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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.521 OF 2001

The State of Maharashtra
Through Public Prosecutor
High Court, Bench at Aurangabad

APPELLANT

VERSUS

1. Sanjay Govind Bhivsane
Age – 24 years,
R/o Chincholi

RESPONDENTS

2. Govind Vithal Bhivsane
(Respondent No. 2 died,
Appeal abated against
respondent No.2)

3. Baban Govind Bhivsane
Age – 22 years,
R/o As above

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Mr. S. D. Ghayal, APP for the appellant State
Mr. N. S. Ghanekar, Advocate for respondents

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[CORAM : SUNIL P. DESHMUKH &
P. R. BORA, J.J.]

DATE : 18th JANUARY, 2018

ORAL JUDGMENT (PER SUNIL P. DESHMUKH, J.) :

1. The State is in present appeal against decision dated 31st August, 2001 by Sessions Judge, Aurangabad in Sessions Case No.24 of 1999, whereunder, respondents – accused No. 1 to 3

had been acquitted of accusation of commission of offence punishable under section 302 read with section 34 of the Indian Penal Code.

2. Law had been set in motion upon a report having been made at police station Phulambri by Haribhau Sajan Bhivsane, resident of Chincholi, Taluka – Phulambri, District – Aurangabad on 25th September, 1997 stating to the effect that he was resident of Chincholi and had two brothers, namely, Namdeo and Pandurang. Namdeo and him were staying separately at Chincholi. While he was staying in '*Buddhawada*', Namdeo had been residing at '*Zopadpatti*'. There had been dispute over a piece of land in '*Buddhawada*', in front of their house with the family of the accused. Civil litigation in the court had been decided in their favour and as such, family of the accused had been entertaining grudge against them.

3. Around previous festival of '*Pola*', accused – respondent No.1 and accused – respondent No. 3 had consumed liquor and there had been quarrel between them, wherein they had suffered injuries. Yet, a complaint had been made against the informant, his son and brother by accused persons in police station and they were arrested.

4. He further has reported that on 25th September, 1997 his brother Namdeo had been to him around 6.00 a.m. telling him that he would go to *Talathi* at Bilda to see as to whether mutation in respect of the well has been effected. As such, Namdeo had proceeded to Bilda. Thereafter, one Dr. Subhash Jadhav from Bilda had been to the village telling that Namdeo Bhivsane is lying in a streamlet and he was bleeding. Thereupon, the informant along with his wife, wife of Namdeo and a few persons from the village had been in Bilda area and had found his brother Namdeo lying dead. Bleeding injuries were seen on his head and near eye. Clothes of Namdeo were smeared with blood. Thus, he suspected that accused persons have murdered Namdeo. He, therefore, alleged that accused No.1 to 3 and their accomplices had hit Namdeo on his head with stone and sharp weapon.

5. Inquest and spot *panchanamas* had been drawn. The corpse had been sent for post mortem to Government Medical College and Hospital at Aurangabad. Post mortem report shows cause of death to be head injury viz., laceration of brain and intercrainial hemorrhage due to fracture of skull bones and associated findings were – fracture of multiple ribs on left side,

multiple contusions and abrasions over body. Viscera was preserved and had been sent to forensic science laboratory. There had been seizure of stones having blood stains as well as sand and mud. Clothes of deceased Namdeo had also been seized on 25th September, 1997 itself under a *panchamama*, those were full sleeves white shirt having blood stains and cotton '*buniyan*', white '*dhoti*' with green border and two '*uparnas*' also having blood stains. Clothes of accused No. 3 Baban were seized on 27th September, 1997 pursuant to procedure under section 27 of the Indian Evidence Act, whereunder a red and white strapped full sleeves shirt along with light gray colour tricot pant both having blood stains were seized.

6. Accused were charged of commission of offence punishable under section 302 read with section 34 of the Indian Penal Code. Judicial Magistrate, First Class, as such, had committed the case to the court of Sessions at Aurangabad. The Sessions Court accordingly framed charge against the accused persons, who claimed to be tried.

7. Informant PW-1 Haribhau had been examined at Exhibit-9. He has stated in his evidence that earlier battering had taken place and accused No. 1 had hit accused No. 3 on head.

However, they had lodged a complaint against him and deceased Namdeo and they were taken to police station, where accused No.1 and 3 had threatened him and Namdeo that they will kill them. On 25th September, 1997, Namdeo had been to the informant around 6.30 a.m. telling him that he would go to Bilda to see about mutation entry of the well and that around 8.00 a.m. Dr. Subhash Jadhav had been to wife of Namdeo telling that Namdeo had fallen down in a streamlet near Bilda and had suffered bleeding injuries. Thereupon, the informant along with his wife and wife of Namdeo had been to a streamlet in Bilda, where Namdeo had been lying. He had noticed that Namdeo had suffered injuries on upper portion of right eye and backside of his head and had found him dead. Clothes of Namdeo were smeared with blood and there were two / three blood stained sharp stones lying around and he had lodged report around 12.00 noon at Phulambri police station. Thereafter, police had been to the spot of incident and the dead body was sent to hospital for post mortem.

8. During his cross examination, PW-1 Haribhau has stated that within half an hour after Namdeo had left for Bilda on the date of incident, Dr. Jadhav had come to village Chincholi and that his son had reached the spot of incident before him and that

he had reached the spot around 8.00 or 8.30 a.m. He further states in the cross examination that about fifty to sixty persons had gathered near dead body of Namdeo and that Raosaheb, his son, had already gone to police station along with police Patil to inform about the incident and they had brought along with them a police constable from Phulambri police station. He has further stated in the cross-examination that he has lodged report against the accused persons on suspicion and that he had not asked anyone who had gathered around the dead body of Namdeo, as to how the incident had taken place.

9. PW-2 Uttam Parbat Jogdande and PW-3 Dhondiram Shekuji Waghul, examined at Exhibit-11 and Exhibit-15 respectively are witnesses of inquest, spot and recovery *panchanamas*.

10. PW-4 Rukhmanbai Namdeo Bhivsane who had been examined at Exhibit-18 is the wife of deceased Namdeo. Her version in respect of previous incident of '*pola*' festival is different from that of PW-1 Haribhau. She states that accused had assaulted her husband Namdeo and had lodged complaint in the police station against the informant and deceased Namdeo. She, however, corroborates version of PW-1 that it was Dr. Subhash Jadhav who had come to her telling that Namdeo had

been lying in a streamlet at Bilda. She further states that her nephew Raosaheb went to the spot on motorcycle with Dr. Subhash Jadhav and she went on the spot with one wireman from Chincholi finding that her husband Namdeo had been lying in a pool of blood in the streamlet. She had sent Raosaheb – her nephew to her brother in law at Aurangabad and that her father in law had come there and thereafter, *panchanama* was drawn. She pleaded ignorance about arrest of her husband and informant in respect of incident of '*pola*'. She further, in her cross-examination, states that before she and Raosaheb had reached the spot of incident, there had already been collection of about fifty to sixty persons. Police had come at the scene within half an hour after they had reached the spot. Police had immediately started investigation. Namdeo had already been dead before they had reached the spot. She has stated, she had not told the police that the accused had threatened that they would kill her husband and informant Haribhau.

11. PW-8 Raosaheb Haribhau Bhivsane had been examined at Exhibit-27. He is son of PW-1 informant Haribhau and nephew of deceased Namdeo. He has stated that around 8.00 a.m. on 25th September, 1997 Dr. Subhash Jadhav had come to their house telling that Namdeo had been vomiting blood in the streamlet at

Bilda and as such, he went along with Dr. Jadhav to the spot finding that Namdeo had been lying smeared with blood and that he was alive when he had reached the spot. Namdeo had told him as to how the incident had occurred. Conduct of Dr. Jadhav also appears to be strange of not attending to an injured person and instead leaving the spot to inform his family members. On this count, it appears that the version as put forth by Raosaheb is highly improbable that Raosaheb had been left alone and the incident had been narrated by Namdeo to him. It may be a case that since Namdeo had been lying injured, he would not have been in a position to speak and since Dr. Jadhav may not have supported, he has not been produced as witness by the prosecution. There appears to be lapse in proper prosecution of the matter and thus Dr. Jadhav and Laxman Rama had not been examined. He states that Namdeo had told him while he was going from Sanjol to Bilda, accused had followed him and while he had been climbing down the streamlet, they held him and gave stone blows on his head and eye. He had asked for water and while he tried to get him up, Namdeo succumbed to the injuries. Thereafter, PW-4 Rukhmanbai had come along with wireman and he had been to Aurangabad informing about the incident. In his cross-examination, PW-8 Raosaheb has stated

that there had been no quarrel with the accused on '*polā*'. He has stated that it is not the case that many persons had gathered near the spot when he had reached there. He in fact went on to state that not a single person was there. He has further stated that after reaching him on the spot Dr. Subhash Jadhav had left the place. He was near the deceased for about half an hour. Thereafter his father Haribhau had come there. He states that along with Haribhau and Rukhmanbai, wireman and many persons had also gathered and he had immediately informed his father about the narration of incident given to him by Namdeo. He further states that he had gone back to the spot from Aurangabad. He further states that he had neither told narration of deceased Namdeo to the police who had been present on the spot nor to any other relative. He could not give explanation as to why the incident, as narrated, had not been told to the police or the relatives.

12. PW-5 Dr. Anil Digambarrao Jinturkar, who is a medical officer and had been examined at Exhibit-18, had conducted post mortem on dead body of Namdeo has opined that Namdeo Bhivsane died of "*head injury in the form of laceration of brain and intercrainial hemorrhage due to fracture of skull bones*" and associated findings were "*fractures of multiple ribs to left side,*

multiple contusions and abrasions over body". His cross examination is worth mentioning, as he had further opined that instantaneous death with such injuries is possible and the injuries can be caused if a person falls from a height of about 10 feet and rolls down. According to him, stone, like muddemal article, if hit directly, can cause depressed classical fracture. However, there was no classical depressed fracture mentioned in the post mortem report in column No.19.

13 PW-6 Sandu states in his evidence at Exhibit-24 that around 8.30 a.m. on the fateful day, he had been proceeding to land of Indran Bapu and while walking on the way, he saw Namdeo and Laxman Rama were sitting on the road and were chatting. While he was proceeding, they followed him at some distance. He claims to have seen accused No.3 Baban following Namdeo, who was going to urinate. Thereafter, while he reached village Bilda, he heard shouts from a distance of about 500 feet from the streamlet, however, he did not immediately go to the spot. While other people went to the streamlet he had also gone there and found Namdeo lying in the streamlet smeared with blood. His cross-examination, however, reveals that quite a few people were proceeding to and fro to villages Sanjol and Bilda. It had been elicited from his cross-examination that had he seen

Namdeo and Baban quarreling, he would have intervened.

14. PW-7 Harchand Shankar Bhujange, who had been examined at Exhibit-25 appears to be a passer by. He, in his evidence, claims that while he had been going on bicycle to Dhamangaon, he saw accused No. 2 Govind and his sons coming from water tank and going towards field and that accused No. 2 Govind had not responded to his call, although he had looked back. He had seen many people rushing towards water kutta telling him that Namdeo was killed by accused No. 2 Govind in the streamlet. In his cross-examination although he purports to say that he had told names of sons of accused Govind to police, yet, there appears to be absence of reference to the same in his police statement.

15. PW-9 Vinayak Bapurao Mahanavar is Assistant Police Inspector and had been in charge of police station Phulambri. He had been examined at Exhibit-29. He states that on 25th September, 1997, around 10.30 a.m. police patil Bilda gave a report that dead body of unknown person had been lying in the streamlet. As such, he had been to the spot and had recorded the report made to him by PW-1 Haribhau. He, thereafter, registered the offence at Crime No.120 of 1997 and drew inquest

and spot *panchanamas* and also collected three stones smeared with blood and after recording statements of some witnesses, he had arrested accused No. 1 and 2 and clothes of the deceased were seized on the very day and clothes of accused stained with blood were seized on 27th September, 1997. Blood stained clothes of PW-8 Raosaheb and blood sample of accused No.2 Govind were also seized and the collected material was sent to chemical analyst. PW-9 had requested the Tahsildar to prepare a sketch-map of the spot. He was subsequently transferred and investigation was taken over by PSI Mundhe who had submitted charge sheet in the court. In his cross examination he states that statement of Harishchandra Bhujange had been recorded on 29th September, 1997 at Harsul, who was stated to be eye witness to the incident. It has been elicited from his cross-examination that accused No. 1 and 3 were found to be residents of Ambedkar Nagar, Aurangabad. He had recorded statement of PW-1 Haribhau on 26th September, 1997 and he did not remember about presence of PW-8 Raosaheb on the spot on the date of the incident.

16. Sessions Judge, after trial, acquitted the accused of all the charges. Sessions judge considered that although death of Namdeo was homicidal, yet the prosecution has not been able to

prove that the accused persons were responsible for the same or had committed the offence of hitting him with stone and sharp weapons in furtherance of their common intention to kill Namdeo.

17. Having regard to the evidence, as had been recorded, it is obvious that Namdeo died a homicidal death.

18. Accusations against the accused have been made by the informant on suspicion that there had been a dispute between family of informant and deceased Namdeo on one side and that of the accused on the other, which in the court had went in favour of family of the informant and deceased Namdeo and that there had been an incident earlier on in which accused persons had lodged first information report against deceased Namdeo, informant Haribhau and Raosaheb son of informant and a case had been registered accordingly against them.

19. There is no eye witness to the incident as can be seen from the evidence on record. The accusation is with reference to the suspicion as referred to above. Evidence of having last seen the accused in the company of deceased Namdeo is in the form of evidence of passers by on the road joining villages. There is only one witness i.e. PW-6 Sandu, who in his deposition refers to that

he had seen Namdeo climbing down the streamlet for urination and that accused No. 3 Baban had been following him. While earlier, in his deposition, he refers to that he had seen Namdeo and Laxman Rama had been chatting on the road and further that Namdeo had been following him at a distance of 250 feet. He heard shouts of accused No.3 and deceased Namdeo, yet he did not go back and he went to the spot only after people had gathered there. This he states to be around 8.30 a.m. While it is stated so, it appears to be the case that about two hours earlier Namdeo had been to village Chincholi telling the informant and his wife that he was proceeding to Bilda. PW-7 claims to have seen Namdeo and Laxman Rama around 8.30 a.m. There is long hiatus between the time at which the informant claims to have been told by deceased Namdeo about him proceeding to Bilda and the time at which PW-6 claims to have seen deceased Namdeo and Laxman Rama on the road.

20. Evidence of PW-8 Raosaheb, who claims to have been immediately on the spot, puts up a story that around 8.00 a.m. Dr. Jadhav had been to his house telling that Namdeo had been vomiting blood. It clearly emerges that it was only Dr. Jadhav, who had informed the family about Namdeo being seen lying bleeding in streamlet. Version of Raosaheb shows that Dr.

Jadhav, after reaching him on the spot of the incident, had left the place immediately. It has not come on record as to how Dr. Jadhav happens to know about Namdeo lying in the streamlet. It thus, emerges that Namdeo had been seen lying bleeding in streamlet by Dr. Jadhav, according to the version of the informant and relatives. It is rather strange that Dr. Jadhav had not attended to the injured Namdeo and had moved away immediately. He was the first person as it appears from the evidence, who had seen Namdeo lying in the streamlet and he did not attend to him and had instead left the place. Dr. Jadhav has not been examined. His non examination has weakened prosecution's case. From cross-examination of PW-8 Raosaheb it emerges that he claims to have told the narration by Namdeo to him to his father Haribhau and wife of Namdeo Rukminibai about accused assaulting him. Yet, none of said witnesses refers to any such narration by Raosaheb to them. It is rather intriguing as to why in the statement to police, Raosaheb had skipped to refer to narration of incident by Namdeo to him.

21. Evidence of PW-7 shows that he had reached Bilda around 9.00 a.m., however, by that time many villagers including family members of Namdeo had gathered around the streamlet. Further, he purports to claim that he had seen accused from a

distance of about ten feet and accused have taken about five to ten minutes to climb the streamlet. He further shows ignorance about names of persons, from Chincholi and Sanjol he had met and had not seen the persons of Chincholi anytime before the incident. In such a case, version of PW-7 about having seen accused No. 2 Govind and his sons along with him, appears to be improbable. Going by the version of PW-6, it was Laxman Rama, who had been known to be last with Namdeo. Laxman Rama was also an important person who was seen with Namdeo last according to the version of PW-6, yet he had not been examined. His version would have been relevant and may have thrown some light. There is no corroboration to the version of PW-6 about accused No. 3 Baban was seen following Namdeo on the fateful day.

22. While PW-6 claims to have seen accused No.3 following deceased Namdeo, PW-7 refers that he had seen it was accused No.2. There is no evidence at all about accused having been seen together with Namdeo.

23. Deceased Namdeo and the accused were residents in the vicinity. Accused No.1 and 2 are stated to be residents of Ambedkar Nagar Aurangabad. It is nowhere referred to in the

evidence that the accused were knowing about deceased Namdeo moving to Bilda on that day. It is not the case that in close proximity of time any provocative incident amongst them had occurred or for that matter movement of Namdeo to Bilda would in any way have enraged the accused beyond the damage which had already taken place. There are no eye witnesses to the incident as is vividly seen and the information has been lodged by Haribhau on suspicion. Evidence, as referred to hereinabove, is not sufficient to conclusively relate the accused to the incident. The trial court has taken a view after scrutiny of the evidence on record which is not incongruous to evidence on record. In view of aforesaid, the appeal is dismissed.

[P. R. BORA, J.]

[SUNIL P. DESHMUKH, J.]