

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

CRIMINAL APPEAL NO. 41 OF 2003

1. Nana S/o Babu Pawar
Age : 26 Yrs., Occ. Agri.,
R/o : Mangwadgaon,
Taluka Kaij, Dist. Beed.

2. Rajabhau S/o Gopinath Jadhav
Age : 30 Yrs., Occ. Agri.,
R/o : Mangwadgaon,
Taluka Kaij, Dist. Beed.

**.... APPELLANTS/
[ORI.ACCUSED]**

V E R S U S

The State of Maharashtra

.... RESPONDENT

.....

Mr. S.J.Salunke, Advocate for Appellants.

Miss. S.S.Raut, A.P.P. for Resp. - State.

.....

**CORAM : SUNIL P. DESHMUKH &
P.R.BORA, JJ.**

DATE OF JUDGMENT : 5th JANUARY, 2018

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ORAL JUDGMENT : [PER – P.R.BORA, J.]

1. Heard Shri. S.J.Salunke, the learned counsel appearing for the appellants - accused and Ms. S.S.Raut, the learned A.P.P. appearing for the State. Perused the impugned Judgment and the evidence on record.

2. The present Appeal is directed against the Judgment and Order passed by the learned Ad-hoc Additional Sessions Judge, Ambajogai in Sessions Case No. 43/2002 on 30/11/2002 whereby the appellants have been convicted for the offence punishable u/s 302 r/w 34 of I.P.C. The appellants are hereinafter referred to as 'the accused'. It was the allegation against the accused that they knowingly and intentionally caused the death of one Rajendra Ganpati Jadhav in the intervening night of 16th and 17th February, 2002 by administering him a poisonous substance. The learned trial Court has held the allegations so raised against the accused to have been proved by the prosecution beyond reasonable doubts. While reaching to the said conclusion, the learned trial Court has mainly relied upon the testimony of Subhabai [P.W.4], the wife of deceased Rajendra and the disclosure statement jointly given by the accused leading to recovery of incriminating articles.

3. Admittedly, there is no direct evidence to show that the accused administered a poisonous substance to deceased Rajendra, which ultimately resulted in causing his death. It is Subhabai [P.W.4] who has alleged that the accused administered poisonous substance to her husband deceased Rajendra. The offence was registered and the investigation was set in motion admittedly on such complaint lodged by Subhabai [P.W.4]. As has been testified by Subhabai [P.W.4], deceased himself disclosed to her that accused brutally beat him and forcibly administered him some poisonous substance. Perusal of the impugned Judgment reveals that the learned trial Court has held the facts so stated by Subhabai [P.W.4] as the oral dying declaration of deceased Rajendra about the cause of his death and relying upon the same, has held the accused guilty for causing the death of deceased Rajendra.

4. No-doubt, the oral dying declaration can form the basis of conviction. However, it is well settled that the Court must be satisfied about the truthfulness of the same before the said declaration can be acted upon and must also be satisfied that the said declaration was made by the deceased in a fit mental and physical condition. The impugned Judgment is attacked by the accused on the ground that the trial Court has failed in appreciating the said aspect and ignoring the circumstances on

record leading to an inference that the deceased was not in a condition to make any statement when Subhabai [P.W.4] met him, has accepted the said statement to be the oral dying declaration of deceased Rajendra.

5. On perusal of the evidence on record, we find substance in the objection raised by the learned counsel appearing for the accused. As has come on record, the insecticide known as 'Endosulphan' was revealed to have been administered to or consumed by deceased Rajendra and the same resulted in causing his death. Dr. Rajendra Suryawanshi [P.W.6] has deposed that the percentage of the poison so administered to deceased Rajendra was fatal to his life. As has been further deposed by the said witness, if a person consumes fatal dose of poison, he may remain conscious for 10 to 15 minutes.

6. In view of the medical evidence as aforesaid, if the testimony of Subhabai [P.W.4] to the effect that when she met deceased Rajendra on 17/02/2002 at about 8.00 a.m., he disclosed to her that the accused administered him the poisonous substance, is to be believed, a further inference has to be drawn that the alleged poisonous substance was administered to deceased Rajendra at around or in the period between 7.30 a.m. to 8 a.m. It has to be, therefore, seen whether any such cogent

material is there on record leading to an inference that the poisonous substance was administered to deceased Rajendra in the said period.

7. The prosecution has, admittedly not brought on record any such concrete evidence. On the contrary, the material on record shows that the poisonous substance was administered to deceased Rajendra some times between 11.00 p.m. to 12.00 mid-night. In the F.I.R. lodged by Subhabai [P.W.4], there is a categorical averment that the accused administered poisonous substance to deceased Rajendra on 16/02/2002 during 11.00 p.m. to 12.00 mid-night. The document at Exh. 19 which is spot panchanama, carries similar averment that Subhabai [P.W.4] informed the panch witnesses that her husband deceased Rajendra was brutally beaten and was administered poisonous substance by the accused on 16/02/2002 in the period between 11.00 p.m. to 12.00 mid-night. The contents of the said panchanama were duly proved by Bibhishan Rambhau Ingle [P.W.2], one of the panch witnesses to the spot panchanama. Similar averments are there in the document at Exh. 17, which is an inquest panchanama, the contents of which have been duly proved by Sanjay Todkar [P.W.1], one of the panch to the said panchanama.

8. Thus, the F.I.R., the spot panchanama and Inquest

panchanama consistently reveal a fact that as per the information given by Subhabai [P.W.4], a poisonous substance was administered to deceased Rajendra on 16/02/2002 during the period between 11.00 p.m. to 12.00 mid-night. Time of death of deceased Rajendra, as per the post-mortem examination report, is within 24 hours in relation to the post-mortem findings and in relation to the last meal taken by deceased Rajendra within seven hours thereof. The prosecution has not brought on record any evidence to show or suggest as to when the last meal was taken by deceased Rajendra. The testimony of Subhabai [P.W.4] is totally silent on this aspect.

9. It was sought to be canvassed by learned A.P.P. that Subhabai [P.W.4] has specifically deposed that her husband did not tell the time of incident. It was, therefore, the further argument of the learned A.P.P. that the averments in the F.I.R. as well as in the spot panchanama and inquest panchanama that the accused administered poisonous substance to deceased Rajendra on 16/02/2002 in the period between 11.00 p.m. to 12.00 mid-night are to be ignored. We are not all impressed by the submission so made. For a moment, even if it is accepted that the time as stated by Subhabai [P.W.4] while lodging the F.I.R. for occurrence of the alleged incident, was not stated to her by deceased Rajendra, the fact remains that the prosecution has not

brought on record any such evidence on the basis of which an inference could have been drawn that the poisonous substance was administered to deceased Rajendra allegedly by the accused persons before half-an-hour of his making the disclosure about the said incident to Subhabai [P.W.4] so as to believe that when such disclosure was made by deceased Rajendra, he was in a conscious state of mind.

10. As is revealing from the testimony of Subhabai [P.W.4] after she saw deceased Rajendra lying in the cattle shade and after it was disclosed by him to her that the accused had administered him the poisonous substance, she loudly shouted for help and rushed to the land known as 'Khatkali'. Subhabai [P.W.4] has further deposed that one Tatyrao Jadhav met her, who happens to be her cousin brother-in-law, and she narrated the incident to him. She has further deposed that at that time tractor of Balasaheb Jadhav was coming from her back side, wherein Devidas Kerba Jadhav [P.W.5], Harischandra and Balasaheb were sitting. Subhabai [P.W.4] further deposed that they took the tractor at cattle shade, where Rajendra was lying and all of them lifted him and put him in the said tractor, whereupon he was taken to the Govt. hospital at Kallamb. Though there is no further material on record and it also can not be gathered from the evidence of P.W. 4 Subhabai as to within how much time she

brought the tractor at the place where deceased was lying, a reasonable inference can be drawn that no much time was consumed and within at the most 10 to 15 minutes the tractor had reached at the place where deceased Rajendra was lying. It is nowhere the case of the prosecution that something was disclosed by deceased Rajendra in presence of the aforesaid persons viz. Tatyarao Jadhav, Devidas Kerba Jadhav [P.W.5], Harishchandra and Balasaheb, who had been at the spot of occurrence with the tractor to take him to the hospital. It is also not the case of the prosecution that at the relevant time deceased Rajendra was in a conscious state of mind and was able to speak. On the contrary, Devidas Kerba Jadhav [P.W.5] has, in clear words, deposed before the Court that when he along with Tatyarao Jadhav, Balasaheb, etc. reached to the spot of occurrence, they saw Rajendra lying there in unconscious condition.

11. Having regard to the evidence as aforesaid, serious doubts are raised whether deceased Rajendra was really conscious and in a fit mental condition to disclose to P.W. 4 Subhabai as to what had happened with him.

12. Dr. Rajendra Suryawanshi [P.W.6] in his cross examination by accused No. 1 has stated that deceased Rajendra died within seven hours of his taking meal. As we have noted

earlier, there is nothing on record to show as to when the meal was taken by deceased Rajendra on the day of the alleged incident. Usually, the villagers/farmers take meal in the evening before 8.00 p.m. In the instant case, even if it is assumed that deceased Rajendra on the relevant day might have taken his meal bit late, the same time can not be unreasonably stretched beyond 10.00 p.m. In such circumstances also, there was no possibility of deceased Rajendra remaining alive, much less conscious till 8.00 a.m. on the next day. It is, therefore, difficult to believe the facts stated by P.W. 4 Subhabai in her testimony before the Court that at about 8.00 a.m. on 17/02/2002 when she met deceased Rajendra, he was conscious and disclosed to her about the alleged misdeeds of the accused persons.

13. There can not be a dispute that oral dying declaration can form basis of conviction and the oral dying declaration proved by a prosecution witness can not be discarded merely on account of the said witness being close relative of the deceased. But it is equally settled that such a declaration has to be trust-worthy, free from every blemish and also must inspire confidence. The evidence on record which we have elaborately discussed herein above, the very fact whether the deceased was in a conscious state of mind when the alleged oral dying declaration is said to be made by deceased Rajendra to P.W. 4 Subhabai,

appears highly doubtful and in the circumstances it would be very unsafe to rely upon the same and to base the conviction of the accused on such oral dying declaration.

14. It need not be stated that if the Court has to rely upon the dying declaration of the deceased, may be written or oral, the said Court must be satisfied that the deceased was in a fit state of mind to make the statement. In the impugned Judgment, the learned Additional Sessions Judge has not expressed any such satisfaction, though he has relied upon the oral dying declaration of deceased Rajendra allegedly made by him to P.W. 4 Subhabai. Though the medical evidence on record clearly suggest that the dose of poison administered or consumed by deceased Rajendra was fatal and in such circumstances there was no possibility of deceased Rajendra remaining conscious for more than 15 to 20 minutes thereafter, the learned Additional Sessions Judge has not made any discussion in regard to the said evidence.

15. As per the opinion recorded in the postmortem examination which is reiterated by Dr. Rajendra Suryawanshi [P.W.6] in his testimony before the Court, the poisonous substance which was noticed to have been administered to or consumed by deceased Rajendra was 'organo phosphorous'. The Modi's Medical Jurisprudence says that in case of fatal dose of 'organo

phosphorous', the symptoms begin in 30 minutes and death results within 30 minutes to three hours. We reiterate that Dr. Rajendra Suryawanshi [P.W.6] has unequivocally stated that if a person consumes a fatal dose of poison which was noticed to have been consumed by deceased Rajendra, he may remain conscious only for 10 to 15 minutes thereafter. Having considered the evidence which we have discussed in detail herein above, we find it unsafe to accept the case of the prosecution that at 8.00 a.m. on 17/02/2002, deceased Rajendra was conscious and that he disclosed to his wife P.W. 4 Subhabai that the accused persons administered him the poisonous substance.

16. In the case of oral dying declaration, reproduction of exact information and/or words used by the deceased while giving such declaration assumes vital importance. In the instant matter, in the F.I.R. lodged by P.W. 4 Subhabai, she has reported that when she saw deceased Rajendra at about 8.00 a.m. on 17/02/2002 and made enquiry with him, deceased Rajendra disclosed to her that the accused persons, on account of the earlier day's incident beat him with fists and kicks, more particularly very heavily on his chest and that they had administered him the poisonous substance. In her testimony before the Court, P.W. 4 Subhabai has however deposed that when she asked deceased Rajendra as to why and how he was lying there, deceased

Rajendra disclosed to her that the accused gave blows on his face and other parts of his body and also administered him the poisonous substance. In her testimony before the Court, P.W.4 Subhabai did not state that the accused also disclosed about the earlier day's incident and the further fact that the accused brutally beat him by fists and kicks, and more particularly heavily on his chest.

17. More over, the facts aforesaid stated by P.W. 4 Subhabai are not corroborated by the medical evidence. The postmortem examination report does not show existence of any external injury on person of deceased Rajendra. Had it been the fact as deposed by P.W. 4 Subhabai that deceased Rajendra was brutally beaten by the accused by fists and kicks and more particularly heavily on his chest, the same must have been reflected in the postmortem examination report. The description of the dead body as is revealing from the Inquest panchanama [Exh.17] also demonstrate that no sign of any injury or assault was noticed on person of deceased Rajendra. At least contusions must have been noticed where the blows were inflicted on person of deceased Rajendra. In the circumstances as above, we are unable to implicitly rely on the testimony of P.W. 4 Subhabai and it would not free from risk to base the conviction of the accused on the basis of uncorroborated version of P.W. 4 Subhabai.

18. Further, as was pointed out by the learned counsel for the accused, the fact deposed by P.W. 4 Subhabai that deceased Rajendra was first taken to the rural hospital at Kallamb, but as the Medical Officer was not available at the said hospital, deceased Rajendra was required to be taken to SRTR hospital at Ambajogai, also is not free from doubt. It is not in dispute that P.W. 6 Dr. Rajendra Suryawanshi was the Medical Officer at Rural hospital at Kallamb. P.W. 6 Dr. Suryawanshi in his evidence before the Court has stated that on 17/02/2002 he was on duty since 9.00 a.m. to 9.00 a.m. of the next day and the other staff was also on duty on that day. P.W. 6 Dr. Suryawanshi also stated that on 17/02/2002 there were three Medical Officers and one Medical Superintendent on duty in the Rural hospital at Kallamb. As has come on record through the evidence of Abdul Razzak, the Investigating Officer, he did not investigate whether Medical Officer was available or not at the Rural hospital at Kallamb in the morning of 17/02/2002. This circumstance also raises doubt about the facts stated by P.W. 4 Subhabai that deceased Rajendra was first taken to the Rural hospital at Kallamb, but was not treated there since no Medical Officer was present in the said hospital.

19. We have also carefully perused the seizure panchanama in regard to the clothes on person of deceased

Rajendra which is at Exh. 21. The description of the clothes seized of the deceased nowhere demonstrates that on any of the said clothes i.e. white Dhoti, white colour terricot shirt and baniyan, there was any stain of poisonous substance or medicine or that any of the said clothes was smelling poisonous substance or medicine. On the contrary, the description of the clothes on person of the accused persons which were seized allegedly in pursuance to the memorandum statement given by the accused, were possessing the stains of the poisonous medicines on the said pants and shirts and the said clothes were smelling of the said poisonous medicine. In the circumstances, though in the C.A. report, Organo Chloro insecticide 'Endosulphan' is stated to have detected on the Dhoti of deceased Rajendra, the said evidence also can not be said to be unblemished or free from doubt so as to rely upon the said evidence, the fact apart that merely on the basis of such evidence, no conclusion could have been drawn about the guilt of the accused.

20. After having considered the entire evidence on record, we are not satisfied that the prosecution has brought on record the evidence establishing the entire chain of circumstances which are consistent only with the guilt of accused and inconsistent with their innocence. When the evidence against the accused is of circumstantial nature, all the links in the chain must

be conclusively established by cogent and unimpeachable evidence. In the trial for the offence punishable u/s 302 of I.P.C., when the case of the prosecution is based on circumstantial evidence, the evidence of the prosecution has to be closely scrutinized and there should not be any weak link being a ground of reasonable suspicion which may call for acquittal. We reiterate that in the instant matter, the offence came to be registered on the basis of the report lodged by P.W. 4 Subhabai and it is undisputed that the allegations made by P.W. 4 Subhabai in her said report were based on the facts allegedly disclosed to her by deceased Rajendra before suffering the death. As has been elaborately discussed by us, there are serious doubts whether deceased Rajendra was in-fact conscious and in a position to disclose something to P.W. 4 Subhabai when P.W. 4 Subhabai met him at about 8.00 a.m. on 17/02/2002. The alleged declaration made by deceased Rajendra to P.W. 4 Subhabai is the sole base for initiating prosecution against the accused and as discussed by us in detail, the prosecution has utterly failed in proving the said fact beyond reasonable doubts benefit of which would certainly go to the accused. In the above circumstances, we do not deem it necessary to indulge in testing the veracity of the other evidence on record in the form of C.A. reports or the recovery of incriminating articles in pursuance to the memorandum statement allegedly given by the accused. When the prosecution has failed in

establishing the very first link in the chain of circumstances, it would be very unsafe to base the conviction of the accused for the offence with which they are charged. For the reasons stated above, the impugned Judgment cannot be sustained and deserves to be set aside.

21. In the result, the following order is passed.

ORDER

- [i] The Judgment and Order passed by the I Ad-hoc Additional Sessions Judge, Ambajogai, District Beed on 30/11/2002 in Sessions Case No. 43/2002 is quashed and set aside.
- [ii] Accused No. 1 Nana S/o Babu Pawar and accused No. 2 Rajabhau S/o Gopinath Jadhav are acquitted of the charges levelled against them. Their bail bonds stand cancelled.
- [iii] The fine amount, if any, paid by the accused be refunded to them.
- [iv] The appellants – accused are directed to furnish P.R.

Bond of Rs. 15,000/- [Rupees Fifteen Thousand]
each with one solvent surety in the like amount u/s
437-A of Cr.P.C. before the trial Court.

[v] The Criminal Appeal thus stands allowed.

[P.R.BORA]
JUDGE

[SUNIL P. DESHMUKH]
JUDGE