

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 176 OF 2015

- [1] Pralhad S/o Sandu Dandge, Age **APPELLANTS**
38 years, Occ. Rikshaw Driver,
R/o. Village Wangi Khurd,
Tq. Sillod, Dist. Aurangabad,
At present R/o. Sambhaji Colony,
House No.E-13/4, N-6, CIDCO,
Aurangabad, Tq. & Dist. Aurangabad
- [2] Uttam S/o Sandu Dandge, Age
41 years, Occ. Rikshaw Driver,
R/o. Village Wangi Khurd, Taluka
Sillod, Dist. Aurangabad, At present
R/o. N-6, CIDCO, Mathuranagar,
House No.E-30/16, Aurangabad,
Taluka and District Aurangabad

V E R S U S

The State of Maharashtra, Through **RESPONDENT**
the Police Station, Satara,
Aurangabad, Tq. & Dist. Aurangabad

Mr. G.A. Kulkarni, Advocate, holding for
Mr. R.S. Deshmukh for the Appellants
Mr. S.J. Salgare, APP for the respondent-State

W I T H

CRIMINAL APPEAL NO. 296 OF 2015

The State of Maharashtra, Through **APPELLANT**
the Police Station, Satara,
Aurangabad, Tq. & Dist. Aurangabad

V E R S U S

- [1] Pralhad S/o Sandu Dandge, Age **RESPONDENTS**
36 years, Occ. Rikshaw Driver,
R/o. Village Wangi Khurd,
Tq. Sillod, Dist. Aurangabad,
At present R/o. House No.E-13/4,
N-6, CIDCO, Aurangabad
- [2] Uttam S/o Sandu Dandge, Age
39 years, Occ. Rikshaw Driver,
R/o. Wangi Khurd, Taluka
Sillod, Dist. Aurangabad,
At present R/o. N-6, CIDCO,
Mathuranagar, House No.E-30/16,
Aurangabad

Mr. S.J. Salgare, APP for the appellant-State
Mr. G.A. Kulkarni, Advocate, holding for
Mr. R.S. Deshmukh for the respondents-State

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**CORAM : T.V. NALAWADE AND
SMT.VIBHA KANKANWADI,JJ.**

DATE : 7th SEPTEMBER, 2018

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

Criminal Appeal No. 176/2015 is filed by
accused Nos.1 and 2 from Sessions Case No. 264/2013
which was pending in the Court of learned Addl.
Sessions Judge, Aurangabad to challenge the conviction
and sentence given for offences punishable under

Sections 304 [I], 324, 504 read with Section 34 of the Indian Penal Code. For the main offence, the sentence of imprisonment for 10 years and fine of Rs.5,000/- is given. The appellants-accused were charged and tried for offence punishable under Section 302 read with Section 34 of Indian Penal Code, but they are acquitted of that offence, and so, the other Appeal is filed by the State. Both the sides are heard.

2. In short, the facts leading to the institution of the appeals can be stated as follows :-

The deceased Satyawar Dandge was real brother of the accused. Prosecution witness Shubham [PW-5] is a son of accused No.1-Pralhad. There was some dispute between Pralhad and his wife Maya, and due to that, wife was living separate from Pralhad in another village, Wangi with her son and two daughters. The deceased was living with this family in Wangi. About four months prior to the date of incident, the wife of Pralhad had shifted to Aurangabad with her issues and she had started living at Satara, Aurangabad. The deceased had also shifted to Aurangabad. Due to the aforesaid circumstances, the relations between deceased and Pralhad were strained.

3. The incident in question took place on 06.05.2013 at 07.00 p.m. The deceased and Shubham

were proceeding towards Osmanpura Weekly Bazar place on foot. When they reached near railway-gate situated near Dargah of Osmanpura, both the accused came there. Both the accused assaulted Satyawar by using sticks. Pralhad gave blow of the stick on the head of Satyawar. Satyawar sustained injury and some persons shifted him first to Satara Police Station and then he was referred to Government Hospital, Aurangabad. A Police Constable of Satara Police Station recorded the statement of Satyawar in Government Hospital and on that basis the Crime was registered against both the accused at 00.30 hours of that night. Satyawar succumbed to the injuries at 02.40 a.m. of 07.05.2013. Initially, the Crime was registered only for the offence punishable under Section 324 read with Section 34 of Indian Penal Code, and after the death of Satyawar, it was converted to make it for the offence of murder. During investigation, the statements of Shubham and wife of deceased came to be recorded.

4. For proving the offences, the prosecution relied on the evidence of record of Dying Declaration of Satyawar and the direct evidence of Shubham, son of accused No.1. Mr. Chavan [PW-4], the Police Head Constable of Satara Police Station gave evidence to prove the record of Dying Declaration. His evidence shows that before recording the statement, he had obtained the Certificate of fitness of Satyawar from

Medical Officer of Government Hospital. Certificate was obtained at 08.55 p.m. on 06.05.2013. The Dying Declaration is proved vide Exhibit-28. The requisition letter given to Doctor for giving opinion is proved as Exhibit-27. Dr. Londhe [PW-7] is examined to prove that the deceased was fit to give the statement. On Exhibit-27 there is endorsement of Dr. Londhe and substantive evidence is given on the fitness of Satyawar by Dr. Londhe. This evidence shows that at 08.55 p.m. Satyawar was conscious, oriented and was in condition to give statement.

5. In Dying Declaration [Exhibit-28], Satyawar blamed accused Nos.1 and 2 for the injuries caused to him. He disclosed that both the accused had assaulted him by using wooden sticks. He, however, specifically blamed accused Pralhad by disclosing that the blow on his head was given by Pralhad. In Exhibit-28, the deceased mentioned that at the relevant time Shubham [PW-5] was in his company.

6. In the evidence of P.S.O. Bhole [PW-6], the requisition letter given by Police Station to Government Hospital is proved as Exhibit-34. According to Bhole, the information in requisition letter was written by him on the basis of disclosure made by the deceased. In Exhibit-38 it was mentioned that the relatives had assaulted Satyawar. Dr. Londhe [PW-7]

has given evidence that with Exhibit-38 the patient was reached to the Hospital at 08.15 p.m. and then he gave his opinion regarding the fitness. A photo-copy of case paper prepared by Government Hospital is proved at Exhibit-45 and this record is consistent with substantive evidence given by Dr. Londhe. In Exhibit-45 also the history of assault is mentioned and it was given by the deceased. In Exhibit-61 which is a requisition given by police for conducting postmortem examination, the name of accused Pralhad was given. The postmortem of deceased was conducted on 07.05.2013 between 10.30 a.m. to 11.30 a.m.

7. In the evidence of Dr.Meshram [PW-9], the postmortem report is proved as Exhibit-50. Dr. Meshram found following injuries on the dead-body :-

"17. Surface wounds injures - [Their nature position, dimensions [measured] and directions to be accurately stated their probable age and causes to be noted. If bruises are present what is the condition of the subcutaneous tissues?]

[N.B.- [When injuries are numerous and cannot be mentioned within the space available they should be mentioned on a separate paper which should be signed].

1. Stitched wound over right parieto-occipital region measuring 7cm with 7 stitches in situ. no gaping or oozing. Margins are dried & darks reddish.

3. Abraded contusion over left knee measuring 5x3 cm, reddish.

[a] Can you say definitely that the injuries show against column no.17 & 18 are ante-mortem injuries ?

8. According to Mr. Meshram [PW-9], injuries were caused to deceased on his brain and head, and they were as follows :-

"3. We found under scalp contusion over right parieto occipital region of size 10x8 c.m. with corresponding subperiosteal haemorrhage. It was reddish. Linear undisplaced fracture of right parietal bone present. Fracture margins are blood infiltrated. Subdural hemorrhage present over right parieto-temporo-occipital region of size 12x10x1 c.m. reddish. Subarchonoid haemorrhage present over right parietal

region of size 5x4 c.m., reddish. Brain is oedimatous. In my opinion the cause of death was head injury. Blood was kept for grouping. Injury No.1 under Sol.No.17 with corresponding injury in column no.19 are sufficient in ordinary course of nature to cause the death..."

Dr. Meshram has deposed that the injuries mentioned in column No.17 of postmortem report were caused by wooden stick. Such possibility was given by him when Article Nos.1 to 4, piece of stick and iron cap of stick were shown to him.

9. The substantive evidence of Shubham [PW-5] and the other evidence shows that the statement of Shubham was recorded on 07.05.2013. He gave evidence in the Court on 28.04.2014 and on the date of his deposition he was studying in 8th standard. He gave his age as 14 years, and so, oath was administered to him. It is already mentioned that in Dying Declaration there is name of this witness. Shubham has given evidence on the incident and he has specifically stated that, it is accused No.1-Pralhad, his father, who had given blow of stick on the head of Satyawar. Though he has tried to say that accused No.2 had also assaulted by kicks and fist blows, there is no corroboration of any nature to this direct evidence.

He has given evidence that during incident he became frightened and he ran away.

10. The evidence of Shubham [PW-5] is consistent with the evidence of Dying Declaration on material particulars. Mr. Dehade [PW-1], a panch witness of spot-panchnama is examined to prove the spot panchnama which is at Exhibit-15. His evidence and the record show that the spot of offence was shown by Shubham and on the next day of the incident the weapon, two pieces of wooden stick and two iron rings [Article Nos. 1 to 4] were found on the spot. Though there was no blood on the spot of offence, in view of nature of injuries, described above, not much can be made out of that circumstance in favour of Pralhad.

11. In the evidence of Baburao Kanje [PW-11], the P.S.I., who made investigation, it is brought on record that Article Nos. 1 to 4 were sent to C.A. office with covering letter at Exhibits 64 and 65. The C.A. report at Exhibit-66 shows that blood of Group-A was detected on Article Nos.1 to 4. The C.A. report at Exhibit-69 in respect of the blood of deceased shows that his blood group was "A". This evidence gives corroboration to the evidence of Shubham [PW-5] and also the evidence of Dying Declaration.

12. Prosecution examined Chhayabai Dandge [PW-8],

the widow of the deceased. Her evidence is only on motive. There is such evidence from Shubham also. There was dispute between Pralhad and his wife, and Pralhad was feeling that the deceased was taking the side of his wife.

13. The trial Court has believed the evidence of Shubham [PW-7]. The evidence as a whole shows that there is no reason to disbelieve Shubham. There was no reason for the deceased to falsely implicate his real brother Pralhad. There is direct evidence also and there is evidence on motive against Pralhad. However, there is no evidence on motive as against accused No.2 and there is no convincing evidence against accused No.2 that he had used weapon in the incident and he had caused any injury to the deceased. Due to these circumstances, benefit of doubt could have been given to accused No.2. The evidence as against accused No.1 is easily separable, and so, this Court holds that only accused No.1 can be held responsible for inflicting injury to deceased which proved to be fatal.

14. The aforesaid evidence does not show that there was intention of Pralhad to finish the deceased, who was his real brother. In view of the circumstance that a stick having metal rings was used and the stick hit on head, it can be inferred that there was

knowledge that by using such weapon, Pralhad was likely to cause the death. The evidence of doctor is to the effect that such injury is sufficient to cause death in ordinary course of nature, but the evidence on the intention of the accused to cause particular injury or to cause death is not that convincing. Thus, only the knowledge can be inferred that by such act Pralhad was likely to cause the death. In view of these circumstances, this Court holds that the offence committed by Pralhad is punishable under Section 304 Part II of Indian Penal Code. In the case reported as **1997 DGLS [SC] 25 [Mavilathamban Nambiar vs. State of Kerala]**, when there were similar facts, the Apex Court held that conviction can be given for offence mentioned in Section 304 Part II of Indian Penal Code.

15. On the evidence of Dying Declaration, reliance was placed in the case reported as **[1976] 3 Supreme Court Cases 618 [K. Ramachandra Reddy & Anr. vs. The Public Prosecutor]**. The Apex Court has made following observations :-

"Dying declaration is undoubtedly admissible under Section 32 of the Evidence Act and not being a statement on oath so that its truth could be tested by cross-examination, the courts have to apply the strictest scrutiny and the closest circumspection to the statement before acting upon it. While

great solemnity and sanctity is attached to the words of a dying man because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person yet the court has to be on guard against the statement of the deceased being a result of either tutoring, prompting or a product of his imagination. The court must be satisfied that the deceased was in a fit state of mind to make the statement after the deceased had a clear opportunity to observe and identify his assailants and that he was making the statement without any influence or rancour. Once the court is satisfied that the dying declaration is true and voluntary it can be sufficient to found the conviction even without any further corroboration."

There cannot be dispute over aforesaid proposition. In the present matter, this Court has considered relevant circumstances having connection with Dying Declaration. In the result, following order :-

O R D E R

- [1] Appeal filed by the State bearing Criminal Appeal No. 296/2015 is dismissed.
- [2] Criminal Appeal No.176/2015 filed by convict is allowed as follows :-

- [i] The Appeal filed by appellant No.2 Uttam S/o Sandu Dandge is allowed.
- [ii] The Judgment and Order of learned Additional Sessions Judge, Aurangabad given against appellant No.2 Uttam S/o Sandu Dandge in Sessions Case No.264/2013 by which he was convicted and sentenced for offences punishable under Sections 304 [I], 324, 504 read with Section 34 of the Indian Penal Code is hereby quashed and set aside.
- [iii] Appellant No.2 Uttam S/o Sandu Dandge stands acquitted for above offences. Fine amount, if any, deposited by him be returned to him. He be set at liberty forthwith from jail. Bail bonds of the amount of Rs.15,000/- with one surety of like amount be obtained from him for the period of six [06] months as provided under Section 437-A of the Code of Criminal Procedure.
- [iv] The Appeal of appellant No.1 Pralhad S/o Sandu Dandge is partly allowed.
- [v] The Judgment and order convicting appellant No.1 Pralhad S/o Sandu Dandge for the offence punishable under Section 304 [I] read with

Section 34 of the Indian Penal Code is set aside and he is convicted for the offence punishable under Section 304 [II] of the Indian Penal Code. He is sentenced to suffer imprisonment for the period for which he has already undergone and he is to pay fine of Rs.1,000/- [Rupees One Thousand]. In default of payment of fine, he is to undergo rigorous imprisonment for one month.

[vi] Appellant No.1 Pralhad S/o Sandu Dandge stands acquitted of the offence punishable under Sections 324, 504 read with Section 34 of the Indian Penal Code. Fine amount, if any, deposited by him be returned to him. Bail bonds of Rs.15,000/- [Rupees Fifteen Thousand] with one solvent surety of like amount be obtained from him for the period of six [06] months as provided under Section 437-A of the Criminal Procedure Code.

[3] Criminal Application No. 27/2016 filed for early hearing is disposed of.

[SMT.VIBHA KANKANWADI, J.]

[T.V. NALAWADE, J.]