

(1)

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

CRIMINAL APPEAL NO.274 OF 2002

The State of Maharashtra

..APPELLANT

VERSUS

1. Madan Manik Dalwale,
Age: 21 years,

2. Raju Mani Dalwale,
Age: 33 years,

3. Baban Mahadu Pawar,
Age: 57 years,

(Appeal abated against
R.No. 2 & 3 as per Hon'ble
Court order dt. 24/11/17)

4. Manik Motiram Dalwale,
Age: 65 years,

5. Kantilal Manik Dalwale,
Age: 18 years,

6. Rajendra Baburao Ogale,
Age: 24 years,

7. Bhagwat Baburao Ogale,
Age: 28 years,

8. Rajendra Namdeo Marathe,
Age: 40 years,

9. Motilal Bhaidas Pawar,
Age: 40 years,

Accused Nos. 1 to 5
R/o. Vadjai Road, Shivaji

(2)

Nager, Dhule & Accused
Nos. 6 to 9 R/o. Shivaji
Nagar Lane No.1, Dhule.

..RESPONDENTS

Mr V.S. Badakh, A.P.P for appellant;
Mr. M.R. Wagh, Advocate h/f Mr P.S. Paranjape,
Advocate for respondents

**CORAM : T.V. NALAWADE &
S.M. GAVHANE, JJ.**

DATE: 14th DECEMBER, 2017

JUDGMENT : [PER T.V. NALAWADE, J.]

The appeal is filed by the State to challenge the judgment and order of learned 3rd Additional Sessions Judge, Dhule in Sessions Case No. 2 of 1999. The trial Court has acquitted the respondents of the offences punishable under Sections 302, 323 read with Section 149, 147, 148 of the Indian Penal Code and Section 135(1) of the Bombay Police Act.

2. Both sides are heard.

3. In short, the facts leading to the institution of present proceedings can be stated as follows :

(3)

Deceased Navnath was resident of Shivajinagar, Dhule. He was earning livelihood by plying auto-rickshaw. All the respondents are resident of Shivajinagar, Dhule.

4. The incident in question took place on 01/08/1998 at about 7-00 p.m. The deceased Navnath was present with his auto-rickshaw at rickshaw stop situated in Shivajinagar locality near cross road having width of 80 feet. At that time, accused No.1 Madan, accused No.2 Raju, accused No.3 Baban, accused No. 4 Manik, sons of Manik and accused No.7 Bhagwat Ogle and Baban Pawar, who are related as son-in-law to Manik came towards deceased and they were 15 to 20 persons. These 15 to 20 persons virtually dragged deceased towards house of Madan, accused No.1 and there they started assaulting deceased with sword, axe, stick, iron bar etc. He was assaulted on his legs and on his head. When the assault on Navnath was going on, his wife Vandanabai learnt about assault and she rushed

(4)

towards house of Madan, son of Manik. She heard that beating was being given to the deceased inside of the house. One more witness, nephew of deceased also rushed to the spot and he also heard that beating was being given to Navnath in the house of Manik. In their presence, Navnath was virtually thrown out of the house. Then by using hands, assault was made on Vandanabai also and threat of life was given to her.

5. On the spot, the deceased disclosed to his wife that he was assaulted by using aforesaid weapons. Vandanabai and deceased were shifted to Civil Hospital, Dhule in rickshaw by the persons like Hari Jagtap and Latabai Suryawanshi, residents of Shivajinagar. The statement of Navnath came to be recorded by police in Civil Hospital. On the basis of that statement, crime at C.R. No. 133 of 1998 came to be registered for offence punishable under Section 307 read with Section 149 of the Indian Penal Code and for other offences. Then supplementary statement of Navnath was recorded on

(5)

01/08/1998. Navnath died in Civil Hospital on 03/08/1998.

6. During the course of investigation, panchnama of house of accused Nos. 1,2 and 4, where the incident had allegedly taken place, was prepared and panchnama of spot, where Navnath was lying in injured condition, was also prepared. Nothing was found inside the house like blood stains and blood was not found on the road where Navnath was thrown. It was rainy season.

7. When Navnath was admitted in Civil Hospital, injury certificate was prepared and after his death, post mortem came to be conducted on the dead body. Navnath died mainly due to head injury though he had sustained fracture injuries like fracture of tibia fibula right side middle third. Head injury had caused haematoma on parital region of scalp and there was also subdural haematoma on left temporoparital region with subarachnoid haemorrhage.

(6)

8. During the course of investigation, accused No.1 gave statement to the police in presence of panch witness about axe used as weapon. Memorandum statement was prepared and then as per information, accused No.1 produced axe before the police. Blood was found on the axe. In similar manner, iron bar was recovered from accused No.9 and sword was recovered from accused No.3. There was blood on iron bar and also on sword. These articles came to be seized under panchnama. The articles were sent to chemical analyzer's office. The blood was detected on axe and sword. After completion of investigation, police filed charge sheet against the respondents, 9 persons.

9. The charge was framed for aforesaid offences and plea was recorded. All the accused pleaded not guilty. The prosecution has examined in all 19 witnesses. When the statements under Section 313 of the Code of Criminal Procedure were recorded, all the accused took defence of total

(7)

denial. The trial Court has not believed the witnesses examined and also evidence given on recorded dying declaration and oral dying declaration.

10. The prosecution was relying mainly on recorded dying declaration, which is proved in the evidence of Bhimrao (PW-12), who was attached to Azadnagar Police Station, Dhule. He has given evidence that on 01/08/1998 he was informed about the incident at 6-30 p.m. and he was asked to go to Civil Hospital, where Navnath was admitted. He has given evidence that he visited Civil Hospital and he obtained certificate regarding fitness of Navnath from Medical Officer, Civil Hospital and then he recorded statement of Navnath. The statement of Navnath, dying declaration is proved at Exhibit-93. He had obtained thumb impression of Vandanabai on the said statement in token of the receipt of the copy the said statement. He has given evidence that when he recorded statement, Doctor, who had given opinion, was present by the

(8)

side of patient and endorsement of Doctor, regarding fitness of patient was obtained on the dying declaration. There is endorsement as follows :

"Conscious to give statement"

Time of recording is mentioned as 7-30 p.m. to 8-00 p.m. In the dying declaration, deceased disclosed against 15 to 20 persons including Madan, Raju, sons of Madan, two sons-in-law of Madan and Baban Pawar. He disclosed that all of them were holding sword, stick, iron bars and axe. He disclosed that he was assaulted by using aforesaid weapons and assault was made, particularly on head and legs and then he was thrown out of house of Madan by those persons. He disclosed that after he was thrown out, his wife Vandanabai came there but she was also assaulted by using hands by these 15 to 20 persons. The supplementary statement is, however, not proved by prosecution.

(9)

11. The main witness of prosecution is Vandanabai (PW-8), widow of deceased. She has given evidence that at about 7-00 p.m. when she was present in the house, she learnt about the incident and she ran towards the house of Manik Dalwale, accused No.4. She has deposed that her sister in law Latabai and mother in law Sunderabai had also gone there with her. She has given evidence that when they questioned accused No.2 Raju, as to why they had assaulted deceased, accused Nos. 1 and 2 assaulted her by using hands. She has deposed that she then made inquiry with her husband and husband told that accused No.1 Madan had assaulted him on his head by using axe, accused No.9 Motilal had assaulted him by using iron bar, accused No.2 Raju and accused No.4 Manik were holding sticks and sword, accused No.3 Baban, accused No.5 Kantilal, accused No.6 Rajendra, accused No.7 Bhagwat, accused No.8 Rajendra Marathe were in company of Manik and they had also assaulted him.

(10)

12. The widow of deceased (PW-8) has given evidence that Hari Marathe shifted them to Civil Hospital by auto-rickshaw. She has given evidence that she was examined in Civil Hospital, as she had also sustained injuries.

13. Yogesh (PW-9), who is nephew of deceased has given evidence that at the relevant time, he was present on the spot by chance and he saw that accused Nos. 1 to 9 had gathered there, they assaulted him and then took him to the house of accused No.4 by dragging him. He has given evidence that he rushed to the house of Latabai, sister of deceased and narrated the incident and then he went to the house of accused No.4. He has deposed that while standing outside, he had requested assailants not to assault Navnath and then Navnath was virtually thrown out of the house after giving him beating. He has deposed that Navnath had sustained bleeding injuries and from that place, they shifted him to Civil Hospital. He has given evidence that when at the place of

(11)

incident, widow of Navnath made inquiry with accused No.1 Madan as to why they had assaulted Navnath, they gave beating to Vandanabai also by hands.

14. The aforesaid evidence of PW-8 and PW-9 if compared together, it can be said that even when Yogesh (PW-9) has deposed that he rushed to the spot first and he was there when Vandanabai (PW-8) was questioning the accused as to why they had assaulted deceased, Yogesh has not given evidence that in his presence, deceased disclosed incident to Vandanabai. In ordinary course, the male persons take lead in shifting injured to the Civil Hospital. The other witness Hari, who had driven auto-rickshaw to Civil Hospital had turned hostile and there is only evidence of Vandanabai of aforesaid nature. These circumstances are important as there is serious doubt about the fitness or consciousness of the deceased, when he allegedly made disclosure. Further, there is apparent inconsistency in the evidence given on

(12)

oral dying declaration and evidence of written dying declaration. When in Civil Hospital, the deceased could not disclose particulars of incident to the police, as per Vandanabai (PW-8), particulars of the part played by the accused persons was disclosed to her by Navnath.

15. The spot panchnama, which is at Exhibit-67, is proved in the evidence of panch witness Hemraj (PW-1). PW-1 has given evidence that the panchnama bears his signature. There was no reason for accused persons to seriously dispute the contents of spot panchnama. The document shows that the panchnama was prepared on 01/08/1998 itself between 9-00 p.m. and 9-30 p.m. The spot was shown by Vandanabai (PW-8). The police and panchas had inspected the house, where allegedly assault was made. Inside the house, some articles were found in scattered condition, which were kitchen articles. One mirror was also found in broken condition but there was not a single blood stain inside the house. The police and panchas had

(13)

carefully inspected the entire portion. Then they inspected open space situated in front of house of Manik but there also no blood was detected. In the panchnama, it is mentioned that due to rain, road had become wet. In view of the circumstance that panchnama was prepared immediately, in ordinary course, police would have noticed some blood. Many bleeding injuries were found on the dead body and that can be seen in the evidence of Doctor, who conducted post mortem examination and prepared post mortem report. Thus, the document of spot panchnama is not corroborating the aforesaid evidence given by the so called eye witnesses and also contents of dying declaration.

16. The prosecution has proved injury certificate, which was prepared after admission of Navnath in Civil Hospital in the evidence of Dr. Arjun (PW-10). He found following injuries on the person of injured:-

1. C.L.W. 1/2" x 1/4" x muscle deep Rt. Knee.
2. C.L.W. 1/2" x 1/4" x muscle deep vertical - one inch below knee.

(14)

3. C.L.W. 3/4" x 1/4" x muscle deep 2" inch below injury no.2 over right leg.
4. C.L.W. 1/2" x 1/4" x muscle deep - one inch below the injury no.3 over right leg.
5. C.L.W. - 3/4" x 1/4" x by muscle deep - 1" below injury no.4 over right leg.
6. C.L.W. 3/4" x 1/4" x skin deep left mid shin left leg.
7. C.L.W. 1/2" x 1/4" x skin deep -1" below injury no.6 left leg.
8. C.L.W. - 3/4" x 1/4" skin deep -1" below injury no.7 left leg.
9. C.L.W. - 4" x linear x skin deep over left parietal occipital region of the head.
10. C.L.W. 1/2" x 1/4" x skin deep over left wrist bleeding present.
11. Abrasion - 3/4" x 1/4" over right face.

17. Dr. Arjun (PW-10) is the same Medical Officer, who had endorsed regarding fitness of Navnath for giving statement and he has given the evidence on that endorsement also by saying that the patient was conscious at the relevant time. The injury certificate prepared by Doctor is proved as Exhibit-86 and this document is consistent with oral evidence of Doctor.

18. Dr. Patil (PW-11) conducted examination of dead body of Navnath on 03/08/1998 between 16.45 hours

(15)

and 18.15 hours. Doctor found following injuries on the dead body.

1. Sutured wound on left parieto-occipital region 9.8 cm. in length (on removing sutures 9.8 cm. X 0.4 cm x scalp deep. Hair shaved around the injury.
2. Contusion over right side of back, i.e. right scapular region 7.8 cm x 1.8 cm., reddish black in colour.
3. Abrasion below injury No.2, 4.8 cm. X 2 cm. reddish in colour
4. Minute abrasions over face (forehead and right cheek), left wrist, left palm.
5. Stitched wound on right knee 1.6 cm. (on removing stitches, muscle deep)
6. Stitched wound below right knee, vertical 1.8 cm, in length (on removing stitches, muscle deep)
7. Stitched wound on right leg, below injury no.6, 2.1 cm in length (on removing stitches, muscle deep)
8. Stitched wound on right leg below injury no. 7, 1.5 cm in length (on removing stitches, muscle deep).
9. Stitched wound on right leg below injury no. 8, 2.1 cm in length (on removing stitches, muscle deep).
10. Stitched wound on left shin of the junction of upper 1/3 and lower 2/3, 2.1 cm in length.
11. Stitched wound on left shin below injury no.10, 1.6 cm in length.
12. Stitched wound on left shin below injury no.11, 2.1 cm in length.
13. Stitched wound on left shin below injury no.12, 1.9 cm in length (on removing stitches of injury no. 10,11,12,13 skin deep).

(16)

19. Dr. Patil (PW-11) has given evidence that all aforesaid injuries were ante mortem in nature. His evidence shows that injuries caused fracture of tibia fibula right side middle 1/3. On internal examination, he found haematoma at parital region of scalp, subdural haematoma on left temporoparietal region and subdural haematoma. Both cerebral hemispheres were oedematous. Lungs were congested, stomach was empty, stomach muscosa healthy. Doctor gave opinion that death took place due to head injury and fracture injury to right leg also contributed in the cause of death. Post mortem report at Exhibit-91 prepared by him is consistent with his oral evidence. He gave evidence that the aforesaid injuries can be caused by blunt side of weapon like axe and sword and such injuries can be caused by iron rod, thus, by hard and blunt object.

20. The medical evidence given in the present matter needs to be kept in mind before appreciation of evidence given on dying declaration. There was serious head injury. The Medical Officer, who gave opinion on the fitness of Navnath, when Police Officer recorded statement did not know about haemorrhage in brain. The case paper in respect of deceased, which must have been

(17)

prepared by Civil Hospital is not produced. When deceased was admitted on 01/08/1998 and he died on 03/08/1998, if he was really fit, in ordinary course, police would have made attempt to get recorded statement of deceased through Executive Magistrate. Though it is not trite law that dying declaration recorded by Executive Magistrate only can be relied upon, when there are circumstances like found in the present case, the Court needs to consider circumstances and it was necessary for the prosecution to explain the things. The case paper is not produced and there is no explanation as to why the statement was not got recorded through Executive Magistrate. Further, Doctor gave opinion only to effect that the patient was conscious. Though satisfaction of person who recorded the statement should have been considered by this Court, the Police Officer, who recorded the statement could not given evidence that he himself got satisfied that the patient was fit and that was done by him after putting some questions. Due to all these circumstances, this Court holds that so called recorded dying declaration is surrounded by suspicious circumstance. Similarly, the evidence given by widow of the deceased (PW-8) on oral dying declaration cannot be

(18)

believed for the same reason and also for the reason that it is not consistent with the recorded dying declaration. The eye witnesses also cannot be believed as they have not given evidence that they had seen 15 to 20 persons involved in the incident of assault. There is no corroborative evidence of spot panchnama to show that the incident really took place in the house of accused No.4 or in front of house of accused No.4. Further, there is medical opinion that only hard and blunt object could have caused injuries and that opinion is not consistent with the evidence given by this witness and contents of the dying declaration. There is no mention in dying declaration that weapons were used from blunt side.

21. The aforesaid discussion shows that probably, the widow of deceased and other eye witnesses had no opportunity to see the incident. Due to some reason, they gave names of present respondents. However, the evidence on record does not show that there was previous enmity between the deceased and any of the accused persons. It can be said that probably, some incident took place in the house of accused No.4 Manik, but in that incident, damage was caused to house hold

(19)

articles of Manik. No inference is possible that in the house of Manik, the deceased was assaulted by using such weapons and bleeding injuries as mentioned above were inflicted to the deceased.

22. The trial Court has considered all aforesaid circumstances and benefit of doubt is given to the accused persons.

23. During argument, learned Counsel for respondent Nos. 2 and 3 submitted that they are dead, as per his information. It appears that abatement order is already passed in respect of these respondents. It is not possible to interfere in the decision given in favour of remaining respondents.

24. In the result, the appeal stands dismissed. Bail bonds of all respondents stand cancelled.

(S.M. GAVHANE, J.)

(T.V. NALWADE, J.)