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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.27 OF 2003

The State of Maharashtra
Through Police Station Naigon
at the instance of Yadav s/o Manika Bhaskare
r/o Temburni, Taluka – Naigaon,
District - Nanded

APPELLANT

VERSUS

1. Manika s/o Yadav Bhaskare
Age – 58 years, Occ – Agriculture
R/o Temburni, Taluka – Naigaon (K)
District – Nanded

RESPONDENTS

(Appeal abated against respondent No.1)

2. Gangadhar Manika Bhaskare
Age – 25 years, Occ – She goats possessor,
R/o as above
3. Pandurang Manika Bhaskare
Age – 19 years, Occ – She goats possessor
R/o as above

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Mr. S. S. Salgare, A.P.P. for appellant - State

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

DATE : 19th JANUARY, 2018

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

1. This is an appeal by the State against judgment of
Additional Sessions Judge at Biloli in Sessions Case No. 45 of

2000 acquitting respondents No. 1 to 3 who are of committing murder, an offence punishable under section 302 read with 34 of the Indian Penal Code.

2. Statement made by Yadav Manika Bhaskare had been registered as First information report. The statement had been recoded on 2nd August, 2000. First information report refers to that Tolba and Yadav were sons begotten to Manika from his first wife – Rukminibai. Rukminibai died of hanging and thereafter father Manika had performed second marriage with Laxmibai. From said wedlock four children – two sons - Gangadhar and Pandurang and two daughters – Palsabai and Tulsabai have begotten. Informant alleges that his father Manika and step brothers Gangadhar and Pandurang used to beat Tolba and him and used to threaten them that they would not be given share in agriculture property. Due to harassment, Tolba and him had left the village around 1983 and were working as labourers. About four years before the incident, they had come back and had demanded share in the property. Accordingly, the property had been partitioned and they were put in possession of partitioned property. He and Tolba were asking their father to have the partitioned property registered in their names. However, the accused persons had threatened that they would kill them, if

they insist on the same. The brothers i.e. the informant and deceased Tolba had, therefore, instituted proceedings in the court. Their father Manika and step brothers Gangadhar and Pandurang were insisting for withdrawal of the proceedings. While they had been to the court for withdrawal, father Manika had not withdrawn proceedings filed by him and as such, they also did not withdraw proceedings instituted by them. In that evening, the step brothers and their father had threatened them that they would kill the informant and Tolba. It is alleged that in the night intervening 1st and 2nd August, 2000 while brother Tolba had been sleeping on a cot outside his house, father Manika and step brothers Gangadhar and Pandurang had attacked him and had hit him with axe and had killed him due to enmity over partition of the property. In the report it is alleged that respondents No. 1 to 3 have committed murder of Tolba – the victim – brother of the informant.

3. Investigation was undertaken upon registration of First Information Report. Inquest and spot *panchanamas* were drawn, clothes were seized and statements of witnesses came to be recorded. On completion of investigation, charge sheet came to be filed. Since, the offence was triable by the court of sessions, the same came to be committed to the court of sessions.

Thereafter, trial court had framed charge of murder punishable under section 302 read with 34 of the Indian Penal Code against the respondents - accused. It was explained in vernacular. Accused claimed to be tried.

4. Prosecution, in order to prove guilt by the accused, examined about eleven witnesses. PW-1 Suryakant Sambhaji Wadje, examined at Exhibit-21 is a *panch* witness in respect of inquest. PW-2 Dr. Rajaram Jairam Basvante, examined at Exhibit-23 is a medical officer, who had conducted post mortem on the dead body. PW-6 Nagorao Gangaram Shelke at Exhibit-36, PW-7 Sk. Jilani Sk. Shadulsab, at Exhibit-42 and PW-8 Mahadeo Sitaram Gotmukhle at Exhibit-45 are the *panch* witnesses. PW-9 Prabhakar Hansgir Giri, examined at Exhibit-50 and PW-10 Arun Hanmantrao Rautwar at Exhibit-52 are the investigating officers. PW-11, Babu Satwaji Kamble at Exhibit-64 is police Patil of village Temburni who had informed about the incident to the police.

5. Evidence of PW-4 informant Yadav Manika Bhaskare who had been examined at Exhibit-29 is similar as appearing in the first information report. He in his examination in chief refers to that his supplementary statement had been recorded on next

day of first information report. It was to the effect that while son of the informant, Vilas, as usual along with cattle had been passing over house of Tolba he had noticed that Tolba had been sleeping beneath the cot. A dog was seeping blood. After removing bed-sheet he found Tolba in injured condition and thereafter he went back to his house and had told about the same to his mother Sakhubai, who in turn informed the same to the informant. He further refers to that step brother Gangadhar had purchased a wrist watch from Giridas and the same had been found lying near the spot of incident and police had seized the same. In the cross-examination he has stated that after coming to know about the incident, they all had been to the spot and were grieving and weeping and had not alleged anything against the respondents. Then neighbours had gathered around. A statement has come from him in the cross examination that while he had seen dead body for the first time, two policemen were present there. He has claimed ignorance in respect of dispute over land gut No.102 or about its pendency and also about some proceedings against other persons in respect of immovable property in Naigaon. Documents show that the informant had been staying separately from Tolba. It has been revealed that there had been omission in the information and /

or supplementary statement to the police about Rama having told about the incident.

6. There is evidence of two persons, namely, PW-3 Subhash Joshi examined at Exhibit-28 and PW-5 Baba Kallate at Exhibit-31, who claim to be residents of area near the spot of incident. In their evidence they purport to claim that in the midnight intervening 1st and 2nd August, 2000, they had seen the actual incident occurring and purport to give ocular account of the incident. They claim to have seen the accused persons actually assaulting Tolba, finding Manika holding an axe and Gangadhar a *Kutti* and Pandurang was standing by the side. Both the witnesses further claim that they were frightened and did not dare to disclose the same to anyone till 8th August, 2000.

7. Trial judge has found evidence of the two claimed eyewitness to be unreliable on many aspects.

8. Trial judge has observed that the prosecution is conspicuously silent in respect of sufficient light to see the incident occurring. He has found that distance as claimed by the two witnesses, of Tolba's hut from the places of their residence could be hardly believed, in view of the *panchanamas* drawn of the place of occurrence of incident. Distance between places of

residence of the witnesses and the place of incident in *panchanama* are far more than the one claimed by them. Trial judge has adverted to that there could not have been moonlight at the time of the incident to see faces of the culprits clearly and to recognize them and even if it is assumed that these two witnesses had seen the incident, there is every possibility of mistaken identity.

9. Trial judge has disbelieved evidence of PW-3 that he was sleeping outside residential construction, since he had been suffering asthma. Trial judge has also adverted to that PW-5 Babu had attempted to rectify his versions from time to time.

10. Trial judge found that the plea and excuse put forth by these two witnesses, about them been frightened and that they were afraid of the accused, to be untrustworthy, having regard to their assurance to victim's brother. It was also found that the evidence by the two witnesses does not get any corroboration from report of Chemical Analyzer and the same is silent in respect of injury by *Kutti*. It was appreciated that seizure of clothes from the accused persons and the evidence in respect of the same is of doubtful nature.

11. It emerges that it was in the dark middle of night, the

incident had occurred causing death of Tolba, which indeed is a homicidal death and the post mortem sufficiently endorses the same.

12. It was midnight of August. It is a village place. It is not the case that there had been sufficient light and persons could be identified clearly. Evidence of the claimed two eyewitnesses is doubtful about having witnessed the actual incident. PW-3 Subhash Joshi tells in the cross-examination that the assault was for about a minute or two, whereas version of PW-5 Baba Kallate is he heard some sounds from hut of Tolba during the period between 12.00 midnight and 1.00 a.m. and he got awakened and saw towards hut of Tolba finding accused Manika hitting Tolba with axe and Gangadhar with *Kutti*.

13. Evidence of the two witnesses does not inspire confidence and their behavioural pattern appears to be unnatural and it shows that there have been stark omission about them having been frightened upon seeing the incident, while making statements to the police.

14. The incident had occurred in the midnight intervening 1st and 2nd August, 2000 whereas accused were arrested on 5th August, 2000 and their clothes were not seized then and the

same were seized on 6th August, 2000. The evidence is silent in respect of as to whether the clothes were seized from the person of the accused or from some other place and particularly it has referred to that the place from where the clothes were seized has been someone else's place, whose place has no reference in the evidence. It is highly improbable that the accused would preserve blood stained garments to be produced during trial as observed by the trial judge. Apart from that, the reason considered by the trial judge that occurrence of such blood stains would not be sufficient to implicate the accused persons carries lot of weight. It could not be definitively related to deceased Tolba.

15. The wrist watch, which had been found while drawing spot *panchnama*, although is claimed by the prosecution to be belonging to accused Gangadhar, him having purchased the same from Giridas and though Giridas had been interrogated during investigation, he had not been examined by the prosecution. Trial court had aptly considered that his examination could have possibly linked the accused to the commission of offence, however, in the absence of examination of such an important witness, the same would not be relied upon.

16. Discovery of weapons for commission of offence has also been considerably weakened, having regard to that the only witness who had been examined by prosecution had not supported prosecution case nor did his cross-examination elicit anything.

17. The accused have been implicated in the commission of offence on suspicion by the informant, since there had been a land dispute between the accused on one side and the informant and Tolbad on the other and further that the accused were reluctant to part with the land in favour of deceased Tolba and the informant. The dispute had been a long standing dispute. As a matter of fact, the informant has also referred to that some land had been given in possession of the informant and Tolba and they had been in occupation of the same. There have been court matters in respect of the land, in which it appears that, deceased Tolba as well as informant were involved. Dispute by the informant and deceased Tolba was sought to be withdrawn and had not been withdrawn. In such a case, by killing only Tolba it does not appear that the pending land dispute could have been resolved or would have come to an end. The informant and his witnesses were cross-examined in respect of

some other matters, regarding some lands with third persons. Although it had not significantly come out anything on that, yet it appears that deceased Tolba had also been involved in some other disputes.

18. Evidence of the claimed eyewitnesses is not credible and rather is doubtful and there is no corroboration to incriminate the accused on that count. The evidence of other persons with reference to land dispute is not sufficient to convict the accused merely on suspicion of the informant.

19. While the trial judge has taken a view, which is a probable and possible view, on appreciation of evidence, in the absence of convincing material on record, it may not be proper to reverse the findings recorded by the trial court. It does not appear to be a case where the acquittal of the respondent – accused deserves to be reversed converting into their conviction. The appeal, therefore, is dismissed.

[P. R. BORA, J.]

[SUNIL P. DESHMUKH, J.]