

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

CRIMINAL APPEAL NO. 562 OF 2006

1. Dattarao Ramrao Jumde
Age : 55 years, occu.: agri.,
R/o Kumbhari, Taluka and
District Parbhani.
2. Prakash Gangaram Wazir
(Abated)
3. Ahilyabai Gangaram Wazir
Age : 65 years, occu.: household
R/o Ganpur, Taluka Jintur,
District Parbhani.

Appellants.

(original accused Nos.
1, 2 and 3)

Versus

1. State of Maharashtra
Through Police Station Officer,
Bori Police Station,
District Parbhani.
2. Maroti Pandurang Wazir
Age : 33 years, occu.: agri.,
R/o Ganpur, Taluka Jintur.
District Parbhani.

Respondents.

Mr. S.S. Bora, Advocate for the appellants/accused.

Mr. M.M. Nerlikar, A.P.P. for the State.

**CORAM : T.V. NALAWADE &
SUNIL K. KOTWAL,JJ.**

Date : 26th March, 2018.

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

1. Conviction of accused Nos.1 to 3 in Sessions Case No.50/2003 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as "I.P.C.") by judgment dated 29.07.2006, passed by 1st Ad hoc Additional Sessions Judge, Parbhani is challenged in the present appeal by original accused persons. Respondent No.1 is the State of Maharashtra and respondent No.2 is informant.

2. Brief facts of the case in nutshell are that, accused No.1 is resident of Village Kumbhari and accused Nos.2, 3 and deceased Sarubai Pandurang Wazir, informant Maruti Wazir and other witnesses are residents of village Ganpur, Taluka Jintur. Accused No.2 is the son of accused No.3 and accused No.1 is the father-in-law of accused No.2. Prior to 15 years before the date of occurrence, daughter of accused No.1 namely Gawlanbai married accused No.2 Prakash.

3. Prior to 15 to 20 days from the date of occurrence, accused No.2 used to beat his wife Gawlanbai by doubting her character. Accused Nos.1 and 3 suspected that deceased Sarubai was the person who poisoned ear of accused No.2 Prakash regarding character of his wife Gawlanbai. On 17.11.2002, informant Maruti Wazir (PW-1), his mother Sarubai Pandurang Wazir and wife Sulabai (PW-5) had been to their agricultural land to perform

agricultural work in the field. At about 1.00 p.m., initially accused No.1 came to that field and started quarreling with Sarubai on account of poisoning the ear of accused No.2 Prakash. Accused No.1 started assaulting Sarubai by stones, which were tied in the large handkerchief. Even accused No.2 and 3 reached on the spot and started beating Sarubai by fists and kicks. Accused No.2 lifted Sarubai and forcibly threw her on the ground. Sulabai Wazir (P.W.5) raised hue and cry and, therefore, Maruti Wazir (P.W.1), who was working at some distance, rushed on the spot. When accused noticed the approaching Maruti (P.W.1) they bolted away from the spot. During this incident, Sarubai sustained serious injuries and she became unconscious. Therefore, Maruti (P.W.1) took Sarubai to Police Station, Bori with the help of his cousin Angad Sahebrao Wazir. Police Referred Sarubai to Primary Health Centre, Bori. However, on the same day at about 3.30 p.m., Sarubai succumbed to her injuries. Therefore, Maruti Wazir (P.W.1) lodged F.I.R. Exh.53 to Police Station, Bori. In the result, Crime No.100/2002 came to be registered under Section 302 read with Section 34 of the Indian Penal Code.

4. P.S.I. Sunil Nikalje (P.W.7) conducted investigation of this crime and prepared inquest panchanama (Exh.86) and spot panchanama (Exh.59). When dead body of Sarubai was referred to Rural Hospital, Bori for post mortem examination, Dr. Rapeswar

Mokashe (P.W.6) performed autopsy examination on that dead body and by submitting post mortem notes (Exh.78), opined that, the cause of death of Sarubai was due to "huge haemothorax with pneumothorax with hemorrhagic shock". During investigation, accused No.1 to 3 were arrested and as per disclosure statement of accused No.1, the handkerchief with tied stones was seized. After completion of the investigation, charge sheet was submitted before Judicial Magistrate, First Class, Jintur against all accused for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

5. Offence punishable under Section 302 of the Indian Penal Code being exclusively triable by Court of Sessions, this case was committed to Sessions Court, Parbhani.

6. Charge (Exh.15) was framed against accused No.1 to 3 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code. Accused pleaded not guilty and claimed trial.

7. Defence of the accused is of total denial. By filing statement (Exh.95) under Section 313 of the Criminal Procedure Code, accused No.1 contended that, at the instance of deceased Sarubai, on 16.11.2002, accused No.2 pushed his wife Gawlanbai in the well. Therefore, Gawlanbai sustained serious injuries. On 16.11.2002, accused No.1 took injured Gawlanbai to Primary Health

Centre, Bori. He also approached Police Station, Bori to lodge report against accused No.2. However, police did not accept his report and falsely implicated him in the present case.

8. Prosecution examined total 7 witnesses. After considering the evidence placed on record, learned trial Court pleased to convict accused No.1 to 3 for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code and they were sentenced to suffer imprisonment for life and to pay fine of Rs.3000- each. Therefore this appeal.

9. During pendency of the appeal appellant No.2 Prakash Gangaram Wazir died, and therefore, the appeal against him is abated. In the circumstances, we have to consider correctness of the judgment and conviction only against accused Nos.1 and 3.

10. Heard strenuous arguments submitted by Mr. S.S. Bora, learned Counsel for the appellants and learned A.P.P. for the State.

11. Learned Counsel for the appellants submitted that the prosecution has examined only Maroti Wazir (PW-1) and his wife Sulabai (PW-5) as eye witnesses, though independent witnesses were available to the prosecution, and therefore, only on the basis of the testimony of inimical and interested witnesses, conviction of the accused cannot be sustained.

12. His next limb of the argument is that Maroti Wazir (PW-1) reached on the spot when deceased Sarubai was lying

unconscious, and therefore, he cannot be an eye witness of the incident. He has drawn our attention towards the admission of Maroti (PW-1) that he was at the distance of 700 to 800 ft. from the spot of the occurrence. He pointed out that as Toor crop was standing in the field of Maroti (PW-1), the spot of the incident was not visible to Maroti (PW-1).

13. The next limb of the argument of learned Counsel for the appellants is that even the testimony of Sulabai (PW-5) is not reliable as her statement before the Court is nothing but material omissions. He pointed out that no blood stains were found on the spot, though the witnesses have admitted that deceased Sarubai sustained bleeding injuries on her body.

14. The next contention of the learned Counsel for the appellants is that on the date and time of the occurrence accused No.1 visited Police Station Bori with his daughter Gawalanbai to lodge report against accused No.2, who pushed Gawalnbai in the well and thereby seriously injured her. To substantiate this submission learned Counsel has drawn our attention towards the cross-examination of Investigating Officer P.S.I. Nikalje (PW-7).

15. In the alternate, the contention of the learned Counsel for the appellants is that no deadly weapon was used by accused and they did not come on the spot at one and the same time. Therefore, no evidence is available to establish that accused Nos.2

and 3 shared common intention with accused No.1. His contention is that otherwise also all the injuries found on the body of deceased were on her back, which is not vital part of the body and therefore, prosecution cannot establish that the accused had intention to kill deceased Sarubai. His submission is that in any case accused cannot be convicted for the offence under Section 302 read with Section 34 of I.P.C.

16. Learned A.P.P. for the State in reply submitted that though accused Nos.1 to 3 did not come on the spot together, the time gap in between their arrival on the spot is so short that sharing of common intention can be gathered. He submitted that because the daughter of accused No.1 was defamed by deceased by poisoning the ear of accused No.2 regarding her character, accused No.1 had strong motive to kill Sarubai.

17. The next contention of the learned A.P.P. is that as the incident occurred at about 1.00 p.m., no other agriculturists in the adjoining fields were present as everybody had gone for lunch to their respective houses. Therefore, non-examination of independent witnesses cannot be viewed with suspicion.

18. The next contention of the learned A.P.P. is that only because Maroti (PW-1) is on inimical terms with accused Nos.2 and 3, his testimony cannot be disbelieved when otherwise he is a trustworthy witness. According to learned A.P.P., the testimony of

Maroti (PW-1) is corroborated by Sulabai (PW-5) as well as medical evidence, and therefore, minor discrepancies in the testimonies of these witnesses deserve to be ignored. He pointed out that Medical Officer Dr. Rajeshwar Mokashe (PW-6) has opined that the fatal injury No.2 corresponding to fracture of rib on the dead body of Sarubai is possible due to forcibly throwing her on the ground of hard stones. He pointed out that Medical Officer Dr. Mokashe (PW-6) has opined that all the injuries found on the dead body of Sarubai are possible due to blows of the stones tied in the handkerchief.

19. Learned A.P.P. pointed out that though accused No.1 has taken a plea of *alibi*, he has not examined witness to prove this defence. He pointed out that Investigating Officer P.S.I. Nikalje (PW-7) has admitted in his cross-examination that he was not present at Bori Police Station when Gawlanbai paid visit to the Police Station.

20. At the outset we must make it clear that as the appeal against accused No.2 Prakash Gangaram Wazir is abated due to his death, in this appeal we need not consider, the correctness of the conviction of accused No.2. So also, though Maroti (PW-1) has admitted in his cross-examination that he is on inimical terms with accused Nos.2 and 3 on account of dispute of boundaries of their respective fields, that cannot be a ground to discard his testimony, if otherwise he is a trustworthy witness.

21. The total prosecution case is based on the evidence of Maroti Wazir (PW-1) and Sulabai Wazir (PW-5), who are examined as eye witnesses of the occurrence. Though Maroti (PW-1) posed himself as one of the eye witness and though he claims that he heard conversation in between accused No.1 and deceased regarding poisoning of ear of accused No.2 by Sarubai creating doubt in the mind of accused No.2 about the character of his wife, from the examination-in-chief of Maroti (PW-1) it becomes clear that at the time of occurrence at about 1.00 p.m. Maroti (PW-1) was grazing bullocks at the distance of 700 to 800 ft. from Sarubai and Sulabai (PW-5), who were performing weeding in the field. Thus, it is very hard to accept that from the distance of about 800 ft. Maroti (PW-1) can hear the actual words uttered by accused No.1 while talking with deceased at the time of occurrence.

22. Another most important aspect is that from the cross-examination of Maroti (PW-1) it has been brought on record that due to standing crop of Toor on the spot of the incident, that spot was not within the sight of Maroti (PW-1). So also the spot panchnama (Exh.59) proved by Bapurao Wazir (PW-2) shows that Toor as well as Maize crops were standing in the field of Maroti (PW-1) at the relevant time of occurrence. Thus, it is very hard to accept that when Toor and Maize crops were standing in the field of Maroti (PW-1), that time he can watch the occurrence even from the distance of

800 ft. Thus, obviously testimony of Maroti (PW-1) cannot be accepted as one of the eye witness. Otherwise also, Maroti (PW-1) has admitted in his cross-examination that when he reached on the spot after hearing shouts of Sulabai (PW-5), that time he found that Sarubai was lying unconscious on the spot. Even Sulabai (PW-5) has admitted in her cross-examination that accused bolted away when Maroti (PW-1) was at the distance of 20 ft. from the spot of the incident.

23. These admissions on record are sufficient to show that Maroti (PW-1) is not an eye witness of the incident, and therefore, whatever he has stated against the accused in his evidence, cannot be considered as trustworthy evidence. At the most, his testimony is acceptable only to the extent that after hearing shouts of his wife Sulabai (PW-5), he reached on the spot and that time he found his mother lying unconscious in the field, and therefore, he took his mother to Bori Police Station and from there to Primary Health Centre, Bori and after death of Sarubai, lodged F.I.R. (Exh.53) to Police Station, Bori.

24. In the circumstances, only the testimony of Sulabai (PW-5) is available against the accused persons to prove the actual occurrence. From the evidence of Sulabai (PW-5) it emerges that on the date of the incident she went to her field alongwith deceased Sarubai at about 9.00 to 10.00 a.m., that time accused Nos.2 and 3

were already present in their field performing the agricultural operations. It is to be noted that till 1.00 p.m. accused Nos.2 and 3 did not talk to deceased Sarubai regarding poisoning of the ear of accused No.2. According to Sulabai (PW-5), accused No.1 reached on the spot at about 1.00 p.m. and asked Sarubai as to why she was making false allegations against his daughter Gawalanbai and thereby poisoned the ear of accused No.2. According to Sulalai (PW-5), thereafter accused No.1 started assaulting Sarubai by stones which were tied in a large handkerchief. When Sulabai (PW-5) and her daughter Usha tried to intervene, that time accused No.1 pushed them aside. Thereafter accused Nos.2 and 3 reached on the spot and accused No.2 lifted Sarubai up and threw her on the ground. After this act, Sarubai became unconscious and hearing the shouts of Sulabai, Maroti (PW-1) rushed towards the spot and when he was at the distance of 20 ft. away, all accused bolted away from the spot. Thereafter with the help of one Angatrao, the deceased Sarubai was taken to Bori Police Station and from there to Primary Health Centre, Bori, where she succumbed to her injuries at about 3.30 p.m.

25. It is to be noted that if this testimony is accepted as it is, even then it becomes clear that accused No.1, who is the resident of village Kumbhari, reached on the spot first in time and that time accused Nos.2 and 3, who are the residents of village Ganpur, did

not accompany him. Undisputedly, accused Nos.2 and 3 were unarmed at the time of the occurrence. In fact, according to Sulabai (PW-5), only accused No.2 lifted Sarubai and threw her on the ground. Sulabai (PW-5) has not whispered a word against accused No.3. Thus, even if the testimony of Sulabai (PW-5) is accepted as it is, no offence can be established against accused No.3 as the above evidence falls short to prove that accused Nos.1 to 3 shared common intention to assault Sarubai. No evidence is available regarding prior meeting of accused Nos.1 to 3 soon before the occurrence. In the circumstances, we have no hesitation to hold that the conviction of accused No.3 under Section 302 read with Section 34 of I.P.C. is bad in law and deserves to be set aside.

26. No doubt, after going through the cross-examination of Sulabai (PW-5) it becomes clear that she stood constant and successfully faced the searching cross-examination of the defence Counsel. Except minor omissions no material discrepancies are pointed out by the learned defence Counsel in the testimony of Sulabai (PW-5) to disbelieve her testimony. On the other hand, presence of Sulabai (PW-5) on the spot of the incident is natural and her oral testimony is also fully corroborated by prompt F.I.R. (Exh.53) lodged by Maroti (PW-1) in Bori Police Station.

27. Even Dr. Rajeshwar Mokashe (PW-6) has proved the following external injuries on the dead body of Sarubai :-

- (i) CLS (stitched wound) over left supra-scapular region, 2 cm in length x $\frac{1}{2}$ cm in width and $\frac{1}{2}$ in depth (after stitches opened).
- (ii) Contusion lateral to left scapular on back (on left side) of size 6 x 3 x 3 cms.
- (iii) Contusion near midline on back of size 1 x 1 cm.
- (iv) Contusion over right thigh of size 4 x 3 cm.
- (v) Contusion over left thigh of size 1 x 1 cm.

28. Dr. Mokashe (PW-6) opined that these injuries were caused within 12 hours and are possible due to stones tied in the handkerchief, when the seized stones tied in handkerchief were referred to this witness. Medical Officer has also proved the following internal injury on the dead body of Sarubai -

Fracture of 6th rib on the posterior aspect of back, corresponding to injury No.2 mentioned in Column No.17 i.e. contusion lateral to left scapular on back.

The Medical Officer has also established irregular tear on left side of pleura and tear on lateral aspect of left lung of size 3 x 1 x 1 cm. 1 $\frac{1}{2}$ liter blood was found in thoracic and pleural cavity which is suggestive of huge haemothorax with pneumothorax Dr. Mokashe (PW-6) opined that probable cause of death was due to "huge haemothorax with pneumothorax with haemorrhagic shock".

29. No doubt, Dr. Mokashe (PW-6) has admitted in his cross-examination that in old age due to osteoporosis calcium concentration in bone is reduced which results in weakness of bone.

Medical Officer Dr. Mokashe (PW-6) has also admitted that injury No.2 noted in the postmortem report (Exh. 78) is possible if the injured person is forcibly thrown on the ground of hard stone and injury No.2 corresponds to fracture of the rib. In other words, Dr. Mokashe (PW-6) has admitted that as the deceased was 70 years old woman, due to weak bones, fracture of rib is possible if she is thrown on stony hard surface. However, this admission brought on record by defence is of no help to the defence, for the simple reason that Sulabai (PW-5) has admitted in her cross-examination that on the spot of the incident the place is of soft soil. Even the spot panchnama does not show that the spot where the incident had occurred, was of stony surface. Therefore, the opinion of Dr. Mokashe (PW-6) deserves to be accepted that the injuries sustained by deceased Sarubai are possible due to blows of stones tied in the handkerchief.

30. In the result, in view of the testimony of Sulabai (PW-5) which is fully corroborated by medical evidence of Dr. Mokashe (PW-6), the prosecution has proved beyond reasonable doubt that the deceased Sarubai sustained above-said injuries, which resulted in her death due to blows inflicted by accused No.1 by stones tied in the handkerchief.

31. Now the question arises whether this evidence is sufficient to establish guilt of accused No.1 under Section 302 of

I.P.C. It is to be noted that in the case at hand, unique weapon is used by accused No.1 i.e. small stones tied in the handkerchief. Such small stones tied in the handkerchief cannot be treated as “deadly weapon” like sword, knife or iron bar. Seizure panchnama of the stones (Exh.64) proved by Govind Wajir (PW-4) shows that neither number of stones seized nor its weight is mentioned in the said panchnama. The stones are described only as “small stones”. Thus, obviously the small stones tied in the handkerchief cannot be treated as “deadly weapon” which may cause death of human being in ordinary course of nature.

32. So also, from the evidence of Dr. Mokashe (PW-6) it becomes clear that most of the injuries are on the back and both thighs of the deceased. Thus, none of the injury is found on the vital part of the deceased. Inflicting blows of small stones tied in the handkerchief on the back and thighs of the deceased by accused No.1 is a clear indication that he had no intention to kill deceased. Had Accused No.1 intention to kill deceased, he would have used deadly weapon like heavy stick, sword, axe, iron bar, instead of small stones tied in the handkerchief. So also he would have inflicted blows of the weapon on the vital part of the body, such as head of the deceased. Thus, the part of body where the stone blows were inflicted by accused No.1 and user of small stones tied in the handkerchief, clearly indicates that accused No.1 had never

intention to kill the deceased. In absence of intention to kill, the prosecution cannot establish guilt of the accused No.1 under Section 302 of I.P.C.

33. However, internal damage noted by Medical Officer Dr. Mokashe (PW-6) i.e. fracture of 6th rib resulting into tearing of pleura and left lung and contusion on left kidney of the deceased, indicate that the blows of small stones were inflicted with certain force. Inflicting such blows with force on the body of 70 years old lady, like deceased, is sufficient to hold that accused No.1 at least had knowledge that due to his act the deceased may sustain injury which is sufficient to cause her death. Therefore, as there was no pre-mediated attack by accused No.1 and as accused No.1 did not intend to kill the deceased, but had knowledge that his act may result into death of Sarubai, only offence punishable under Section 304 (II) of the Indian Penal Code is established against accused No.1 beyond reasonable doubt.

34. Regarding objection raised by defence Counsel about non-examination of independent witness, Sulabai (PW-5) has given acceptable explanation that at the time of the occurrence, adjoining field owners had gone to village Ganpur probably for lunch. Despite searching cross-examination by defence Counsel, he cannot bring on record that any independent witness was present nearby the spot of the occurrence. In the circumstances, non-examination of

independent witness by prosecution cannot be viewed with suspicion.

35. Before parting with the judgment we must consider the plea of *alibi* taken by accused No.1. In fact, no defence witness is examined by accused No.1 to prove that at the time of the occurrence he was present at Police Station Bori with his daughter Gawalanbai. No doubt, from the cross-examination of P.S.I. Nikalje (PW-7) it has been brought on record that on 17.11.2002 before registration of crime, Gawalanbai had come to Police Station Bori for lodging complaint against accused Prakash. However, it does not mean that even accused No.1 was present alongwith Gawalanbai and when Gawalanbai visited the Police Station, it was 1.00 p.m. So also, because Dr. Mokashe (PW-6) has proved the M.L.C. Certificate of Gawalanbai which shows that on 17.11.2002 at about 5.00 p.m. Medical Officer of Primary Health Centre, Bori examined Gawalanbai and found six injuries on her body including dislocation of left upper two incisors, on the basis of this M.L.C. Certificate, at the most it can be inferred that Gawalanbai visited Police Station, Bori prior to 5.00 p.m. However, that does not mean that accused No.1 was present at Police Station, Bori at 1.00 p.m. i.e. at the time of occurrence of the incident. Thus, otherwise also the plea of *alibi* raised by accused No.1 is not established by him. He cannot even bring on record even probability that he was not present on the spot

at about 1.00 p.m.

36. Thus, our conclusion is that on the basis of the testimony of Sulabai (PW-5), which is corroborated by medical evidence of Dr. Mokashe (PW-6), the prosecution has proved beyond reasonable doubt, offence punishable under Section 304 (II) of the I.P.C. only against accused No.1. Conviction of accused No.1 for the offence punishable under Section 302 read with Section 34 of I.P.C. being bad in law deserves to be set aside and conviction is to be modified into Section 304 (II) of I.P.C.

37. Regarding quantum of sentence, considering the circumstances under which the incident occurred and the weapon used by accused No.1 i.e. small stones tied in the handkerchief, we hold that rigorous imprisonment for five years and fine of Rs. 3,000/- (Rupees Three Thousand) i/d rigorous imprisonment for one month will be the sufficient punishment to meet the ends of justice. It follows that the appeal filed by accused No.1 Dattarao deserves to be partly allowed and the appeal of accused No. 3 Ahilyabai deserves to be allowed.

38. In the result, following order is passed.

ORDER

1. Appeal of appellant No.3 Ahilyabai Gangaram Wazir is allowed.

2. Judgment and order of 1st Ad hoc Additional Sessions Judge, Parbhani in Sessions Case No. 50/2003 under Section 302 read with Section 34 of I.P.C. is set aside. Appellant No.3 Ahilyabai Gangaram Wazir is acquitted of the offence punishable under Section 302 read with Section 34 of I.P.C.
3. Bail bonds and surety bonds of appellant No.3 Ahilyabai Gangaram Wazir stand cancelled.
4. Fine amount deposited by appellant No.3 Ahilyabai be refunded to her after appeal period is over.
5. Appeal of appellant No.1 Dattarao Ramrao Jumde is partly allowed.
6. Conviction given by 1st Ad hoc Additional Sessions Judge, Parbhani to appellant No.1 Dattarao Ramrao Jumde for the offence punishable under Section 302 read with Section 34 of I.P.C. is set aside and it is modified for the offence punishable under Section 304 (II) of I.P.C.
7. Appellant No.1 Dattarao Ramrao Jumde is sentenced to suffer rigorous imprisonment for five years and to pay a fine of Rs.3000/- (Rupees Three Thousand), in default to suffer rigorous imprisonment for one month.

8. Appellant No.1 Dattarao is entitled to set of under Section 428 of the Code of Criminal Procedure for the period already undergone i.e. 22.11.2002 to 07.02.2003.
9. Appellant No.1 Dattarao shall surrender to his bail bonds before the trial Court immediately to undergo the sentence.
10. The order passed by trial Court regarding payment of compensation to informant Maroti Pandurang Wazir out of fine amount deposited by appellant No.1, is maintained as it is.
11. Fine amount deposited by appellant No.2 Prakash Gangaram Wazir be refunded to appellant No.3 Ahilyabai Gangaram Wazir.

(SUNIL K. KOTWAL)
JUDGE

(T.V. NALAWADE)
JUDGE

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