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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 321 OF 2014

1 Shankar Sukhdev Kadam,
Age 34 years, Occu. Agriculture

2 Chimya @ Jambo @ Vishwas,
Sukhdev Kadam,
Age 32 years, Occu. Agriculture,
Both R/o. Kalambi, Tal. Khanapur,
Dist. Sangli.
(At present lodged in Sangli
District Prison, Sangli)Appellants

Vs.

The State of MaharashtraRespondent.

Mr. Shekhar Arwind Ingawale for the Appellant.
Ms. P.P. Shinde, APP for the Respondent-State.

CORAM : A. S. OKA, AND

A. S. GADKARI, JJ.

DATE : 7th & 8th MARCH, 2019.

ORAL JUDGMENT (PER- A.S. OKA, J.): -

The Appellants-accused have taken an exception to the Judgment and Order dated 5th March, 2014 passed by the learned Additional Sessions Judge, Sangli in Sessions Case No. 69 of 2009. The

Appellants have been convicted for the offence punishable under Section 302 read with Section 34 of the Indian Penal Code.

2 With a view to appreciate the submissions canvassed across the bar, it will be necessary to make a brief reference to the factual aspects of the case.

3 The name of the deceased is Vidya. The incident is of 17th January, 2009. The first informant is P.W.No.1 Dhanaji Tukaram Patil. The deceased Vidya had married in the year 1997 to one Rajendra. The present Appellants are the real brothers of the husband of Vidya. The Appellants were the accused Nos. 1 and 2. The accused No. 3 who was acquitted under the impugned Judgment and Order is the mother-in-law of Vidya.

4 According to the case of the prosecution, 7 to 8 years prior to the date of incident, Vidya lost her husband. Thereafter, Vidya started residing in her parental home along with the family of P.W.No.1, Dhanaji who is the brother of Vidya.

5 It is brought on record that there was a dispute over the landed property between deceased Vidya and the Appellants and their family members. There was a Civil litigation filed and the deceased Vidya succeeded up to this Court. Suit was filed by her for partition and separate possession of her share. After she succeeded in the Civil suit, she started cultivating the land which came to her share. According to the case of the prosecution,

she had given the land for cultivation to one Dhondiram Shripati Kamble (Defence Witness) and the said Dhondiram has sown gram (pulse) on the said land. Vidya used to frequently visit her land for managing the same.

6 At 6.00 a.m. on 17th January, 2009 deceased Vidya informed P.W. No. 1 and her mother that she along with Ashok Ananda Kate P.W. No.6 were going to village Kalambi for harvesting the gram crop. When they left for village Kalambi, P.W. No. 1 was present in his house. Deceased Vidya was having a cell phone. Around 11.50 a.m. on the date of the incident, P.W. No.1 received a missed call on his cell phone from her. Therefore, he called back Vidya. According to P.W. No.1, Vidya informed him that the accused persons had come to her field. Vidya therefore, told P.W. No.1 to rush to the field along with the copies of the Court decisions.

7 According to P.W. No.1, she stated that she needed the copies of the decisions as the accused persons were raising a dispute. Thereafter, P.W. No. 1 collected the necessary documents from his house and proceeded to Kalambi to the field of deceased Vidya on his motor-cycle. According to the prosecution case, when he reached near the field, P.W.No.6 Ashok Kate was standing on the road adjacent to the field. P.W.No.6 informed P.W.No.1 that Vidya was on her field and there was an ongoing quarrel.

8 According to the prosecution case, P.W.No.1 thereafter proceeded to the field where he saw acquitted accused No.3 hurling abuses at deceased Vidya and she was using filthy language. Appellant No.1 Shankar had caught hold both the hands of the deceased from the back side and the Appellant No.2-Chimnya stabbed her with knife in her abdomen. As a result of the assault, Vidya fell down on the ground. Thereafter, the Appellant No.1 took the knife from the Appellant No.2 and assaulted Vidya with the knife on various parts of her body. Thereafter, the accused ran away towards the streamlet by taking the knife with them. Noticing that the deceased Vidya was lying calm and quiet, P.W.No.1 instructed P.W. No.6 Ashok to go to the police station which is at about a distance of 10 km. from the scene of offence and informed the Police. P.W.No.6 proceeded to the police Station. D.W.Dhondiram (the person appointed by deceased Vidya to cultivate her land) and other labourers left the spot. P.W. No.6 Ashok went to the police station and came back with the police.

9 The complaint of P.W. No.1 was recorded at the scene of offence on the basis of which, the first information report was registered. Investigation of the crime was carried out. The charge-sheet was filed and thereafter, the case was committed to the Court of Sessions.

10 The defence of the accused was of denial. As per their statements recorded under Section 313 of the Code of Criminal Procedure, 1973 they have been falsely implicated in the case. The prosecution examined 7 witnesses. P.W. No.1-Dhanaji, as stated earlier is the brother of Vidya and the first informant, P.W. No.2-Prakash is a panch witness to the spot panchanama, P.W. No.3-Chandrashekhar is a panch witness to the discovery of knife at the instance of Appellant No.2, P.W.No.4 is Dr. Anil Patil, Medical Officer who performed autopsy on the body of deceased Vidya, P.W.No.5-Satish Sakat who is a panch witness to the arrest panchanama of the accused. P.W. No.6 is the said Ashok Kate. P.W. No. 7 is Jahangir Rasool Nadaf, the Investigating Officer. The Appellants and accused No.3 examined Dhondiram Shripati Kamble as a defence witness (D.W.).

11 The learned counsel appearing for the Appellant has taken us through the evidence of the prosecution witnesses as well as the defence witness. His submission is that the conduct of P.W.No.1 and P.W.6 is very unnatural. He submitted that if evidence of P.W. No.1 and P.W. No.6 is considered together, the presence of P.W. No.1 at the scene of offence at the time of commission of offence becomes doubtful. He submitted that according to the version of P.W. No.1, he received a missed call from Vidya at 11.50 am, on the date of

the incident. Thereafter, he called back Vidya who told him to get the documents of court cases, kept in his house. He took the documents and proceeded to the field of Vidya. He pointed out that even according to the prosecution witnesses, the distance between the place of P.W.No.1 and the field is about 22 kms., and therefore, P.W. No.1 may not have reached the place immediately and he must have reached after about 1 hour. He pointed out the falsity of the evidence of the P.W. No.1 by showing the statements made by the P.W. No.6 that on the day prior to the date of the incident, he was with deceased Vidya and in fact in the night before the incident, P.W. No.6 resided in the house of P.W. No.1 with whom Vidya was residing. At 6.00 am, Vidya left the house accompanied by P.W.No.6 who had for no reasons accompanied Vidya to her field early morning at 6 O'clock. He submitted that even assuming that the case made out by both the prosecution witnesses (P.W.No.1 and P.W.No.6) is correct, their conduct is most unnatural even according to their version. Though they were watching the incident from a close distance, they made no attempt to intervene and save deceased Vidya. Moreover, though both of them were carrying cell-phones and were having motorcycles, they made no attempt to use the cell-phone and call for help and called the police. They made no attempt to lift the deceased Vidya and take her to nearby doctor or hospital for medical treatment.

12 He submitted that apart from the fact that there is a serious doubt created whether both the witnesses have actually seen the incident, there is a serious doubt about their presence at the time of incident. Their testimony cannot be relied upon due to unnatural conduct reflected from their evidence. He pointed out that P.W.No.1 has clearly stated that the police had shown the knife which is the weapon used by the Appellants for assaulting Vidya at the site when his statement was recorded on the date of the incident. He would, therefore, submit that the evidence of alleged discovery of the same weapon two days thereafter at the instance of the Appellant No.2 become extremely doubtful and cannot be accepted. He invited our attention to the evidence of the P.W. No.4 Dr.Anil Dinkarrao Patil. His submission is that though the witnesses have deposed that both the Appellant No.1 and Appellant No.2 repeatedly stabbed deceased Vidya, there were no corresponding injuries on the body of the deceased which may have been caused due to stabbing and many injuries are incise wounds which cannot be as a result of repeated stabbing. He also pointed out that P.W.No.4 Dr.Anil Patil has not disclosed the approximate time of death and no opinion is recorded by him on this aspect. He pointed out that according to the version of P.W. No.6, after 6 O'clock when they started from the house P.W. No.6, the deceased Vidya had not consumed any food. Assuming that the incident occurred after 12.30 p.m on the date of the incident, the evidence of P.W.

No.4 discloses that semi-digested food was found in the stomach of deceased Vidya. He submitted that a serious doubt is created about the veracity of the prosecution case even by virtue of the evidence of P.W. No.4. He urged that independent eye witnesses were available in the form of labourers, but they were not examined.

13 The learned APP while opposing the submissions made by the learned counsel for the appellants has invited our attention to the relevant part of the evidence of both the eye witnesses. Her submission is that as there is an ocular evidence of eye witnesses, it was not necessary for the prosecution to examine labourers who were working in the field. Her submission is that even assuming that the statements made by both the eye witnesses about the manner in which assault was made are not consistent with the injuries found on the person of the deceased, there is no reason to discard the testimony of the eye witnesses in as much as the medical evidence is always an opinion evidence. Her submission is that apart from the fact that the evidence of D.W.-Dhondiram Shripati Kamble does not help the appellants, he appears to be a tutored witness considering the manner in which he has deposed in the examination-in-chief and cross examination. She would, therefore, submit that no interference is called for with the impugned Judgment and order.

14 We have carefully considered submissions, we have perused the evidence of the prosecution witnesses and other documents on record. As far as P.W.No.1 is concerned, we have already noted that he was the real brother of the deceased. Moreover, the deceased was residing in the house of her parents along with P.W.No.1 and her another brother. The P.W.No.1 deposed in his evidence regarding a civil suit filed by the deceased seeking a partition which ultimately ended in her favour up to this Court. He also disclosed that Dhondiram (D.W.) was appointed by the deceased to cultivate her share of the land. About the main incident, P.W.No.1 has deposed in paragraph 2 of his evidence. For the sake of convenience, we are reproducing paragraph 2 which reads thus:

"2 Incident took place on 17.1.2009. On that day, Vidya told me and mother that she along with Ashok Ananda Kate would visit village Kalambi for harvesting gram crop and bringing the same. Then, they both left village morale for proceeding to Kalambi. While I was present in the house, at about 11.50 A.M., I received miss call of Vidya on my cell phone. Soon I rang up Vidya on her cell phone. On phone, Vidya disclosed me that mother-in-law have come in field; and called me upon to rush Kalambi with the papers of Court decisions because they are raising dispute. Accordingly, I along with papers

of litigation proceeded to Kalambi on motorcycle and went in the field of gram. At that time, one Ashok Ananda Kate was standing on the road adjacent to the field. I inquired with Ashok Kate about Vidya. Ashok Kate informed that Vidya is in field and quarrel is going on. On looking towards field, I noticed that accused No.1-Shankar Kadam had held both the hands of Vidya from back side; accused No.3 Sampada seen abusing Vidya in filthy language; and accused No.2 -Vishwas Kadam seen while stabbing Vidya with knife in her abdomen. Due to that, Vidya collapsed after shouting. Thereafter, accused No.1 - Shankar took that knife from the hands of Vishwas and gave blows on throat (गळा), chest, head back, hands, shoulder and abdomen of Vidya with that knife. At that time of assault, I rushed towards the field. Before our reaching all the three accused ran away towards side of streamlet, along with knife. At that time, Ashok Kate was with me. Vidya was lying there in dead condition and blood was oozing from aforesaid injured parts. Seeing this, I told Ashok Kate to proceed to the police station and inform the police and I would stay there on the spot. Accordingly, Ashok Kate proceeded to the police station on motorcycle. Dhondiram Shripati Kamble and female labours collected in the field for harvesting gram crop also gone away.

Thereafter, Ashok Kate returned back with police. Police recorded my complaint against accused at spot, after seeing Vidya in dead condition. If is the same, now shown to me bears my signatures; also bears signature of police officer – Mr. Nadaf, contents therein are true; it is marked with Exhibit 44. I lodged this complaint against all the three accused for committing murder of Vidya.”

15 In paragraph 4, he has stated that his deceased sister was associated with one organization working for the patients suffering from AIDs known as “Amhich Aamche” and that she was the District President of the said organization. He also disclosed that the P.W.No.6 Ashok was also associated with the same organization as he himself was a victim of the same disease. He stated that according to the version of his deceased sister, before finalizing her marriage, the fact that her husband was suffering from the said disease was suppressed from her and therefore, she decided to join the said organization. We must note here that a suggestion was given in the cross examination to the said witness that the deceased had an alliance with P.W.No.6 Ashok which was denied by him. In the cross examination, it is brought on record that after the incident, the statement of the D.W. was recorded under section 164 of the Code of Criminal Procedure, 1973 (for short “Cr.P.C.”) along with his own statement and the statement of P.W.No.6-Ashok.

16 According to the version of P.W.No.1, he received a missed call from deceased Vidya at 11.50 a.m on 17th January 2009 and he immediately called back to his sister. We may note here that though he has stated in his evidence that he had surrendered his cell phone to the police, there is no investigation carried out to verify the exchange of calls between him and his deceased sister. There is some controversy about the distance between village Morale where the deceased and P.W.No.1 were residing and village Kalambi where the field of the deceased was situated. Even going by the version of P.W.No.1 and P.W.No.6 Ashok, it can be safely said that from village Morale at least half an hour was required for reaching the village Kalambi by a motor cycle. As per the version of P.W.No.1 after receiving a missed call from the deceased at 11.50 a.m., he called up the deceased. Thereafter, he took the papers of the litigation pertaining to the field of the deceased from his house and rushed to village Kalambi. Therefore, it can be safely stated that he could not have reached the field before 12.30 p.m. He has narrated what transpired thereafter in the main incident. Therefore, taking his version as correct, the actual incident of fatal assault on his sister must have taken place around 12.45 p.m to 1.00 p.m. There are certain surprising features of his conduct as reflected from his evidence. In the cross examination, he has admitted that he did not inform any of the family members by using his mobile

phone about the incident, though he was present at the spot of the incident for considerably long time. This is very relevant in the context of the fact that even the parents of the deceased were staying with him. In the cross examination, he disclosed that both he himself and P.W.No.6 were having their cell phones and motor cycles. Both of them did not call any Doctor for attending the deceased. As can be seen from the evidence of P.W.No.6, both the P.W.No.1 and P.W.No.6 made no attempt to shift the deceased to any hospital or to take her to any Doctor though a bullock cart was available which was owned by the D.W. In the cross examination, he stated that he was at the distance of 100 to 150 feet from the place where the incident began by hurling abuses at his real sister. Even according to his version, no attempt was made by him to intervene and prevent further incident. He has not even stated that he made any attempt to go anywhere near the place where his real sister was being assaulted to help her and to prevent the accused from assaulting her. He also admitted that he did not enquire with D.W. or any labourers working in the field about what transpired after receiving a phone call from his sister. Thus, he made no attempt to save his real sister. Even assuming that the accused were carrying weapons and therefore, P.W.No.1 did not go near the accused, even according to his case, immediately after the deceased fell down, the accused persons ran away. Even thereafter he made no attempt by rushing his injured sister to

nearby hospital or nearby Doctor. Though he stated that after his sister fell down, he fell down on her body and made a hue and cry, no blood stains were found on the clothes on his person. Though he was having a cell phone, he made no attempt to call police station or call up someone else telling him to inform police. According to his case, he told P.W.No.6 to go to police station which was at a distance of 10 k.m. This conduct is also very unnatural and strange.

17 Before we go to the evidence of P.W.No.6, we must note here that according to the case of the prosecution, there was a discovery of knife used as a weapon of offence at the instance of appellant No.2. The prosecution examined P.W.No.3 who is the Panch Witness to the discovery of knife at the instance of the appellant No.2. We may note here that P.W.No.1 stated in his evidence that on the date of the incident, at the scene of offence, the police had shown him the knife which is the alleged weapon of assault. As stated earlier, the incident is of 17th January 2009. The police had shown discovery of knife at the instance of the appellant No.2 on 20th January 2009. Therefore, the prosecution case as regards the discovery of knife at the instance of the appellant No.2 will have to be discarded.

18 P.W.No.2 Prakash was examined to prove seizure of articles from the scene of offence. Apart from

other articles, there was a seizure of a sickle from the site which was stained with blood. P.W.No.6 stated in his evidence that the deceased was carrying a sickle in her hand. P.W.no.7, the Investigation Officer stated that no other sickle was found at the scene of offence except the sickle which was recovered in presence of the P.W.No.2 Prakash. We must note here that the recovery of the sickle from the site is irrelevant in as much as it was in the hands of the deceased and none of the eye witnesses have stated that the sickle is the weapon used for assaulting the deceased.

19 Now, we turn to the evidence of P.W.NO.6. According to his version, on 16th January 2009, he along with deceased had went to Kalambi as the deceased wanted to make arrangements for harvesting the crop of gram. After reaching her field, she informed Dhondiram (D.W.) about the harvesting of gram on the next day and he agreed for that. He had engaged four field labourers for the said job. Harvesting work was started at 6.00 a.m on the next day. Therefore, P.W.No.6 along with the deceased came back to the house of the parents of the deceased at village Morale. They took dinner in the house and in fact, P.W.No.6 stayed in the house of her parents. This important fact is not disclosed by the P.W.No.1 in his evidence.

20 P.W.No.6 stated that on the date of incident, he started towards the field at Kalambi at about

6.10 a.m along with deceased and reached the field at 6.30 a.m. The Accused No.3 (acquitted accused) who is mother-in-law of the deceased came there and started hurling abuses at deceased when the deceased told her that the Court had given a verdict in her favour. He deposed that thereafter labourers started working in the field. Immediately thereafter, the appellant No.2 arrived at the field and started quarrel when the deceased called up the P.W.No.1 from her cell phone and called upon the P.W.No.1 to visit the field along with the case papers. P.W.No.6 deposed that within 15 to 20 minutes, P.W.No.1 reached the site along with the papers. Immediately thereafter, the accused No.1 came to the spot with a knife in his hand and the main incident of fatal assault on the deceased started. Going by the version of the P.W.No.6, by giving all the latitude, incident must have happened not later than 11.00 a.m. The time of incident has some significance.

21 In the cross examination, P.W.No.6 stated that he was acquainted with the deceased from the year 2000 and he started working with the deceased in the said organization right from the year 2005. We are not on the alleged relationship of the P.W.No.6 with the deceased, but obviously, he was close enough to the deceased as on the earlier day, they had gone together to village Kalambi to make arrangement for harvesting gram. The parents of the deceased allowed him to stay in their house on the earlier day and

he was entertained with a dinner. What is surprising is that like P.W.No.1, even the P.W.NO.6 going by his own evidence appears to be a silent spectator to the incident of assault on Vidya. He watched the entire incident from a close distance but did not even go anywhere near the deceased to protect her or to avoid the incident. Even after the incident, he did nothing on his own. He made no attempt to make medical aid available to the deceased. He did not contact the other brother of the deceased or the parents by using his cell phone which he was admittedly possessing. He did not think of calling up police station. Thus, even his conduct appears to be completely unnatural considering his close proximity with the deceased.

22 P.W.No.6 in his evidence stated that he along with deceased started from her house at 6.00 a.m in the morning after taking tea. He further stated in the cross examination both of them did not take any food till the time of the incident. Thus, after dinner in the night, going by the version of the P.W.No.6, except for taking morning tea at 6.00 a.m, the deceased had not consumed any food. At this stage, we may make useful reference to the deposition of P.W.No.4 Dr.Anil Patil who conducted autopsy on the body of the deceased. Apart from the fact that he has not given possible time of death, he stated that minimum four hours prior to the death, the deceased might have taken last meal. Taking the version of the P.W.No.1 and P.W.No.6 as

correct, the incident may have occurred in between 11.00 a.m to 1.00 p.m. Going by the version of P.W.Nos.1 and 6, the deceased had not consumed any food for not last more than 12 hours except a cup of tea.

23 Going by the testimony of P.W.No.1 and P.W.No.6, their conduct appears to be very unnatural. Considering their unnatural conduct which we have highlighted in the earlier part of this Judgment, their testimony does not inspire confidence. Both of them deposed that the deceased was repeatedly stabbed by both the accused. But the injuries found by P.W.NO.4 on the body of the deceased are only incise wounds.

24 P.W.No.7 Investigating Officer stated that he had recorded the statements of the labourers working in the field at the relevant time. Moreover, as noted earlier, a statement of the D.W.-Dhondiram was not only recorded by the police during the investigation but his statement under section 164 of the Cr.P.C. was recorded. The D.W.-Dhondiram whose statement was recorded under section 164 of the Cr.P.C was not even shown as a witness in the list of witnesses in the charge sheet. This was an attempt to withhold testimony of an eye witness. The labourers were shown as witnesses. We are conscious of the fact that it is a settled principle that as far as the evidence is concerned, quality is more important than the quantity but failure to examine

these witnesses and especially the labourers who were working at the field becomes more significant when the version of the so called two eye witnesses does not inspire confidence. We failed to understand why these relevant witnesses were withheld from the Court and as to why the D.W.-Dhondiram whose statement was recorded under section 164 of the Cr.P.C was not examined as a witness. In the evidence of P.W.No.6, it has come on record that the deceased enjoyed good relationship with the D.W. and in fact on the earlier day, she had called D.W. to fix the schedule for the work of harvesting.

25 Thus, in our view, evidence of the eye witnesses does not inspire confidence and for the reasons which we have recorded above, it is not possible for us to hold that the prosecution had brought home the guilt of the accused beyond a reasonable doubt. Hence, the conviction cannot be sustained.

26 Hence, we pass the following order:

(I) The impugned Judgment and Order dated 5th March 2014 passed by the learned Additional Sessions Judge, Sangli in Sessions Case No.69 of 2009 is hereby quashed and set aside. The appellants-Shankar Sukhdev Kadam (accused No.1) and Chimya @ Jambo @ Vishwas Sukhdev Kadam (accused No.2) stand acquitted of the offence

alleged against them;

(II) They shall be forthwith set at liberty unless they are required in connection with any other offence;

(III) If fine amount has been already paid by the appellants, the same shall be refunded to them. The direction regarding Muddemal Articles stands confirmed;

(IV) Appeal is allowed accordingly;

(V) All concerned to act upon an authenticated copy of this Judgment and order.

(A.S.GADKARI,J.)

(A.S.OKA,J.)