

This is an appeal under Section 374 of the Code of Criminal Procedure Code, by the accused being aggrieved by the judgment and order passed by the learned Sessions Judge, Jalna in Sessions Case No. 104/2012 on 31.07.2013 thereby convicting him for the offence punishable under Section 302 of the Indian Penal Code and sentencing

him to imprisonment for life and fine of Rs. 50,000/- in default to suffer R.I. for three years. For the sake of avoiding confusion we are referring to the parties and witnesses and the exhibits according to their status in the trial Court.

2. Briefly stated, the prosecution story is to the effect that deceased Pralhad was the father of the informant Sachin [P.W.-1]. The accused is the son of Haribhau who happens to be the brother of Pralhad. At the time of the marriage of Haribhau's daughter Panchphula, Pralhad had lent him Rs. 2,50,000/-. Similarly, once when the accused had consumed poison Pralhad had lent Haribhau Rs. 70,000/- for his medical treatment. Unfortunately later on Haribhau committed suicide and therefore Pralhad started demanding the money back from the accused. For this reason the accused was annoyed with Pralhad.

3. According to the prosecution on 08.04.2012 Pralhad along with other villagers was sitting on a platform near Maruti Temple at village Mardi. The accused arrived there with a sword in his hand [Article No. 8] and gave blow of the sword on the head of Pralhad who died instantly and the dead body was lying in pool of blood. Prabhakar, another paternal uncle of the informant Sachin [P.W.-1] telephonically

informed him about the incident at about 1.20 p.m. so he rushed to the spot and found that the dead body of his father was lying in a pool of blood near the platform situated in the vicinity of the Maruti Temple. Rajendra [CW-1], Parasram [CW-2], Munaf [CW-3], Bhaskar [CW-4], Datta [CW-5] and Kailash [CW-6] and Prabhakar all told him that the accused had assaulted his father with a sword, of which his father Pralhad died. Sachin [P.W.1] went to the police station and lodged a report [Exhibit-1] and Crime No. 77/2012 was registered under Section 302 and 504 of the Indian Penal Code and also under Section 25 r/w 3 of the Arms Act. The investigation was handed over to P.I. Gajanan Jaibhai [P.W.-9].

4. Mr. Gajanan Jaibhai [P.W.-9] reached the spot, conducted the panchnama of the scene of the offence [Exhibit.27] and inquest was done as per the panchnama [Exhibit.40]. The post-mortem examination was performed by Dr. Anuradha Suryakant Male [P.W.-2]. She found following injuries:

“1] Chop wound V shaped over head left side extending from left eye brow to upper part of occipital region involving upper part of left ear pinna size 24 cm x 3.5 cm x cavity deep reddish in colour. Some brain matter missing. Evidence of clean cut over underlying bones prefrontal, temporal parietal and occipital bones corresponding to injury.

2] Chop wound over head left side from mid parietal region to upper part of occipital region 10 cm x 3 cm x cavity deep. Evidence of clean cut over underlying bones parietal and occipital corresponding to injury. Injury was reddish in colour.

3] Chop wound over left hand dorsal aspect extending from upper part of left hand to middle phalanx of middle finger of size 9 cm x 4 cm x bone deep reddish in colour. Evidence of fracture of proximal phalanx of middle finger of left hand.

4] Contused lacerated wound to left hand dorsal aspect lateral side 4 x 2 1/2 x 1 1/2 cm reddish in colour oblique.

5] Contused lacerated wound to right leg lower part 3 x 1/2 x 1/2 cm. Reddish in colour medial aspect.

6] Contused lacerated wound to right leg medial aspect lower part 5 x 1 1/2 x 1 1/2 cm, reddish in colour oblique.”

She prepared postmortem examination notes [Exhibit-15]. She opined that Pralhad had died due to head injuries associated with fracture of proximal Phalanx of Middle finger of left hand. It is the prosecution case that while in the police custody the accused discovered blood-stained sword [Article no.8] which was seized under memorandum statement and the panchnama [Exhibit.32]. The muddemal articles were sent for chemical analysis. Statements of the witnesses were recorded and in due course the accused was chargesheeted before the Court of

Judicial Magistrate First Class, Ambad who committed the case to the Sessions Court, Jalna.

5. The learned Sessions Judge framed the charge and recorded the plea. Since the accused pleaded not guilty, the prosecution led its evidence. The defence of the accused is of total denial.

6. It is necessary to note here that during the course of trial the learned Sessions Judge by invoking the powers under Section 311 of the Code of Criminal Procedure and by passing a speaking order on the charge-sheet [Exhibit-1] on 01.07.2013 caused the persons who were cited in the F.I.R. [Exhibit-15], as were present at the time of incident but who were not examined by the prosecution, to be examined namely Rajendra [CW-1], Parasram [CW-2], Munaf [CW-3], Bhaskar [CW-4], Datta [CW-5], Kailas [CW-6]. The accused also examined his wife Manisha [DW-1]. It is necessary to note here that it appears that no objection was raised for such a course being followed by the Sessions Judge when these court witnesses were being examined. On the contrary, without any demur they were cross-examined on behalf of the accused.

7. At the end, the learned Sessions Judge by the impugned

judgment and order convicted and sentenced the accused as mentioned herein-above. Hence this appeal.

8. We have heard the learned Advocate Mr. A.B. Bhosale for the accused. The learned Advocate submitted that the conclusion drawn by the learned Sessions Judge is perverse, drawn by resorting to surmises and conjectures. The learned Sessions Judge has not appreciated the evidence properly. He has ignored the material inconsistencies in the depositions of the witnesses. The prosecution witnesses and the court witnesses were not worthy of credence. No independent witness has been examined. The conduct of the prosecution witnesses was unnatural. The conduct of the Court witnesses who were stated to be present at the scene was wholly unnatural as none of them tried to accost the accused. Some witnesses have simply stated about the accused having straight way arrived at the scene and directly assaulted deceased Pralhad, where as some witnesses have stated about a fighting having been ensued between the accused and Pralhad. The panch on the discovery panchnama [Exhibit-27] is habitual panch and the circumstances of such discovery under Section 27 of the Indian Evidence Act has not been properly established. Thus, the learned Advocate prayed to allow the appeal.

9. The learned A.P.P. on the other hand strenuously supported the impugned judgment and order. According to the learned A.P.P. the Sessions Judge has rightly invoked the powers vested in him under Section 311 of the Code of Criminal Procedure and has played an active role in conducting the trial. Therefore, no fault can be found with such initiative taken by him. The learned A.P.P. also pointed out that the defence has miserably failed to shake the testimonies of the court witnesses and has failed to bring out any oblique intention on their part to implicate the accused falsely. Thus, according to the learned A.P.P. the accused has been rightly convicted and appropriately sentenced by the impugned judgment and order.

10. We have carefully gone through the impugned judgment and the entire evidence led before the learned Sessions Judge. The learned Sessions Judge has systematically considered all the circumstances and the testimonies and has come to a right conclusion in convicting and sentencing the accused. To begin with, it is apparent that Dr. Anuradha Suryakant Male [P.W.-2] who has performed the postmortem examination as per the Post Mortem notes [Exhibit-15] has stated and explained about the injuries noticed by her on the dead body and has also opined that all these injuries were *ante mortem* and the deceased had died due

to head injuries associated fracture with proximal phalanx of middle finger of left hand. Her evidence is duly corroborated by the postmortem notes recorded during the course of said examination. Lastly when the sword [Article no.8] was shown to her, she has also opined that the injury nos. 1 to 3 (supra) were possible by such weapon. She has specifically stated that these injuries could have been caused by sharp edged part of the sword. A careful perusal of her cross-examination would reveal that the defence has not been able to extract anything so as to discredit her opinion. In view of such concrete evidence, the learned Sessions Judge has rightly concluded about death of Pralhad being homicidal one.

11. Coming to the ocular testimonies of witnesses, the learned Sessions Judge has rightly found that Sachin [P.W.-1] though is an informant was not himself present at the time of the occurrence of the incident and therefore his evidence cannot be considered to ascertain what had transpired during the incident. The prosecution did examine Narayan [P.W.-6] by citing him as an eye witness. He happens to be the brother of the deceased Pralhad and paternal uncle of the informant Sachin (P.W.-1) as well as the accused. Though Narayan [P.W.-6] has stated about the episode as if he was personally present there, Sachin

[P.W.-1] has stated that Narayan [P.W.-6] had arrived at the spot after he reached there. In view of such material contradiction the learned Sessions Judge has rightly discredited the testimony of Narayan [P.W.-6]. Incidentally it is also necessary to note that in fact statement of Narayan [P.W.-6] was not recorded by the Investigating Officer and he had refused to give any statement to police and this was one more reason to discard his testimony.

12. It seems that having found that the informant Sachin [P.W.-1] and Narayan [P.W.6] both cited as prime witnesses were of no help in reaching to truth, the learned Sessions Judge has invoked the powers under Section 311 of the Code of Criminal Procedure and has passed following order :

**“ORDER BELOW EXH. 1
OF SESSION CASE NO. 104/2012.**

I have heard final arguments in this matter. It has been brought to my notice that the informant filed the report contending therein that when his father was sitting on the platform near Maruti Temple the accused assaulted him with sword and killed him. It has come in the evidence that there were near about 25 persons sitting in platform. However, the prosecution has examined PW no.6 Mr. Narayan who is the brother of the deceased. He claims that he witnessed the incident while occurring. However, the informant states that when he received a phone call, he went to the scene of offence and saw the dead body of his father was lying on road near the platform

of Maruti Temple. He has further stated that his uncle Narayan came later on. In these circumstances, I find that the prosecution was required to examine other witnesses. For the best reasons known to the prosecution, neither any independent witness has been examined nor the learned Prosecutor has filed any pursish as to why he did not examine any of the independent eye witness in this case.

2. Section 311 of the Code of Criminal Procedure empowers the court to summon any person as a witness or examine any person in attendance though not examined as a witness or recall and re-examine any person already examined at any stage of the enquiry, trial or other proceeding if his evidence appears to the Court to be essential to the just decision of the case.

3. The informant in his report filed below exh. 25 had named Rajendra Asaram Munjal, Parasram Bhimrao Raut, Munaf Zahoorkhan Pathan, Bhaskar Yamaji Bansode, Datta Rangnath Ekhande, Prabhhakar Malharrao Munjal, Kilas Bhaktaji Munjal. Hence, it is necessary to examine these witnesses as Court witnesses. Hence, the following order.

ORDER

Issue summons to Rajendra Asaram Munjal, Parasram Bhimrao Raut, Munaf Zahoorkhan Pathan, Bhaskar Yamaji Bansode, Datta Rangnath Ekhande, Prabhhakar Malharrao Munjal, Kilas Bhaktaji Munjal as Court witnesses.

Dt. 1.7.13.

(B.D. Kapadnis)
Sessions Judge, Jalna.”

In pursuance of such order the learned Sessions Judge proceeded to examine few more witnesses as court witnesses, whose names were appearing in the report filed by the informant Sachin [P.W.-1]. Obviously the Sessions Judge does have the power under Section 311 of the Code

of Criminal Procedure to summon any person as a witness though not summoned as witness if his evidence appears to him to be essential to the just decision of the case. A careful perusal of the F.I.R. [Exhibit-25] lodged on the very date of the incident within 2 to 3 hours specifically mentions that Rajendra [CW-1], Parasram [CW-2], Munaf [CW-3], Bhaskar [CW-4], Datta [CW-5], Kailash [CW-6] and Prabhakar were present at the scene of the offence and they all unanimously told him that his father Pralhad and all of them were chit-chatting by sitting on the platform when the accused arrived there with sword and assaulted Pralhad in their presence and his father had died on the spot. It is thus apparent that by no stretch of imagination can it be said that all these court witnesses are got up witnesses. In fact, the learned Sessions Judge has correctly invoked the powers under Section 311 of the Code of Criminal Procedure in summoning these persons. There is also no room to discard the statement in the F.I.R. [Exhibit-25] as an after thought, since it has been lodged as soon as possible as it can be, after the occurrence of the incident. There was no time lag for any concoction. We therefore see no reason to question the initiative taken by the learned Sessions Judge in summoning and examining them as court witnesses.

13. In this respect, it is also necessary to note that as is mentioned above no objection was raised on behalf of the accused when the learned Sessions Judge proceeded to examine these court witnesses. Under these circumstances, we find no illegality in following such recourse.

14. Now turning to the testimonies of these court witnesses Rajendra [CW-1] has stated that at the time of incident he was sitting on the platform along with Pralhad Parasram [CW-2], Munaf [CW-3], Bhaskar [CW-4], Datta [CW-5] Prabhakar and Kailash [CW-6]. The accused arrived there at 12.00 to 12.30 p.m. Fighting ensued between Pralhad and accused, and when Pralhad tried to run away he fell on the ground. The accused then gave blow of sword on the head of Pralhad. It is pertinent to note that when his examination-in-chief was recorded till this extent he started feeling giddiness and requested for an adjournment. However, again he changed his request and requested for recording his evidence on that day itself and the further cross-examination on behalf of the accused was conducted by offering him sitting arrangement. It is pertinent to note here that demeanor of this witness was noticed by the learned Sessions Judge while appreciating his testimony. The learned Sessions Judge has rightly considered this aspect

to demonstrate that if the witness was even afraid to record his testimony it was not unnatural for him not to have intervened and accosted the accused when the latter was assaulting Pralhad. The learned Sessions Judge had the appropriate opportunity to note the demeanor of the witnesses and to discard the argument of the defence to the effect that had he been really present at the scene of the offence he would have certainly intervened when a quarrel had ensued.

15. Parasram [CW-2] has also narrated about the incident by stating himself to be an eye witness. True it is that he has erred when he said that blow of sword was given on the head as well as shoulder of Pralhad but in fact there is no injury to the shoulder. However, simply on the basis of such error, one cannot readily discard his testimony, for nothing could be extracted during his cross-examination to doubt his presence on the scene.

16. Similarly Munaf [CW-3] and Bhaskar [CW-5] have also supported the prosecution by saying that they were present at the scene near the Maruti Temple and the accused having arrived there and assaulted Pralhad with a sword. True it is that few other court witnesses Bhaskar [CW-4] and Kailash [CW-6] had denied to have witnessed the

incident. It is also true that there has been a variance in the deposition of these court witnesses who have supported the prosecution in as much as some of them have stated about fighting having been ensued between Pralhad and accused initially and later on the accused having assaulted Pralhad. Whereas few other witnesses have simply stated about the accused having straightway after arrival at the scene assaulted Pralhad. However simply on the basis of this isolated inconsistency, one cannot discard their testimonies outrightly when these witnesses have no axe to grind in the matter and are independent and when nothing could be extracted to disbelieve their testimonies. In these circumstances we are convinced that the testimonies of these witnesses can be safely relied upon, the learned Sessions Judge has correctly appreciated their testimonies and has reached to a correct conclusion in accepting them to the extent that the accused had assaulted Pralhad with sword. Thus, there is ample, cogent reliable and direct evidence to prove that the accused did assault Pralhad with the sword and as a result he died on the spot due to head injury.

17. In fact, in view of such direct and reliable testimonies, the other circumstances like motive and discovery are not very important. Still, there is ample material to show that the accused had the motive to

kill Pralhad inasmuch as Pralhad had lent money to his father Haribhau and was demanding it back. Narayan [P.W.-6] and Parasram [CW-2] have both corroborated this fact. In addition, Parasram [CW-2] had stated that there was also dispute between deceased Pralhad and accused on the ground of agricultural land. During the examination of the accused under Section 313 of the Code of Criminal Procedure he has stated about there being such a dispute on the ground of agricultural land and these circumstances would be sufficient to attribute that there was strong motive for the accused to kill Pralhad.

18. As regards discovery of the sword [Article no.8] by the accused is concerned, Satish [P.W.-5] is the panch who has stated about the accused having given a statement in his presence agreeing to discover the sword and subsequent discovery of the sword [Article no.8] by him from his house and its seizure in his presence as per the panchnama. True it is that Satish [P.W.-5] has admitted to be a stock witness and the learned Sessions Judge has committed error in believing his testimony as a panch on the memorandum statement [Exhibit-32] and the seizure panchnama [Exhibit-33]. The learned Sessions Judge has relied upon the ratio laid down in the case of **State (N.C.T. Delhi) Vs. Navjot Sandhu; AIR 2005 SC 3820** holding that even the panchas

are not necessary for recording testimony under Section 27 of the Indian Evidence Act. The learned Sessions Judge has observed that in view of such principle, the testimony of the Investigating Officer Gajanan Jaibhai [P.W.-9] being of impeccable character can easily be accepted and has accepted such circumstance of discovery under Section 27. Being the Investigating Officer, in our view it would be highly risky to rely upon sole testimony of the Investigating Officer and it would be safe to look for corroboration in the form of testimony of the panch. Therefore, in our view when the panch Satish [P.W.-5] is a stock panch witness and the only evidence of the Investigating Officer Gajanan Jaibhai [P.W.- 9] is there, the learned Sessions Judge ought not to have accepted their testimonies to the extent of discovery of the weapon.

19. Be that as it may, since we are holding that the evidence is not sufficient to believe the circumstance of recovery of the sword [Article no.8] under Section 27 of the Indian Evidence Act, further scrutiny about the blood of group 'O' was found on the blade of the sword [Article no.8] which tallies with the blood group of the deceased is inconsequential.

20. In the result, though the prosecution has failed to establish

the circumstance, of discovery which is admissible under Section 27 of the Evidence Act and the learned Sessions Judge has committed an error in holding otherwise, there is ample direct ocular evidence discussed herein above to conclude that the accused has committed murder of Pralhad. Consequently, we find no hesitation in concurring with the finding and conclusion drawn by the learned Sessions Judge in convicting and sentencing the accused by the impugned order. We see no sufficient and cogent reason to take a different view. The appeal therefore fails.

21. The appeal is dismissed.

[MANGESH S. PATIL, J.]

[S. S. SHINDE, J.]