

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 907 OF 2014

Vitthal Jagan Bendkule.

Age: 20 years, R/o: Gayachiwadi,

Taluka Dindori, Dist. Nashik.

(At present in Nashik Central Prison)

..Appellant.

V/s.

State of Maharashtra.

(Through Police Inspector Dindori

Police Station)

..Respondent.

Mr. Subir Sarkar, advocate appointed for appellant.

Mr. V.V. Gangurde, APP for State.

CORAM : SMT. SADHANA S. JADHAV,J.

DATE : DECEMBER 18, 2018.

JUDGMENT :

1 The appellant herein is convicted for the offence punishable under section 304(II), 323 of the Indian Penal Code and sentenced to suffer R.I. for 3 years and to pay fine of Rs. 5000/- I.d. to suffer further R.I. for 3 months, by Additional Sessions Judge, Nashik in Sessions Case No. 87 of 2011 vide Judgment and Order dated 23/9/2013.

2 Such of the facts necessary for the decision of this appeal are as follows:

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(i) On 2nd November, 2010 Abaji Bombale lodged a report at Dindori Police Station alleging therein that on 2/11/2010 at about 6 p.m. he was administering water to Garlic crop in his land. His wife was also engaged in agricultural operations.

(ii) His son Sharad was coming with the cattle through the land of Sitaram Bombale and at that time, Sharad suspected that somebody was plucking chilly crop from his land and therefore Sharad had hurled abuses in general. Jagan Sawaliram Bendkule and his wife suspected that Sharad had directed abuses towards him and therefore, they had charged towards Sharad and had started assaulting him.

(iii) Vitthal who happens to be the son of Jagan Bendkule i.e. present appellant had misconceived the whole situation and had rushed towards them with a spade in his hand and had assaulted Sharad with the butt end of the spade. They tried to rescue him, but Sharad sustained an injury near his left eye and there was bleeding from his nose.

(iv) Vitthal himself had got scared and had dropped the spade on the spot and fled from the scene of the offence.

(v) Sharad was taken to the hospital and before he could be admitted in Nashik Hospital, on examination, he was declared dead.

(vi) On the basis of the said statement, Crime No. 126 of 2010 was registered at Dindori Police Station for the offence punishable under section 302, 323, 504 read with section 34 of the Indian Penal Code.

3 The cause of the death was head injury. The post mortem notes would also indicate that there was a single injury on left upper eyebrow laterally. Column No. 19 of the post mortem notes would indicate that there was cerebral oedema, extradural haemorrhage beneath the wound on the left side of the frontal bone, approximately 10 ml. Blood collected (haematoma found causing cerebral compression.)

4 At the trial, the prosecution examined as many as 7 witnesses to bring home the guilt of the accused, whereas the accused had examined 2 defence witnesses including himself.

5 P.W. 1 Abaji Nana Bombale is the father of deceased Sharad. He has admitted that the agricultural lands of Jagan Sawaliram Bendkule and Sitaram Mangaji Bendkule are adjacent to his field. He has

deposed before the Court inconsonance with his first information report. It is admitted that his wife Kachubai was plucking groundnuts in the field. Sharad had generally abused that some one was plucking chilly crop from his field. In fact, it was Latabai who happens to be the mother of the appellant was working in their field, which is adjacent to their chilly crop. That upon hearing the abuses by Sharad, Vitthal assaulted Sharad with spade.

6 In the cross-examination, it is admitted that Gat No. 193 is owned by the complainant, which is divided into 6 sub-divisions and these sub-divisions are owned by his brothers. Each of the brothers has constructed their own house in their share of land. The Gat number of the field of the accused is 201. There are four divisions in Gat No. 201, which are again divided amongst the brothers inter se. It is seen from the records that P.W. 1 was earlier cultivating the land of Sitaram on Batai basis. It cannot be said that P.W. 1 has seen the assault upon Sharad by the accused because he had reached the spot only after Sharad had fallen down. It appears from the record that the accused and the complainant are closely related.

7 By the time, Sharad was admitted in the hospital, he was declared dead in the hospital at Umarale. Umarale is at a distance of 4

and half k.m. The complainant has admitted in his cross-examination that it was Jagan Dave who had read the complaint to him and thereafter, he had put his thumb impression over it. The FIR is marked as Exh. 55.

8 The most relevant witness in this case would be P.W. 2 Dr. Prashant Patil, who had conducted post mortem on deceased Sharad. He has deposed before the Court that on examination he had found bleeding injury on left upper eyebrow 1 cm in diameter. He has proved the post mortem notes which are marked at Ex. 47. According to him, there was pulmonary oedema in the thorax. The doctor has further stated that the head injury was sufficient in ordinary course of nature to cause death. It is elicited in the cross-examination by P.W. 2 that said injury was circular in shape. There was no depth to the injury and therefore, he has not mentioned accordingly in Column No. 17. There was no fracture to the skull. It is also admitted that in the eventuality a forceful blow with a heavy spade was given, then possibility of crack or depressed fracture could not be ruled out. However, there was no such fracture to the deceased. The doctor has also stated that in the eventuality a blow is given by a spade from the front side, then lineal injury would be possible. That a circular injury is not possible with a spade like Article-1 from front side i.e. from blade side. The doctor has

admitted that from the condition of rigor mortis found on the dead body, there is possibility that Sharad died between 10 a.m. to 11 a.m on 2/11/2010. It is also admitted that there is no mention in the post mortem report that viscera is preserved in sealed condition. It is true that the post mortem notes would indicate that there was well marked rigor mortis in all limbs and the post mortem lividity on the buttocks. The post mortem was conducted on 3/11/2010 between 10.20 p.m. to 11.10 p.m. as dead body was received for post mortem at about 9 p.m. on 2/11/2010 and therefore, the doctor has rightly stated that in a climatic condition like Dindori in the month of November, rigor mortis starts setting after 12 hours of the death and remains for further 12 hours.

9 At this stage, learned Counsel appointed for the appellant rightly submits that the opinion given by the doctor that the incident must have occurred at about 10 to 11 a.m. morning on 2/11/2010 cannot be brushed aside lightly, since the opinion of expert cannot be substituted by presumption or on unsustainable ground as the opinion given by the doctor is a scientific opinion based on forensic science. It is submitted that the very fact that the time as narrated by the witness P.W.1 is shattered in the cross-examination of P.W.2, an inference needs to be drawn that there is suppression of facts and the incident has not

occurred as narrated by P.W.1.

10 Learned APP submits that this happens to be a case of direct evidence. P.W.1 and P.W.3 Lankabai Rajaram Achari are witnesses to the incident and therefore, the whole case cannot be decided on the basis of the material elicited in the cross-examination of P.W.2. Hence, it would be relevant to examine the evidence of P.W.3, who was working in the agricultural land at the relevant time.

11 P.W.3 Lankabai Rajaram Achari has stated that she had seen Sharad standing on the boundary of the field and abusing as to who was plucking chillies from his field. According to her, Jagan and Latabai i.e. the parents of the present appellant had asked Sharad as to whom he was abusing and that they were assaulting Sharad. Vitthal had seen the incident from a distance. He was also working in the agricultural land nearby and therefore, he was naturally armed with a spade. He had assaulted Sharad with the spade. As per the instructions of the doctor of Primary Health Centre, Umrare, Sharad was taken to Nashik General Hospital. She has categorically admitted that she has not in fact witnessed the incident and therefore, would not be able to throw any light upon the same. She has further admitted that according to her, Sharad was normally taking cattle for grazing at about 8 to 9 a.m. She has

also stated that he used to take cattle for grazing from the boundary of agricultural land of accused Jagan and Sitaram.

12 P.W. 4 Khandu More is the owner of the vehicle in which Sharad was taken to the hospital. According to him, he had received a telephonic call at about 6 to 6.30 p.m. He had dropped the patient alongwith the relative at Government Hospital at Dindori.

13 P.W.7 Bhika Wagh was attached to Dindori Police Station at about 9.30 p.m. He had received an information that a person of Gayachi Wadi was admitted to Rural Hospital, Dindori. He had deputed constable to Rural Hospital, Dindori and the said constable (P.W. 6) returned alongwith 2 to 3 persons for lodging FIR. He had registered the offence as Crime No. 126 of 2010.

14 The accused has examined D.W.1 Sitaram Bendkule who is owner of the agricultural land in Gat No. 201 which he shares with Jagan and his two brothers. The land of the complainant is adjacent to his land on the northern side and there is hilly area on the southern side. According to him, Abaji Bombale has no concern with his land Gat No. 201. P.W.1 has cattle which always entered into the fields of D.W.1 and therefore, there used to be intermittent altercations. He had denied that

in November, 2010 Abaji was cultivating the portion of Gat No. 201 and had taken chilly crop in the said portion. He has also falsified the contention of P.W.1 there was chilly crop of 6 crates out of which Abaji had given 3 crates of chilly.

15 D.W.2 Vitthal Bendkule who is accused No. 1 is also one of the owner of agricultural land in Gat No. 201. He has categorically stated that at about 4.30 p.m. he had heard shouts from the forest area. Therefore, he alongwith his parents rushed to the spot and found Sharad was lying there and some persons had gathered there. They had then lifted Sharad and had taken to his house. Due to previous quarrels Abaji P.W.1 had suspected that it was the defence witness No. 2 and others must have beaten Sharad and thereafter, Sharad was taken to the hospital.

16 The appellant himself has stepped into the witness box as a defence witness and has stated that he was the one who had taken Sharad home in an injured condition as he had found him lying in the agricultural land. It is pertinent to note that D.W. 2 has not been shattered in the cross-examination. Instead, D.W.2 has specifically stated in the cross-examination that Sharad was not conscious when he was found in an injured condition and therefore, they could not ask him as to

what had happened.

17 The learned APP has suggested D.W.2 in the cross-examination that there is no hilly area adjacent to the agricultural land and the same has been denied. It would be relevant to refer to the scene of offence panchanama which is at Exh. 54. The scene of offence as shown by P.W.1 is the agricultural land belonging to Sitaram Bendkule. The land on the west to east and southern side are barren. There is a standing crop of about half a feet. They had found a spade on the spot. There is a chilly crop in the land of Sitaram and a constructed house. On the western side, there is land of Jagan Sawaliram Bendkule i.e. accused No. 2 and there is standing crop of Tomatos. There is barren land on the side. It is a hilly area. The scene of offence panchanama is conducted on 3/11/2010 between 9.45 a.m. to 10.15 a.m. The defence of the accused seems to be consistent as there was a suggestion to P.W.1 that Sharad was found lying in the forest in the field of accused and that he was brought home by the accused. In fact, as per spot panchanama spade was found in the barren land but the same has been denied by P.W. 1.

18 It is admitted position that witness may lie, but not the circumstances. In the present case, the medical evidence falsifies the time of death of Sharad as the doctor who conducted the post mortem,

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on the basis of the findings recorded by him in the post mortem notes, more specifically column Nos. 11 and 12, has stated that the time of death is probably 10 to 11 a.m. Rigor Mortis was well marked in all limbs and post mortem lividity on buttocks was seen. The possibility that Sharad had died at about 10 to 11 a.m. cannot be ruled out. There appears to be suppression of genesis of the incident.

19 Section 315 of the Code of Criminal Procedure, 1973 contemplates that an accused can be competent witness in his own case. Section 315 (1)(a) of Code of Criminal Procedure, 1973 contemplates that the accused can give evidence on oath in disproving the charges made not only against him but also against other accused in the same trial.

20 Section 315 of the Indian Penal Code reads as under :

“315. Accused person to be competent witness. [\(1\)](#) Any person accused of an offence before a Criminal Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial: Provided that-

[\(a\)](#) he shall not be called as a witness except on his own request in writing;

[\(b\)](#) his failure to give evidence shall not be made the subject of any comment by any of the parties

or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings: Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject or any comment by any of the parties or the Court or give rise to any presumption against him or any other person proceeded against together with him at the same inquiry.

21 In the case of Raj Kumar Singh Alias Raju Alias Batya Vs. State of Rajasthan, reported in Supreme Court Cases (2013) 5 SCC, page 722, while distinguishing between Sections 313 and 315 of Cr.PC. has held as follows :

“The statement under Section 313 Cr.P.C. is not recorded after administering oath to the accused. Therefore, it cannot be treated as an evidence within the meaning of Section 3 of the Evidence Act, though the accused has a right if he chooses to be a witness, and once he makes that option, he can be administered oath and examined as a witness in defence as required under Section 315 Cr.PC”.

22 Section 8 of the Oaths Act, 1969 reads as follows :

“8. Persons giving evidence bound to state the truth-- Every person giving evidence on any subject before a court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject”.

In a judicial proceeding, testimony is not believed unless given upon oath. The 28th Report of the Law Commission of India has considered the Commentary of Best on Evidence Act, 1922 and has observed as follows :

“As Best has said : However, much abused or perverted by ignorance and superstition, an oath has, in every age, been found to supply the strongest hold on the conscience of man either as a pledge of future conduct or as a guarantee for the veracity of narration.”

23 The accused-Appellant has stepped into the witness box and has given evidence on oath, which shall have more weightage than the answers given to the questions under section 313 of the Code of Criminal Procedure, 1973. The evidence on oath of defence witnesses needs to be treated at par with the evidence of the prosecution witness. Moreover, the evidence of Defence Witness No. 2 is corroborated by medical evidence and hence, it can be safely inferred that circumstances speak for themselves. Moreover, the prosecution could not shatter the

defence of the accused by way of cross-examination and hence, the accused deserves to be acquitted by extending him the benefit of doubt. In these circumstances, for the above mentioned reasons, the appeal deserves to be allowed.

24 Hence, following order is passed :

ORDER

- (i) The appeal is allowed.
- (ii) The conviction and sentence awarded against the appellant vide Judgment and Order dated 23/9/2013 passed by the Learned Sessions Judge, Nashik in Sessions Case No. 87 of 2011 is hereby quashed and set aside. The accused-appellant is acquitted of the offence punishable under section 304-II and 323 of the Indian Penal Code.
- (iii) The accused-appellant be released forthwith, if not required in any other offence.
- (iv) The amount of fine, if paid, be refunded.
- (v) Writ be expedited.
- (vi) The professional fees of the learned advocate Mr. Subir Sarkar, appointed to espouse the cause of appellant is quantified as per

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rules.

(vii) The appeal is disposed of accordingly.

The Registry to communicate this order to the appellant who is lodged in the prison.

[SMT. SADHANA S. JADHAV, J.]