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

CRIMINAL APPEAL NO.104 OF 2014

Anand s/o Kernnath Khatke
Age 40 years, Occu. Private Service
R/o Handral (M), Tq. Nilanga,
District Latur

... **APPELLANT**

VERSUS

The State of Maharashtra
Through Police Station Officer,
Police Station, Omerga,
District Osmanabad
(Copy to be served on P.P.,
High Court, Bench at Aurangabad)

... **RESPONDENT**

.....
Shri Govind Kulkarni, Advocate holding for
Shri Rajendra S. Deshmukh, Advocate for appellant
Mrs. D.S. Jape, A.P.P. for respondent
.....

CORAM: T.V. NALAWADE AND
R.G. AVACHAT, JJ.

Date of reserving judgment : 3rd September, 2019

Date of pronouncing judgment : 16th October, 2019

JUDGMENT (PER R.G. AVACHAT, J.) :

This appeal is directed against the judgment of conviction and order of sentence, dated 30.11.2012, passed by Additional Sessions Judge, Omerga in Sessions Case

No.8/2011, whereby the appellant herein has been convicted for the offence punishable under Sections 302 and 324 of the Indian Penal Code and sentenced to life imprisonment and to pay fine of Rs.2000/- and rigorous imprisonment for one year with fine of Rs.1000/- respectively. The appellant has also been directed to undergo simple imprisonment for three months and two months, in case of default in payment of the respective fine amount.

2. Facts of the prosecution case :-

Appellant married Sumanbai (P.W.7) six years before 26/27th June 2010. Sumanbai was treated well for about two years of her marriage. The appellant thereafter started ill-treating her. A few months before the incident, both the appellant and Sumanbai had been to Ahmednagar to earn their living. The appellant doused Sumanbai with kerosene. She had related the incident to her brother Balaji (P.W.2) and father Bajirao (deceased). Sumanbai was, therefore, brought back to her parent's house.

3. On 26.6.2010 at about 6.00 p.m., the appellant called Balaji (P.W.2) on cell phone and asked him to send his

wife back to her matrimonial home. Balaji informed the same to his father (deceased Bajirao). The appellant was asked to come with 2 – 3 persons, as middlemen, to give assurance that he would treat Sumanbai well. At about 11.00 p.m., the appellant came to the house of his parents-in-law. He asked the deceased Bajirao to send his wife with him. The appellant picked up quarrel with deceased Bajirao over not sending his wife back to her matrimonial home. The appellant then went away to come back by 2.00 a.m. The deceased – Bajirao was sleeping on a cot just outside his house. All other family members were asleep in the house. The appellant sat on the person of the deceased Bajirao and gave blows on his head with a Kukari. Cries of the deceased Bajirao made his family members awake. They came out of the house to see the appellant assaulting the deceased with a Kukari. Balaji (P.W.2), brother-in-law of the appellant, caught hold of the Kukari. In the result, he sustained injuries to his both hands. The appellant then gave a blow on his head with the Kukari. Balaji (P.W.2) dashed the appellant to make him fall on the ground. Meanwhile, some persons gathered. Balaji (P.W.2) and Bajirao were rushed first to Dr. Vijay Patil's Hospital. As condition of

Bajirao was critical, he was rushed to Solapur for better treatment. Dr. Vijay Patil (P.W.3) contacted Police Station, Omerga. Shri Shaikh, Sub-Inspector of Police, rushed to Dr. Patil's Hospital and recorded F.I.R. (Exh.19) given by Balaji (P.W.2).

4. Based on the F.I.R. (Exh.19), crime vide C.R. No.104/2010 came to be registered for offence punishable under Section 307 of the Indian Penal Code. Dilip Udate (P.W.8), Assistant Police Inspector went to the scene of offence. He drew the scene of offence panchanama (Exh.26) there in the presence of panch witnesses. Kukari and other articles found at the spot came to be seized. Further investigation was made by Shri Madhav Gundile (P.W.9) Police Inspector. He recorded statements of persons acquainted with the facts and circumstances of the case, sent the seized articles to Central Forensic Science Laboratory (C.F.S.L.) for analysis and report.

5. On 7.8.2010, Bajirao succumbed to the head injury. Offence of murder, therefore, came to be registered against the appellant. Inquest and post mortem examination was held. On

completion of investigation, the appellant was proceeded against by filing the charge sheet before the Court of Judicial Magistrate, First Class, Omerga.

6. Learned Judicial Magistrate, First Class, Omerga committed the case to the Court of Additional Sessions Judge, Omerga.

7. The learned Additional Sessions Judge framed the charge (Exh.5) for offence punishable under Sections 302 and 307 of the Indian Penal Code. The appellant pleaded not guilty. The defence of the appellant was that he had been to the house of his in-laws by 6.00 p.m. on 26.6.2010 to get his wife back. His father-in-law asked him to come back for dinner by 10.00 p.m. When he went back, Balaji (P.W.2) started assaulting him with a Kukari. In the melee, Bajirao suffered head injury. The appellant too suffered serious injury and became unconscious.

8. The prosecution, to establish the charge against the appellant, examined 9 witnesses and produced on record certain documents. In his defence, the appellant examined Dr. Shrinivas Jadhav (D.W.1).

9. Learned Additional Sessions Judge, Omerga, on appreciating the evidence of Balaji (P.W.2) and Sumanbai (P.W.7), came to the conclusion that the prosecution has brought home the charge of murder. The trial Court, however, found that, so far as regards offence against Balaji (P.W.2) is concerned, it was not an offence of attempt to murder, but voluntarily causing hurt with dangerous weapon.

10. It be noted that the case basically rests on the evidence of Balaji (P.W.2) and Sumanbai (P.W.7). P.W.1 Dr. Santosh conducted post mortem examination to find that deceased Baburao died of head injury. The post mortem report is at Exh.17. Dr. Vijay (P.W.3) was examined since both the deceased and Balaji (P.W.2) were rushed first to his hospital. He had extended them first aid. The F.I.R. was recorded in his hospital. Shrimant Lamture (P.W.4) is a witness to the scene of offence panchanama (Exh.26) while Mahadeo Salgare (P.W.5) is a witness to the inquest panchanama (Exh.28). Dr. Sudhir (P.W.6) was examined in proof of the injuries on the person of Balaji (P.W.2). Dilip Udate (P.W.8) and Madhav Gundile (P.W.9) are the police officials who did the investigation of the crime.

11. Heard. Shri Govind Kulkarni, learned counsel for the appellant, would submit that, the prosecution has suppressed the genesis of the case. Injuries on the person of the appellant have not been explained. The appellant all along wanted his wife to resume marital relations. On the fateful day, the appellant had been to the house of his parents-in-law to get his wife back. It was nothing unnatural for him to be at the place of the incident. Learned counsel took us through the cross-examination of Balaji (P.W.2) and Sumanbai (P.W.7) to suggest that both these witnesses did not speak truth. No independent witness has been examined. The learned counsel ultimately urged for allowing the appeal.

12. Mrs. Jape, learned A.P.P., on the other hand, would support the impugned judgment of conviction and order of sentence. According to her, it is not that in each and every case the prosecution is under obligation to explain injuries on the person of the accused. The appellant was found at the scene of offence. His wife had no reason to give evidence against him. The appellant was aggressor. The witnesses are natural and truthful. There is no reason to disbelieve their evidence. Learned A.P.P. ultimately urged for dismissal of the appeal.

13. Let us turn to appreciate the evidence in the case. The post mortem report (Exh.17) suggests that, the deceased died of head injuries. Dr. Santosh (P.W.1) had conducted post mortem examination. He found the following external injuries on the person of the deceased :-

- (1) Surgically stitched wound present on right parito-temporal region, horizontal, length, 20 cm., 18 stitches intact. Evidence of healing of wound present.
- (2) Surgically stitched wound present on right tempero-occipital region, oblique, of length 10 cms. Stitches nine in number intact. Evidence of healing of wound present.
- (3) Surgically stitched wound present on right ear, three stitches intact. Evidence of healing present.
- (4) Surgically stitched wound present on vertex, starting from 2 cm. above left ear, running obliquely over both parietal region, of length 22 cms. It is stitched, 20 stitches, intact. Healing of wound present.
- (5) Abrasion present on right thigh, antero-media aspect, in middle 1/3 region, size 10 cm. X 4 cm.
- (6) Contused abrasion present over left sheen, size 10 cm. X 2 cm.

Age of injuries is more than a week.

14. Dr. Santosh (P.W.1) also found internal injuries

corresponding to the external injuries (No.1 to 4) mentioned hereinabove. In his opinion, the aforesaid injuries were sufficient in the ordinary course of nature to cause death. The injury Nos.1 and 2 were possible by the article – Kukari.

15. As such, the evidence of Dr. Santosh (P.W.1) undoubtedly suggests that Bajirao met with homicidal death.

16. The F.I.R. (Exh.19) records that, the appellant came to the house of his in-laws by 2.00 a.m. Deceased – Bajirao was sleeping on a cot just outside his house. On hearing his cries, the first informant Balaji (P.W.2) came out of the house to see the appellant assaulting his father with a sharp weapon. His father had profusely bled. Balaji (P.W.2) intervened to rescue his father. The appellant thereupon gave a blow on his head with a sharp weapon. He attempted to snatch away the weapon. In the process, his fingers suffered injuries. Shri Shahaji Tambe and Arvind Biradar intervened. The deceased and Balaji were brought to Dr. Vijay Patil's hospital in a tempo (Tamtam) of one Jalindar Bansode.

17. In response to Dr. Vijay Patil's call, Police official rushed to his hospital and recorded the First Information Report

in the morning.

18. Balaji (P.W.2) testified that the appellant did not treat his wife – Sumanbai (P.W.7) well. Once the appellant had poured kerosene on her person. Sumanbai was, therefore, brought back to her parent's house. The appellant had been to the house of his in-laws on 2 – 3 occasions to get his wife back. Deceased Bajirao, father-in-law of the appellant insisted him to bring 2 – 3 persons as middlemen to give assurance of good treatment to Sumanbai as a condition to send her back to her matrimonial home.

19. It is further in evidence of Balaji (P.W.2) that, on the fateful night, the appellant had called him on cell phone. It was about 8.00 p.m. The appellant asked him to send his wife back. The appellant came to the house of his in-laws. It was 11.00 p.m. The appellant was drunk. He was asking deceased – Bajirao to send his wife with him. The appellant quarreled with Bajirao over the same. He then went away. Thereafter, Bajirao (deceased) slept on a cot just outside his house. All the inmates were asleep in an adjoining room. On hearing the shouts of his mother, Balaji (P.W.2) came out to see the appellant sitting on

the chest of the deceased and inflicting blows on his head, with a Kukari. He, therefore, caught-hold of Kukari. In the result, he sustained injuries to his both hands. The appellant thereafter gave a blow on his head, with the Kukari. He (Balaji) dashed the appellant and made him fall on the ground. Thereafter, the family members came out of the house. Shahaji Tambe and Arvind Biradar brought the deceased and Balaji (P.W.2) to hospital of Dr. Vijay Patil (P.W.1).

20. Somewhat on the same lines is the evidence of Sumanbai (P.W.7). It is in her evidence that, on her marriage, she started residing with the appellant at her matrimonial home. She was treated well for a few years. The appellant thereafter started ill-treating her. Once he had doused her with kerosene. She was, therefore, brought back to her parental house. Her father refused to send her back to her matrimonial home until the appellant gave assurance through middlemen that he would treat her well.

21. Sumanbai went on to state that, at about 8.00 p.m., the appellant had contacted her brother to ask him to send her back. The appellant came. It was 11.00 p.m. The appellant

was inebriated. He asked his father-in-law to send her with him. His request was turned down as he was drunk. The appellant went back. The deceased went to sleep on the cot, outside the house. All the family members were asleep in the house. On hearing shouts of her mother, they came out to see the appellant assaulting her father with a Kukari. Balaji (P.W.2) caught hold of the Kukari. The appellant gave blow on his head. Then there was a scuffle between the two, the appellant and Balaji (P.W.2). Both Balaji and his father were rushed to hospital.

22. Both Balaji and Sumanbai were subjected to a searching cross-examination. It has come on record that the appellant had previously been married. His first wife passed away. The appellant was blessed with four children of first marriage. Then he married Sumanbai. Sumanbai has two children, fathered by the appellant. As such, there were six children to be looked after by Sumanbai.

It is the case of the appellant that Sumanbai was reluctant to maintain her step-children. There, therefore, used to be quarrels between the two. Sumanbai has, therefore, come

her parent's house in anger.

23. It has also come on record in the evidence of Sumanbai that, the appellant suffered multiple injuries. Although her brother and father were rushed to the hospital, the appellant was left behind to fend himself. She did not bother to see her husband. It was only in the morning police came. The appellant was still lying there. None of her family members gave the appellant any kind of aid. The appellant was taken to the hospital by police.

24. The aforesaid evidence also suggests that the case appellant wants to propound, might be true i.e. his wife Sumanbai did not want to maintain her step-children. Therefore, there used to be quarrels between the two and she had come back to her parent's house. As per the prosecution, the appellant had once doused Sumanbai with kerosene. She was, therefore, brought back by her father. The F.I.R. is silent to make mention of this incident. It is true that the F.I.R. is not an encyclopaedia. The issue is, who is to be believed. Equally sustainable versions have been pitted against each other. No independent witness has been examined in proof of a fact that

the appellant had doused his wife with kerosene. An independent witness was available in the nature of a landlady, in whose house the duo had stayed at Ahmednagar. It is in the evidence of Sumanbai that the landlady had pacified the appellant.

25. Admittedly, the appellant had all along been wanting his wife to resume the marital relationship. On not less than three occasions, he had been to the house of his parents-in-law to get her back, but in vain. The same indicates that he was eager for resumption of his marital relationship. The appellant's presence at the scene of offence i.e. at the house of his parents-in-law, cannot be a circumstance against him since he had admittedly been there with a request to his father-in-law to send his wife with him.

26. Admittedly, one Shahaji Tambe and Arvind Biradar had intervened. Both appear to be independent witnesses. None of them has been examined. Both Balaji (P.W.2) and Sumanbai (P.W.7) are the interested witnesses. Balaji (P.W.2) did not speak the whole truth. Admittedly, the appellant had suffered not less than seven injuries. Dr. Shrinivas Jadhav

(D.W.1) had examined appellant to find the following injuries on his person.

- (1) Incised wound with fracture of skull bone of size 14 x 1 cm. up to brain depth, on left tempo parietal and occipital region skull,
- (2) Incised wound, 10 x 1 x 1 cm. at right tempo parietal occipital region,
- (3) Incised wound of dimension 10 x 1 x 1 cm. at right parietal region,
- (4) Lacerated wound with fracture of fibula bone, 6 x 4 x 2 cm. at lower 2/3 of the left lower limb,
- (5) Incised wound of dimension 5 x 1 x 0.5 cm. on the right forearm.
- (6) Incised wound of size 3 x 1 cm. at middle metacarpal left foot,
- (7) Incised wound of 5 x 1 x 2 cm., at left scapular region,
- (8) Incised wound of dimension 7 x 1 x 2 cm., on the back at left renal region.

27. The first four injuries were grievous in nature. Those were possible by Kukari. The injury certificate of the appellant is at Exh.13. When the appellant was brought to the hospital, he was in a critical condition. There is no evidence to indicate the appellant to have been drunk, except the oral testimony of Balaji

P.W.2 and Sumanbai (P.W.7). The injuries on the person of the appellant were not superficial in nature. Balaji was said to be the author of the said injury and was, therefore, prosecuted. True, he has been acquitted, this Court has, however, no benefit to look into the evidence of the Sessions Case, wherein Balaji (P.W.2) was prosecuted for attempting to murder the appellant, although both the cases were tried by the learned Additional Sessions Judge simultaneously. Being wife of the appellant, it was expected of Sumanbai to see or ensure that the appellant is taken to the hospital. The same indicates her hostile attitude towards her husband. Her evidence, therefore, needs to be scrutinised with a pinch of salt. The evidence of Balaji (P.W.2) indicates that, all other family members came out of the house after most of the incident was over. Balaji (P.W.2) tried to screen himself. He testified that, he pushed the appellant to make him fall on the ground. He, however, claimed ignorance as to how the appellant suffered multiple injuries. On the contrary, the injuries on the person of Balaji (P.W.2) were very simple and superficial in nature. He was discharged from the hospital same day. He got himself admitted to the hospital again, might be with a view to avoid arrest since a crime for the

offence punishable under Section 307 of the I.P.C. was registered against him.

28. Scene of offence panchanama (Exh.26), drawn by P.W.4 – Shrimant, indicates that, a Kukari, with its cover, was found at the scene of offence. The investigating officer appears to have not taken pains to see wherefrom the appellant fetched the Kukari. As per the prosecution case, the appellant had first come home by 11.00 p.m. After some quarrel, he went back and came again by 2.00 a.m. Kukari might have been available at the house of his in-laws. The house of the in-laws of the appellant is in a field. The field is away from the village. At the dead of a night, wherefrom appellant could fetch a Kukari is a mystery.

29. Appreciation of evidence in the case, thus, leads us to observe that, both Balaji (P.W.2) and Sumanbai (P.W.7) did not speak whole truth. Their evidence is mingled with falsehood. When war breaks out, truth is the first casualty. If a broken rope is tied again, it retains a knot. It is just difficult to disengage truth from the falsehood. The prosecution has failed to explain grievous injuries on the person of the appellant. No

independent witness has been examined. Genesis of the prosecution appears to have been suppressed. The police papers of the charge sheet presented against the appellant even did not contain his injury certificate. The appellant was required to summon a Medical Officer in proof of injuries on his person.

30. In case of **Rajender Singh & ors. Vs. State of Bihar [(20004 SCC 298)**, it has been observed :

“The question, therefore, that remains to be considered is whether non-explanation of the said injuries on accused-appellant Rajender can form the basis of a conclusion that the prosecution version is untrue. In *Mohar Rai and Bharath Rai Vs. State of Bihar [AIR 1968 SC 1281]*, this Court had held that the failure of the prosecution to offer any explanation regarding the injuries found on the accused shows that the evidence of the prosecution witness relating to the incident is not true or at any rate, not wholly true and further, those injuries probabilise the plea taken by the accused persons. But in *Lakshmi Singh Vs. State of Bihar [(1976) 4 SCC 394]*, this Court considered Mohar Rai and came to hold that non-explanation of the

injuries on the accused by the prosecution may affect the prosecution case and such non-explanation may assume greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution. The question was considered by a three-Judge Bench of this Court in the case of *Vijayee Singh Vs. State of U.P.* [(1990) 3 SCC 190] and this Court held that if the prosecution evidence is clear, cogent and creditworthy and the Court can distinguish the truth from falsehood the mere fact that the injuries are not explained by the prosecution cannot by itself be a sole basis to reject such evidence and consequently the whole case and much depends on the facts and circumstances of each case. In *Vijayee Singh* case the Court held that non-explanation of injury on the accused person does not affect the prosecution case as a whole.”

31. The learned trial Judge found the evidence of Balaji and Sumanbai (P.W.2 and P.W.7) wholly reliable. We are not at one with the learned trial Judge. In our view, the prosecution appears to have suppressed genesis of its case. Injuries on the person of the appellant have not been explained. P.W.2 Balaji

gave exculpatory evidence. Sumanbai was found to be hostile with her husband. No independent witness has been examined. As such, the prosecution failed to bring home the charge against the appellant beyond reasonable doubt.

32. In the result, the appeal succeeds. Hence the following order :-

ORDER

Criminal Appeal No.104/2014 is allowed.

The judgment of conviction and order of sentence dated 30.11.2012, passed by learned Additional Sessions Judge, Omerga in Sessions Case No.8/2011 is hereby set aside.

The appellant is acquitted of the offences punishable under Sections 302 and 324 of the Indian Penal Code.

Fine amount, if paid, be returned to the appellant.

The appellant be set at liberty forthwith, if not required in any other case.

(R.G. AVACHAT)
JUDGE

(T.V. NALAWADE)
JUDGE

fmp/-