate punishment was imposed under Section 147 of the Indian Penal Code. Accused were sentenced to suffer rigorous imprisonment for two years each

and to pay fine of Rs.2000/- each for the offence punishable under Sections 324 read with Section 149 of the IPC. Therefore, these appeals arise.

5. Learned Advocate for the appellants assailed the judgment and order of conviction on the ground of vague and inconsistent statements of prosecution eye witnesses. His contention is that, the defence has also proved F.I.R. of the cross criminal case as well as injuries on the body of accused persons through prosecution witnesses themselves. Even there is change in the spot of incident and the medical evidence is in conflict with oral testimony of prosecution witnesses.

6. Learned A.P.P. for the State supported the judgment passed by trial Court on the ground that three eye witnesses examined by the prosecution are consistent regarding occurrence of the incident and their testimony is corroborated by medical evidence as well as recovery of weapon of the offences from accused.

7. In the case at hand, admittedly accused persons and prosecution witnesses are on inimical terms for various reasons. Even through cross-examination of prosecution witnesses,

pecially investigating officer (P.W.5), the defence has brought on record pendency of criminal case, in which one Baburao Kolekar was killed from the side of party of the accused. In this background, we have to scrutinize the evidence of prosecution witnesses placed on record more cautiously.

8. Prosecution has examined Shrimant Kolekar, who is the informant and the injured. Nivrutti Kolekar (P.W.2) is one of the eye witness and Prayagbai (P.W.3) is the third eye witness who claims that she intervened when accused persons were assaulting the informant Shrimant (P.W.1). Dr. P.R. Kulkarni (P.W.4) is the Medical Officer, P.H.C., Ter, who examined injured prosecution witnesses as well as injured persons amongst the accused persons. P.S.I. V.D. Kulkarni (P.W.5) is the investigating officer.

9. At the outset, we must observe that the circumstantial evidence placed on record in the form of seizure of the sticks which were alleged to be used as weapon of the offence at the time of occurrence (Exhs.90 and 91) is useless piece of evidence for the simple reason that the seized sticks were neither referred to Chemical Analyser to ascertain whether any blood of the injured is detected on these sticks nor the signs

of struggle were found and noted in spot panchanama (Exh.87). Even the stone which was used as weapon of the offence by one of the accused to injured, the informant Shrimant (P.W.1) was not found on the spot by the investigating officer. So also, the sticks are not identified by any witness as weapon of the offence used by any accused person.

10. Therefore, the prosecution case is totally based on direct evidence of three eye witnesses and evidence of Dr. Kulkarni (P.W.4). Shrimant Kolekar (P.W.1) deposed before the Court that, on the date of incident, when he was taking meal at about 7.30 p.m., that time all the accused came in front of his house, abused him and uttered that father of this witness should bring all his sons outside the house. From the testimony of Shrimant (P.W.1), it emerges that, when he came outside, that time accused No.7 Vasant inflicted stone blow on his head and when he was trying to inflict axe blow on the body of this witness, that time Prayagbai (P.W.3) reached on the spot and tried to intervene. According to this witness, at the time of attempt of Prayagbai (P.W.3) to rescue informant (P.W.1) from the accused, she sustained injury on her hand due to axe in the hand of accused Vasant. Thereafter, Bali, Subrao and Vishnu came on the spot and Bali and Vishnu were assaulted by sticks

and Subrao was injured by chain blow. This witness has duly proved the F.I.R. lodged to Police Station (Exh.56). Nivrutti (P.W.2) and Prayagbai (P.W.3) tried to corroborate the version of informant.

11. However, after careful examination of testimony of Shrimant (P.W.1), it emerges that he has made absolutely vague statement without naming specific accused persons who gathered in front of the house of this witness. He has named only accused No.7 Vasant. According to Shrimant (P.W.1), the accused No.7 (who was named by this witness as accused No.4), inflicted single stone blow and thereafter the stone fell on the ground. However, Medical Officer Dr. Kulkarni deposed that, when he examined Shrimant Kolekar (P.W.1), that time two contused lacerated wounds were found on different parts of head and one contusion was found on his upper lip. Therefore, question arises that when single stone blow was inflicted on the head of Shrimant (P.W.1) how there could be two contused lacerated wounds on different parts of his head. According to Dr. Kulkarni (P.W.4), the injury found on the lip of Shrimant is possible due to stone or stick. However, Shrimant (P.W.1) nowhere deposed that he was assaulted by any other accused by stone or by stick on his mouth. Thus, obviously, the testimony of Shrimant

(P.W.1) regarding actual assault by accused No.7 Vasant is in conflict with medical evidence. So also, the so called stone alleged to be used by accused No.7 for assault was never found on the spot when police prepared spot panchanama. According to Shrimant, initially accused no.7 inflicted stone blow and later on Prayagbai (P.W.3) reached on the spot when accused No.7 Vasant was trying to inflict axe blow on the body of this witness. In other words, according to Shrimant (P.W.1), Prayagbai (P.W.3) was not present when accused No.7 Vasant inflicted stone blow. However, Prayagbai (P.W.3) claims that, accused No.7 Vasant inflicted stone blow in her presence and thereafter when accused inflicted axe blow, that time she intervened and sustained injury on her hand. Thus, version of Prayagbai (P.W.3) is in conflict with testimony of Shrimant (P.W.1) as to when Prayagbai (P.W.3) reached on the spot. Even Dr. Kulkarni (P.W.4) has falsified the claim of Prayagbai (P.W.3) that she sustained injury on her hand due to axe blow inflicted by accused No.7 Vasant. From the testimony of Dr. Kale (P.W.4), it emerges that, when he examined Prayagbai Kolekar (P.W.3), that time he found contused lacerated wound on her forearm and this wound is possible due to hard and blunt object. Thus, the testimony of Prayagbai (P.W.3) is not acceptable that when she tried to intervene, that time she sustained injury due to axe blow inflicted

by accused No.7 Vasant. She nowhere deposed that the butt portion of the axe from accused No.7 touched her hand, due to which such type of injury is possible.

12. Though Shrimant (P.W.1) claims that witnesses Bali and Vishnu were assaulted by sticks and Subrao was assaulted by chain, however, Shrimant (P.W.1) has conveniently suppressed as to who inflicted stick blow on the body of Bali as well as Vishnu and who inflicted chain blow on the body of Subrao. This important injured eye witness are conveniently suppressed by the prosecution for the best reasons known to it. Another important aspect is that, Prayagbai (P.W.3) has not whispered a single word against other 8 accused persons. Except that they were present on the spot, she nowhere deposed that other accused inflicted stick blow on the body of witness Bali, Vishnu or Subrao. Prayagbai (P.W.3) nowhere deposed that, the other accused were armed with sticks and chain. To our surprise, even Shrimant (P.W.1) nowhere deposed that the remaining 8 accused were armed with sticks and chain. Thus, these both so called injured eye witnesses have contradicted each other on every material particulars. On the background of inimical terms between the parties and pendency of cross criminal case, such conflicting version of the eye witnesses

cannot be relied upon to base the conviction.

13. Next eye witness examined by the prosecution is Nivrutti Kolekar (P.W.2). This witness claims that, on the date and time of incident, when he was present in his house, that time all accused came in front of his house and abused him. At the outset, we must make it clear that, this version of Nivrutti (P.W.2) is in conflict with version of Shrimant (P.W.1), who also claims that, at the time of incident, accused came in front of his house. These both witnesses have not made it clear whether they lived together in one and the same house or they lived in separate houses. Therefore, this anomaly regarding the house visited by accused remained unresolved.

14. No doubt, Nivrutti (P.W.2) has specified in his deposition that Baburao Kolekar (deceased) inflicted stick blow on the right hand of this witness. Accused No.7 Vasant inflicted stone blow on the head of Shrimant. From his testimony, it further emerges that, when Prayagbai intervened, that time accused No.7 Vasant inflicted axe blow on her hand. Bali, Subrao and Venkat also reached on the spot and Bali was assaulted by accused No.8 Devidas by stick on his hand and accused No.2 Sanjay inflicted blow on the waist of Venkat by

chain. It is to be noted that, Nivrutti nowhere deposed regarding assault to Subrao Kolekar by any accused person. However, Dr. Kulkarni (P.W.4) has proved two abrasions and one contusion on the body of Subrao. Question arises when Subrao was not assaulted by any accused, then how he sustained such injury at the time of occurrence. Prosecution has not conveniently examined Subrao Kolekar as witness for the reasons best known to the prosecution. So also, Dr. Kulkarni (P.W.4) does not speak regarding any injury on the body of Venkat Kolekar, who was alleged to be assaulted by chain by accused No.2. Thus, otherwise also testimony of Nivrutti (P.W.2) is not fully corroborated by medical evidence.

15. So also, Nivrutti (P.W.2) is silent regarding role played by accused No.1 Kalidas, accused No.3 Abhiman, accused No.4 Dattu, accused No.5 Subhash and accused No.6 Bharat. Another important aspect is that, when Nivrutti was subjected to cross-examination, it emerges that, maximum part of his statement before the Court regarding assault by accused to informant and other witnesses is proved as material improvement. Therefore, when evidence of Nivrutti (P.W.2) is vague, as well as in conflict with medical evidence, and his own statement before the police, on material particulars, the

testimony of such inimical witness cannot be relied upon without any other corroboration.

16. Thus, as observed above, the direct evidence of three eye witnesses is totally unreliable for the reasons stated above. So also, the circumstantial evidence placed on record by the prosecution is also useless piece of evidence and cannot be used as corroboration to the testimony of eye witnesses.

17. In addition to this, from the cross-examination of Dr. Kulkarni (P.W.4), it emerges that, on the date of incident, this Medical Officer also examined accused No.5 Subhash. Accused No.2 Sanjay, one Muktabai Kolekar and Baburao Kolekar as well as accused No.1 Kalidas, accused No.7 Venkat, accused No.8 Devidas, and issued injury certificates (Exh.78 to 84). Medical Officer Dr. Kulkarni (P.W.4) also opined that the injuries found on the body of these accused persons are also possible by hard and blunt object like stick. Through investigating officer (P.W.5) defence has proved the copy of F.I.R. (Exh.94) and charge sheet (Exh.104) and panchanamas (Exhs.95 to 103) of counter Session Case No.94/1993. Investigating Officer has also admitted in cross-examination that spot of this counter case is same. However, prosecution has conveniently suppressed the reasons

for injuries found on the body of above referred accused persons and the counter case. This indicates that, prosecution has suppressed the genesis of the occurrence or some other material part of the occurrence. This conduct on the part of prosecution has also made the clouds of doubt more darker. In the circumstances, benefit of doubt goes in favour of the accused persons.

18. In the circumstances, there remains absolutely no reliable evidence on record which is sufficient to establish the guilt of the accused under Sections 147, 148, 324 read with Section 149 of the Indian Penal Code. The conviction recorded by learned trial Court is absolutely incorrect and deserves to be set aside by allowing this Criminal Appeal. Hence we pass the following order :

ORDER

- (i) The Criminal Appeals No.115/2000, 109/2000 and 110/2000 are allowed.
- (ii) Conviction of the accused No.1 to 8 for the offence punishable under Sections 147, 148, 324 read with Section 149 of the Indian Penal Code and the sentence imposed against them by learned Additional Sessions

Judge, Osmanabad in Sessions Case No.145/1993 is set aside.

- (iii) Accused No.1 to 8 are acquitted of the offence punishable under Sections 147, 148, 324 read with Section 149 of the Indian Penal Code.
- (iv) Accused No.1 to 8 are set at liberty.
- (v) Under Section 437-A of the Code of Criminal Procedure, accused No.1 to 8 shall execute before the trial Court bail bonds with sureties for the amount of Rs.5,000/- (Rupees five thousand) each to appear before the Supreme Court as and when notices are issued to them in respect of any proceedings filed against this judgment and the said bail bonds shall remain in force for a period of six months from today.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/