

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

CRIMINAL APPEAL NO.227 OF 2002

The State of Maharashtra,
through Police Station,
Gangakhed, Dist. Parbhani

..Appellant

Versus

1. Munja Dharba Bobde,
Age 50 years,
Occupation Agriculture

[2] Piraji Dharba Bobde, Age 42 years, Occupation Agriculture	} Appeal abated against } Resp.no.2 as per } Court's order dt.4.12.2017
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3. Laxman s/o Dharba Bobde,
Age 38 years, Occu. Agri.,

4. Parmeshwar s/o Munja Bobde,
Age 17 years, Occu. Agri.,

5. Ram s/o Dharba Bobde,
Age 45 years, Occu. Agri.,

All r/o Padegaon, Taluka
Gangakhed, Dist. Parbhani

..Respondents

Mr V.S. Badakh, A.G.P. for appellant

Mr S.P. Chapalgaonkar, Advocate for respondents no.1, 3 to 5

Appeal abated against respondent no.2 as per Court's order dated
4.12.2017

**CORAM : T.V. NALAWADE AND
A.M. DHAVALA, JJ**

DATE : 5th December 2017

ORAL JUDGMENT (Per A.M.Dhavale, J.)

1. This appeal is by the State against acquittal. Five respondents herein were prosecuted for offences punishable under Sections 147, 148, 302 read with Sec.149 of the Indian Penal Code and by judgment dated 11.1.2002, learned 2nd Additional Sessions Judge, Parbhani in Sessions Case No.47 of 2001 acquitted all of them of all the charges.

2. The prosecution was initiated on the basis of F.I.R. lodged by P.W.2 Haribai on 12.9.2000 at 23.15 Hrs. at Gangakhed police station, on the basis of which crime was registered at C.R.No.175/2000. The informant P.W.2 Haribai is widow of the deceased Rakhmaji. Accused no.1 Munja, accused no.2 Piraji, accused no.3 Ram and accused no.4 Laxman are step brothers of deceased Rakhmaji. While accused no.5 Parmeshwar is son of accused no.1 Munja. Her father-in-law had four wives. Accused nos.1 to 4 were born from one Rakhmabai, while deceased Rakhmaji was born from Sujalbai. Her father-in-law had allotted land of 2 ½ acres to her husband deceased Rakhmaji, while he allotted 15 acres of land to accused nos.1 to 4 each. Hence, her husband had filed a suit for partition in Gangakhed Court against accused nos.1 to 4.

3. Hence, accused nos.1 to 4 were quarreling with him and were giving threats to him. About three to four months before lodging of F.I.R., Rakhmaji sold one acre land to P.W.4 Uttam Aglave. The accused were claiming that the land sold by Rakhmaji was in their possession. After the said transaction, accused nos.1 to 4 abused Rakhmaji and threatened to kill him. That time Police Patil Narayan and others intervened and rescued her husband. The fields of the accused and Rakhmaji were in one survey number. About two to three days before the incident, somebody has mischievously grazed his cattle in the hybrid crop of Rakhmaji. Hence, Rakhmaji was attending his field for keeping watch. He had also filed report with Sarpanch. On 12.9.2000 at 9.00 a.m., he had gone to his field while his wife Haribai had gone to the field of Narayan Niras for labour work. At 5.00 to 5.30

p.m., her minor son Shatrughan P.W.3 came to her weeping and told her that Eknath Aglave P.W.5, brother of Uttam reported to him that accused had assaulted and killed her husband. Hence, on the same day, she went to the police station and lodged the F.I.R.

4. P.W.11 Head Constable Rangnath Kale had conducted enquiry in a previous complaint made by deceased Rakhmaji. (He produced earlier report and statement of Rakhmaji Exhs.71 and 72. Rakhmaji had filed chapter case under Section 107 Cr.P.C. against the accused nos.1, 4 and 5). The crime was investigated by P.W.9 P.S.I. P.P. Kulkarni. During investigation he drew inquest panchnama Exh.29, sent the dead body for post mortem, arrested the accused, recorded statements of material witnesses and seized blood stained clothes of injured. He seized blood stained clothes from the house of accused no.1 Munja, sent the muddemal property for chemical analysis and after completion of investigation he submitted charge-sheet in the Court.

5. After committal of case, learned Additional Sessions Judge, Parbhani framed charge at Exh.5. The accused pleaded not guilty. The prosecution examined eleven witnesses. The defence of the accused is of total denial. The learned Additional Sessions Judge acquitted all the accused. Hence, this appeal.

6. Learned A.P.P. Mr Badakh argued that the assault by the accused on deceased Rakhmaji was witnessed by P.W.4 Uttam and P.W.5 Eknath. They have deposed the story. Rakhmaji met with a

death due to throttling. There is discovery of dhoti and cap of deceased Rakhmaji from the house of accused no.1 Munja. In respect of the same incident, accused no.5 Parmeshwar has lodged complaint report Exh.40. The prosecution witnesses should have been believed and the accused should have been convicted.

7. Per contra, learned Advocate Mr S.P. Chapalgaonkar supported the judgment. He argued that the learned trial Judge has properly appreciated the evidence. The evidence of prosecution witnesses is not trustworthy and reliable. Hence, no interference is called for.

8. During the pendency of the appeal, respondent no.2 Piraji has expired. The appeal stands abated against him. On the basis of arguments advanced, the points for our consideration with our findings are as follows:

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|-------|---|----------------------|
| (I) | Whether deceased Rakhmaji met with a homicidal death ? | ..In the affirmative |
| (II) | Whether on the date of incident accused nos.1 to 5 had formed an unlawful assembly and in prosecution of object of the assembly used criminal force and committed rioting ? | .. Not proved |
| (III) | Whether accused nos.1 to 5 in prosecution of object of the assembly were armed with deadly weapons ? | .. Not proved |
| (IV) | Whether accused nos.1 to 4 in prosecution of common object of assembly committed murder of Rakhmaji ? | .. Not proved |

(V) What order ?

..Appeal against accused nos.1, 3, 4 and 5 is dismissed and Appeal against respondent no.2 is abated.

9. Prosecution has examined witnesses, who can be conveniently grouped as follows:

Eye witnesses P.W.4 Uttam and his brother P.W.5 Eknath

Medical Officer P.W.1 Dr Bhagwan Kendre - Post Mortem notes Exh.21.

Panch witnesses - P.W.6 Ramkishan Inquest panchnama Exh.29

Spot panchnama and seizure of stones, soil, clothes, turban from the spot Exh.31. He identified muddemal Articles 1 to 4 found on the spot. Seizure of blood stained cap Article 10 from the house of accused no.1 Munja - Panchnama Exh.32

Panch P.W.7 Anna Jortade - hostile panch to the seizure of clothes of deceased Rakhmaji.

Police witnesses P.W.8 Head Constable Sopan Machkure who received complaint of accused no.5 Parmeshwar (Exh.40 and Exh.41).

Other witnesses : P.W.2 Haribai and P.W.3 Shatrughan, son of deceased who had no personal knowledge.

P.W.10 Dr. Pandit Chatte who has examined accused no.5 Parmeshwar on 12.9.2000 and issued certificate Exh.64.

P.W.11 Head Constable Rangnath who had received complaint from deceased Rakhmaji on 19.3.2000 Exh.71, report Exh.72 and chapter case Exh.73.

- REASONS -

10. Point No.1 : As per evidence of P.W.4 Uttam, on 12.9.2000 at 9.30 a.m., Rakhmaji was assaulted in his presence. He was held by accused no.1 Munja, accused no.3 Ram, accused no.4 Laxman. Accused no.1 Munja had pressed his leg on the neck of Rakhmaji. While accused no.5 Parmeshwar squeezed his testicles and gave blow of stone. P.W.2 Haribai has stated that her husband was reported to be murdered. His dead body was brought to Rural Hospital, Gangakhed, where P.W.1 Dr.Bhagwan Kendre has carried out post mortem. On examination, he found following injuries on the dead body of deceased Rakhmaji.

- 1) Abrasion on left shoulder 4 x 3 cm
- 2) C.L.W. web between index and middle finger 1 x $\frac{1}{2}$ x $\frac{1}{2}$ cm
on right side
- 3) Abrasion right thigh 5 x 3 cm medially upper third
- 4) Abrasion left thigh 4 x 3 cm medially upper third
- 5) Abrasion left thigh laterally 3 x 2 cm upper third

All abrasions were reddish brown caused within 24 to 36 hours. All injuries were ante mortem. On internal examination, Dr. Kendre found that larynx was congested and fractured. Cartilage and hyoid bone were also fractured. Both lungs were congested and right side of heart was full of blood and left side of heart was empty. He opined that deceased died due to cardio respiratory failure due to asphyxia

due to throttling. His post mortem notes are at Exh.21. He stated that there was ejaculation of semen on the clothes of deceased and such ejaculation is possible when there is vagal invasion. He stated that death was possible due to throttling and it is not necessary that there should be signs of throttling on the neck. In the light of medical evidence led by P.W.1 Dr. Kendre, we find that deceased Rakhmaji died due to throttling.

11. The main issue is whether accused nos.1 to 5 and juvenile accused had formed an unlawful assembly and were armed with deadly weapons and committed murder of deceased Rakhmaji in prosecution of common object of assembly. P.W. 2 Haribai and P.W.3 Shatrughan had no knowledge about the incident. P.W.3 Shatrughan came to know about the murder of his father from P.W.5 Eknath after his school was over at 4.30 p.m. He narrated the incident to P.W.2 Haribai.

12. P.W.4 Uttam has deposed that he had purchased land of one acre from deceased Rakhmaji. One year before the incident and on account of that some of the accused were having grudge against them. Besides, deceased Rakhmaji used to tell him that the accused had grudge against him on account of property dispute. He stated that about two to three days after execution of sale deed by Rakhmaji in his favour, all the accused assaulted and threatened to kill him. That time, Police Patil and other villagers pacified the said dispute.

13. As far as main offence is concerned, P.W.4 Uttam deposed that on 12.9.2001 he was grazing cattle in his field, Rakhmaji came at 9.00 to 9.30 a.m. and had a talk with him. Within ten to fifteen minutes thereafter, he heard shouts of deceased Rakhmaji as '*Melo re Baba*'. He immediately rushed towards the spot and from a distance of 10 feet, he saw deceased Rakhmaji in lying condition and accused no.1 Munja was pressing neck of Rakhmaji by his leg, while Ram was holding his hand and leg. According to his evidence, accused no.5 Parmeshwar had caught the testicles of Rakhmaji and juvenile accused Kabu had given blow of stone on thighs of Rakhmaji. While accused no.2 Piraji was standing by his side. When he was at a distance of ten feet from the spot, accused no.1 Munja threw a stone towards him and gave threats. Immediately P.W.5 Eknath and two others came behind him and after seeing them the accused ran away. When they verified, they found Rakhmaji dead. There were blood stained stones and turban of Rakhmaji lying on the spot. There was blood on the ground. They waited near the dead body in the fear that the accused would take away the dead body and waited upto 7.00 to 8.00 p.m. till arrival of Police Patil and others on the spot.

14. P.W.5 Eknath, brother of P.W.4 Uttam corroborated him. He deposed that his brother had purchased one acre land from deceased Rakhmaji, which was not liked by the accused and they were quarreling with Rakhmaji. On the day of incident at 9.30 a.m., P.W.4 Uttam had rushed towards the spot on hearing shouts of Rakhmaji. He also heard shouts. He stated that he proceeded towards the spot behind Uttam. That time, Shivram and Sheshrao were along with him.

That time accused were running away from the spot and Rakhmaji was lying in dead condition. Uttam disclosed to him that accused no.1 Munja had throttled Rakhmaji by pressing leg, while other accused Ram, Laxman had held his testicles. Knowledge of the main incident of P.W.5 Eknath is hearsay, but it is admissible as *res gestae* as immediately subsequent conduct of Uttam. P.W.5 Eknath has stated that he asked Uttam and Sheshrao to seat near the dead body and he went to the village to give information. He had gone to the house of Haribai, but she was not there. He went to the house of Police Patil, but he was also not available. Then he met to P.W.3 Shatrughan, son of deceased Rakhmaji near canal and he gave information to him and then they came to the field of Narayan Niras. Then he and P.W.3 Shatrughan gave information to P.W.2 Haribai about death of Rakhmaji. Thereafter information was given to Police Patil and Chairman. Then they came to the spot, saw the dead body and then Haribai was taken to the Police Station, where her F.I.R. was recorded.

15. In the cross-examination P.W.4 Uttam, the main witness has stated that the land purchased by him from Rakhmaji was in two pieces, one of 25 gunthas and other of 14 gunthas and there was another land of one acre in between the two pieces. He admitted that land of accused no.1 Munja was in the middle. He admitted that his brother Eknath's daughter Sunita was given in marriage to accused no.5 Parmeshwar and their matrimonial relationship was disturbed. Sunita had filed case under Section 498-A of Indian Penal Code against accused no.1 Munja and accused no.5 Parmeshwar. She had also filed suit for maintenance against accused nos.1 Munja and

accused no.5 Parmeshwar and decree of maintenance was granted in his favour. He admitted that proceeding under Section 107 of Cr.P.C. was initiated against him at the instance of accused no.1 Munja, but he was not aware whether similar proceeding was initiated against accused no.1 Munja on his report. He admitted that accused no.1 Munja had challenged mutation entry in his favour of the land purchased from Rakhmaji. He admitted that Sunita's maternal uncle Shriram was engaged as yearly servant by Rambhau Niras and Shivram and Ashruba were cultivating the land of Shivram. His cross-examination reveals that at the relevant time there was highly grown hybrid jawar crop upto the height of chest and neck in the field of Rakhmaji. He stated that after hearing the shouts of Rakhmaji he had also raised shouts that he was proceeding there. He stated that he had not given any calls to others and except Eknath, Shivram and Sheshrao nobody came there. When the accused were running away they had not followed them nor any efforts were made to arrange to catch the accused. He has stated that Munja had thrown a stone at him, but it did not hit him. He stated that he saw the accused on the spot for one minute and he had seen juvenile accused Kabu giving blow of stone on the thigh of Rakhmaji. It is self-created contradiction which should not have been permitted. He stated that Police Patil, Sarpanch and Shatrughan came collectively on the spot at 8.00 p.m. His statement was recorded under Section 164 of Cr.P.C. by J.M.F.C. Gangakhed. He has admitted the contents marked 'A' from his statement. He denied that he had not seen the incident.

16. As far as remaining evidence is concerned, P.W.2 Haribai and P.W.3 Shatrughan, wife and son of the deceased have no personal knowledge about the incident. They could only depose about the enmity. P.W.7 Anna, panch to the seizure of clothes of the deceased has turned hostile. P.W.6 Ramkishan is a panch to the inquest. He had seen blood stains on the thighs and clothes of the deceased. Since the deceased died due to throttling, the blood stains found on the clothes are suspicious as the deceased had sustained abrasions, besides the internal damage due to throttling. P.W.8 Head Constable Sopan, P.W.9 P.S.I. Kulkarni and P.W.11 Head Constable Rangnath are police witnesses. P.W.8 Sopan has registered the F.I.R. and he has produced report lodged by accused no.5 Parmeshwar. P.W.9 has deposed about seizure of one blood stained tericot cap from the house of accused no.1 Munja, which according to prosecution was of the deceased, but there is no evidence that the said cap was belonging to the deceased. Besides, the deceased had not sustained bleeding injuries. P.W.11 Rangnath has also deposed nothing relevant to show the complicity of accused persons in the crime. Thus, we find that there is no corroboration to the evidence of P.W.4 Uttam and P.W.5 Eknath.

17. Learned trial Judge, while appreciating the evidence recorded the inimical relationship of P.W.4 Uttam and P.W.5 Eknath with the accused and observed that at the time of assault, according to P.W.4 Uttam he was alone present there and P.W.5 Eknath and two others Shivram and Sheshrao who had arrived on the spot had no land near the place of occurrence. Their lands are situated far away. He,

therefore, held that their arrival on the spot was doubtful. He noted that as per the evidence of P.W.4 Uttam and Investigating Officer P.W.9 Prakash Kulkarni, the dead body was lying on the spot for around twenty hours. Whereas, in the statement recorded under Section 164 Cr.P.C., he has stated that police had arrived on the spot in the evening, which is not the time of drawing inquest panchnama. P.W.4 Uttam had stated that he had accompanied Haribai and he had narrated the incident to Haribai, but this fact was not recorded by Haribai in her F.I.R. The learned trial Judge found it difficult to accept the evidence of P.W.5 Eknath that he could not trace out Haribai till 5.00 p.m. The learned trial Judge found it strange that the villagers did not come to the spot for hours even on coming to know about the death. Learned trial Judge noticed that the F.I.R. was not disclosing the details of role played by each accused. He noted that delay of fourteen hours in lodging the F.I.R. was suspicious.

18. After carefully considering the evidence on record in the light of the arguments advanced and the reasoning given by the learned trial Judge, we find that deceased Rakhmaji had land dispute with the accused persons. Besides, Rakhmaji had sold land of one acre to P.W.4 Uttam, which was claimed to be belonging to accused no.1 Munja. Sunita, daughter of P.W.5 Eknath and niece of P.W.4 Uttam was given in marriage to accused no.5 Parmeshwar and she had disturbed matrimonial relations. She had filed proceedings against her husband and parents-in-law and had obtained orders against them. The relations between the deceased and the witnesses as against the accused were strained. P.W.5 Eknath was not having any

agricultural land near the spot. His presence on the spot was doubtful. According to P.W.4, the sole eye witness, the murder was committed at about 9.45 to 10.00 a.m., whereas he did not communicate the said information to the relatives of deceased Rakhmaji or to Police Patil or Sarpanch or other public servant in the village for a long time and the dead body was seen by others for the first time at about 8.00 p.m. The F.I.R. is also lodged late. The evidence of P.W.2 Haribai and P.W.3 Shatrughan shows that deceased had gone to the field without taking food, but in the post mortem notes, semi digested food was found in the stomach. Therefore, the time of commission of murder may be different. Deceased Rakhmaji might have taken some food in the field and thereafter he might have been killed. P.W.4 Uttam is the sole eye witness. His evidence is not of sterling quality. P.W.5 Eknath's field is nowhere near the spot. Therefore, his presence on the spot cannot be believed. In the circumstances, if the learned trial Judge had a reasonable doubt in his mind about the prosecution story, we do not find it unnatural. We have also doubt whether P.W.4 uttam had seen any assault by accused or not. The prosecution story is not free from reasonable doubts. The accused are entitled to get benefit thereof. Learned trial Judge has rightly given benefit thereof. Since the view taken by the learned trial Judge is a reasonable and probable view, we do not find any reason to interfere with it. Hence, the appeal deserves to be dismissed. Hence, the order :

- ORDER -

- (I) Criminal Appeal against accused nos.1, 3, 4 and 5 is dismissed.
- (II) The appeal is abated against respondent no.2.

(A.M. DHAVALA, J.)

(T.V. NALAWADE, J.)

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