

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

CRIMINAL APPEAL NO. 539 OF 2016

Narayan s/o Shivram Kavale,
Age: 55 years, Occ: Labour,
R/o. Tungi (Bk), Tq. Ausa,
Dist. Latur.

... APPELLANT
(Org. Accused No.1)

VERSUS

State of Maharashtra,
Through S.H.O, Police Station,
Ausa, Tq. Ausq, Dist. Latur.

... RESPONDENT
(Complainant)

...

Mr. S. S. Kazi, Advocate for Appellant.

Mr. M. M. Nerlikar, APP for Respondent/State.

...

**CORAM : T. V. NALAWADE &
MANGESH S. PATIL, JJ.**

DATE : 21st August, 2020.

JUDGMENT: (Per T. V. Nalawade, J.)

. The appeal is filed against the judgment and order of Sessions Case No.46 of 2011, which was pending in the Court of learned Additional Sessions Judge, Latur. The Trial Court has

convicted the Appellant for the offence punishable under Section 302 of the Indian Penal Code and he is sentenced to suffer imprisonment for life.

2 Both the sides are heard.

3 In short, the facts leading to institution of the appeal can be stated as follows:

- i) Deceased Tanaji was resident of village Tungi, Tahsil Ausa, District Latur. The incident in question took place on 10th March, 2011 at about 09:00 pm near the house of Ram Kavale, who was Police Patil of the village at the relevant time. When he was present inside of his house, he heard the noise of quarrel and so he came out of the house.
- ii) The informant noticed on that night that quarrel was going on between Narayan (Accused No.1) and Sitaram (Accused No.2) on one side and deceased Tanaji on other side. Sitaram is the son of Narayan. During quarrel, Sitaram made Tanaji to fall on the road

and he asked his father to fetch axe from the house. Accused No.1 Narayan rushed to home, which is situated in the vicinity and came back with axe. When Accused No.1 Narayan started assaulting the deceased with axe, the Police Patil requested Narayan not to assault but Narayan continued to give blows of axe to deceased Tanaji. After giving many blows, Narayan ran away with axe. Sitaram, who had sustained a bleeding injury stayed back. When Police Patil made inquiry with Sitaram about the injury, which Sitaram had sustained, Sitaram said that Tanaji had given stick blow on his head. One stick was lying on the spot. As there was hue and cry, many persons from the neighbourhood had gathered there and amongst them were Shankar Kavale, Raju Kasabe, Laxmibai Kavale, Vaishakha Adasule, Chaturabai Kavale etc. All of them noticed that Tanaji died on the spot.

- iii) Ram Kavale, Police Patil contacted AUSA police station and then further steps were taken. Ram Kavale gave report in respect of the incident to the police station on 11th March, 2011 and the crime came to be registered

at CR No.23 of 2011 at about 01:15 am.

- iv) Postmortem was conducted on the dead body on 11th March, 2011. Eight chop wounds were found on the dead body of Tanaji. Three chop wounds were on neck, three chop wounds were on mandible region and sub-mandibular region and remaining wounds were on hand and infra clavicular region. The injuries on mandibular region had caused fracture of mandible and dislocation of both jaws and they had also cut trachea from left side. All the injuries were *ante-mortem* in nature. The death took place due to multiple chop wounds.
- v) During investigation, police recorded statements of other eye witnesses and also the widow of deceased. It revealed that Tanaji had given hand loan to Accused No.1 and as Accused No.1 was avoiding to return the amount, the quarrel had started. Both the accused came to be arrested on the same day. While in police custody, Accused No.1 gave statement to police inspector Birajdar about weapon and the weapon axe

came to be recovered on the basis of this statement.

The clothes of both the accused persons came to be seized under *Panchanamas*. Earth samples mixed with blood were collected from the spot of offence and the spot *Panchanama* was prepared. All these articles alongwith clothes and blood samples of two accused persons and deceased were sent to CA office. After completion of investigation, charge-sheet came to be filed for the offence punishable under Section 302 read with 34 of the Indian Penal Code.

4 The prosecution examined 10 witnesses to prove the offence. No defence witness was examined. In the statement given under Section 313 of the Code of Criminal Procedure, the defence of total denial was taken. Written say was also filed by both the accused and in that written say defence was taken by Accused No.2 that he was working with the deceased and the deceased was involved in selling illicit liquor. He contended that on that night, he and deceased were returning from the field of one Shaikh where they had delivered the liquor and when they were returning and when Accused No.2 was at some distance from the deceased, two persons attacked the

deceased. He contended that it was night time and he felt that one person was having heavy object and the first blow was given on the head of deceased and then assault was made on other parts of the body of deceased. He contended that when the incident was going on, Police Patil and accused No.1 came running towards the spot. No specific contention was made in the written say about the injury sustained by accused No.2, but while giving reply to question No.5 and question No.23 put in the statement recorded under Section 313 of the Code of Criminal Procedure, he admitted that he had sustained injury. No explanation was given by him in respect of this injury. After considering this evidence and the defence, the Trial Court has given the decision of acquittal in favour of Accused No.2. The acquittal is not challenged by the State.

5 The judgment delivered by the Trial Court and the record of evidence show that the prosecution relied on both direct and circumstantial evidence. The Trial Court has believed all the witnesses. Informant, Ram Kavale was Police Patil of the village and to his evidence, there is a corroboration of at least three eye-witnesses. Ram Kavale (PW-1) has deposed that on 10th March, 2011 at about 09:00 pm to 09:30 pm he was present in the house and as there was noise of quarrel, he came out of the house. He has

deposed that he noticed that deceased Tanaji and accused No.2 were engaged in scuffle. He deposed that during scuffle, accused No.2 gave call to accused No.1 and asked him to bring axe. He has deposed that accused No.1 Narayan fetched axe and Narayan gave blows of axe to Tanaji on his face, head, chest, neck etc. PW-1 has deposed that other neighbours like Laxmibai, Vaishakhabai, Dilip Kawale and some other persons had gathered there and they also witnessed the incident.

6 Ram Kavale (PW-1) has deposed that during incident, accused No.2 Sitaram had sustained one bleeding injury to his head. He has deposed that he called AUSA police as the incident had taken place. His evidence shows that Tanaji died on the spot in the incident. FIR at Exhibit-17 given by Ram Kavale (PW-1) is proved in his evidence.

7 Ram Kavale (PW-1) has deposed that subsequently, he received information that deceased Tanaji had given money, hand loan for the marriage of daughter of accused No.1 and as accused No.1 was avoiding to return the money, there was dispute between him and Tanaji.

8 Ram Kavale (PW-1) has deposed that his house is situated at a distance of 40 to 50 feet from the spot of offence. In the cross-examination, Ram has admitted that the spot is situated exactly opposite to the house of Dinkar Kawale and the house of accused No.1 is situated at a distance of 20 feet from the spot of offence. Admittedly, the house of Tanaji is not situated in the vicinity of spot of offence.

9 In the cross-examination, suggestions are given to Ram Kavale (PW-1) by the defence counsel that there were many complaints given to police against Tanaji by many persons. It is suggested that the relations of Tanaji were strained with many persons. It is suggested that Tanaji was addicted to liquor. It is suggested that Ram had advised accused No.1 to send accused No.2 to other place as accused No.2 used to remain in the company of deceased. All these suggestions are denied by Ram.

10 Other suggestions are given by defence counsel to Ram Kavale (PW-1) in respect of the incident and it is suggested that he has given false evidence against accused Nos.1 and 2. However, the cross-examination does not show that Ram had any interest in favour of Tanaji or he had grudge against accused Nos.1 and 2. Even when

specific defence of aforesaid nature was taken by accused Nos.1 and 2, in the statement given under Section 313 of the Code of Criminal Procedure, it is not suggested to Ram that he had seen two unknown persons assaulting deceased and he and accused No.1 together had rushed to the spot of offence.

11 The aforesaid evidence of Ram Kavale (PW-1) remained shattered in the cross-examination of defence counsel. FIR at Exhibit-17 is fully consistent with this version in the court and it gives corroboration to the version of PW-1 as available under Section 157 of the Evidence Act. Not only there is support of medical evidence and evidence of spot Panchanama and some admitted circumstances already mentioned, to the version of Ram Kavale (PW-1), there is other direct evidence, which is fully consistent with the evidence of Ram so far as it is given as against accused No.1 on the main incident.

12 The FIR at Exhibit-17 and the oral evidence show that FIR was given immediately after the incident even when police station is situated at other place and crime was registered at 01:15 am of 11th March, 2011. The spot *Panchanama* is proved in the evidence of Panch witness Sagar (PW-2) by prosecution and it is at Exhibit-18.

The tenor of the cross-examination of this witness and aforesaid defence taken by the accused persons show that the defence has not disputed that assault was made on Tanaji on the spot shown in the spot *Panchanama*. The Panch witness is resident of same village and he was Sarpanch of the village at the relevant time.

13 The spot *Panchanama* at Exhibit-19 shows that incident took place on cement road in front of the house of one Dinkar Kawale. The spot is situated at a distance of about 18 feet from the pole of streetlight. At a distance of 12 feet from this pole, there was blood. One *Bambu* stick of the length of 2 feet was found on the spot of offence. Earth sample mixed with blood and this stick were taken over by police under spot *Panchanama*. There is evidence of investigating officer Birajdar (PW-10) on the spot *Panchanama*. The investigating officer is not cross-examined on the evidence given by him on spot *Panchanama*.

14 The description of spot mentioned in Exhibit-16 shows that on the two sides of the road where the incident took place, there are houses of Dilip Kavale and Dinkar Kavale. It is true that in the spot *Panchanama*, house of Ram (PW-1) is not shown, but that is obvious as his substantive evidence shows that his house is situated

at a distance of 40 to 50 feet from the spot of offence. Further, witness Dilip has given evidence in support of the prosecution case and his evidence is there to show that Police Patil was present on the spot of offence when the incident was taking place.

15 Dilip (PW-4) has deposed that he came out of the house on that night after hearing the noise of quarrel. He has deposed that accused Nos.1 and 2 were quarreling with the deceased and that noise was heard by him. His evidence shows that he heard that Police Patil was requesting accused No.1 Narayan not to assault deceased and due to that he rushed out of the house. He has deposed that he noticed that Narayan was giving blows of axe to Tanaji and blows were given on shoulder, neck, face and chest of Tanaji. He has deposed that accused No.2 was holding hands of Tanaji when the incident of assault was going on. He has given evidence that he could see the incident in streetlight.

16 In the cross-examination, PW-4 has admitted that he had not stated before police in police statement that there was streetlight. In his evidence and the evidence of investigating officer (PW-10), this omission is proved. There is one more material omission in relation to previous statement of PW-4. He had not stated before police that

when the incident was going on, accused No.2 was holding the deceased and that enabled accused No.1 to assault the deceased. This omission is also duly proved by the defence. In view of this material omission, that part of evidence of PW-4 cannot be considered for basing conviction against accused No.2 and that circumstance must have been considered by the Trial Court in his favour. The name of PW-4 is given in FIR and this is another circumstance due to which PW-4 can be believed. In spot *Panchanama* also, as already observed, the house of this witness is shown as adjacent to the spot of offence.

17 The name of Laxmibai (PW-3) was mentioned in the FIR by PW-1. PW-3 has given evidence that in the incident of assault, accused No.1 first made the deceased to fall and then he fetched axe from his house. She has deposed that in the meantime, accused No.2 was sitting on the chest of deceased. She has deposed that accused No.1 delivered blows of axe on the person of deceased even when Police Patil was requesting accused No.1 not to assault. She has also described the sites of the body where assault was made by accused No.1.

18 In the cross-examination of Laxmibai (PW-3), the omission in police statement about the version that accused No.2 was sitting on the chest of deceased was brought to her notice and that omission is proved in the evidence of investigating officer (PW-10). This is material omission and due to that the evidence to that effect given against accused No.2 cannot be used against him. However, this part of the evidence can be easily separated from other evidence.

19 In the cross-examination, Laxmibai (PW-3) has admitted that the house of accused is situated at considerable distance from her house. It appears that her house is situated in the vicinity of the house of Tanaji. Her cross-examination made by the defence counsel shows that she has no reason to give false evidence against both the accused. She has admitted that she is relative of PW-4, but the evidence of PW-4 does not show that this admission can be used in favour of accused persons. There is no reason to disbelieve this witness also to aforesaid extent.

20 It is already observed that the circumstances mentioned in the spot *Panchanama* and the defence taken by accused persons, which admits their presence, corroborates the evidence of eye-witnesses. There are more circumstances to corroborate the direct

evidence. The postmortem report at Exhibit-38 is proved by prosecution in the evidence of Dr. Pashaminya (PW-8). Postmortem report at Exhibit-38 shows that postmortem was conducted between 10:15 am and 11:30 am on 11th March, 2011. The crime was registered at 01:15 am, well before the postmortem examination. This circumstance also shows that there was no room of concoction in respect of the blows given on different sites of the body. The evidence of PW-8, Dr. Pashaminya and Exhibit-38 show that following ante-mortem injuries were found on the dead body:

- “1. Chopped wound over right arm anteo medially,
3 inch X 1.75 inch X deep up to muscle.
2. Chopped wound over right axillary region
2.75 inch X 1 inch X deep upto muscle, red.
3. Chopped wound over right pectoral and infra
clavicular area 2 inch X 1 inch X deep upto pleural
cavity with fracture of 1st and 2nd rib in mid clavicular
line, horizontal, red.
4. Chopped wound over right mandibular area horizontal
1.5 inch X 1 inch X deep upto bone, red.
5. Chopped wound over neck right sub-mandibular area,
horizontal 2.5 inch X 1 inch X deep upto vertebra
cutting under line vessel and muscle, red.
6. Chopped wound over neck right side 3 cm. blow to
injury No. 5 horizontal 2 inch X 1 inch X deep upto
vertebra, red muscle with fracture of vertebra, red.
7. Chopped wound over neck right side supra clavicular

- area horizontal 2 inch X 0.5 inch X deep upto muscle, red.
8. Chopped wound over left mandibular and submandibular area horizontal 4 inch X 1 inch X deep upto trachea and oral cavity, with fracture of mandible, fracture dislocation of teeth in lower and upper jaw, cutting trachea from left side.”

21 Dr. Pashaminya (PW-8) has deposed that the death took place due to multiple chop wounds. His evidence shows that these injuries are sufficient to cause death in ordinary course of nature. He has deposed that surface wound No.3 corresponds to injury mentioned in column No.20(d). This internal injury was laceration to right upper lobe of lung. The weapon, axe (article 6) was shown to this witness and he has deposed that the injuries found on the dead body can be caused by such weapon. The sites of the body where attack was made, were described in the FIR and the weapon was also described. Thus, the direct evidence has necessary corroboration of postmortem report.

22 When there is direct evidence of aforesaid nature and there is a check to direct evidence of circumstances like the circumstances mentioned in spot *Panchanama* and postmortem report, there is no need of evidence on other circumstances and

evidence on motive, which is ordinarily relevant under Section 8 of the Evidence Act. The fact in issue in murder case is “who caused the death” and this fact can be proved on the basis of only direct evidence corroborated by postmortem report and spot *Panchanama*. In many such cases, there may not be evidence on other circumstances or motive as mentioned in Section 8 of the Evidence Act as the witnesses may not be knowing as to what had happened on that day or as to whether there was previous enmity between the parties. Thus, even without discussing other evidence of prosecution the Court could have convicted accused No.1 for the offence of murder of Tanaji.

23 Ram Kavale (PW-1) has given evidence that he learnt about the motive subsequently. He has deposed that Tanaji had given money for marriage of daughter of accused No.1 and on that count there was dispute between the two. There was no such mention in FIR. Dilip (PW-4), who heard the quarrel first from the house and whose house is situated adjacent to the spot of offence, has not whispered that the quarrel was taking place on the count of money. Laxmibai (PW-3), whose name is mentioned in FIR, has deposed that there was quarrel over money and Tanaji was demanding money from Narayan. In her cross-examination, defence has pointed out to her

that she had not given such version to police in her police statement. This omission is duly proved by defence in the evidence of investigating officer (PW-10). For consideration of motive, this omission is material and so this relevant fact is not proved in the evidence of Laxmibai.

24 The prosecution has examined Shubhangi (PW-5), widow of Tanaji. She has given evidence that in her presence, deceased had given hand loan of Rs.30,000/- to accused No.1 for the marriage of his daughter. She has deposed that one month prior to the date of incident, Tanaji had visited her and Tanaji had told her that accused No.1 was not ready to return the money. Her evidence and the evidence of other witnesses show that she was living in Nanded and not in village Tungi. Her evidence in cross-examination shows that she could not give the particulars like name of daughter of accused No.1, whose marriage was settled. She could not specifically say as to whether the amount was given in a particular year when two years were suggested to her. In view of the nature of evidence of PW-5, this Court holds that on motive point, she could not have been believed. Thus, the evidence on motive given by prosecution is not that convincing.

25 The defence taken by the accused shows that they have totally denied their involvement in the assault, which was made on the deceased. It is already observed that in support of specific defence, suggestions are not given to prosecution witnesses by the defence counsel. Even when one bleeding injury like CLW was found on parietal region of accused No.2 and one contusion was found over his right hand, he has not tried to say as to who had caused this injury if unknown persons were assaulting the deceased in his presence. He could have taken the defence that he was involved in the incident and accused was responsible for causing this injury. The spot *Panchanama* shows that one stick was found on the road. The injury certificate of accused No.2 shows that the injuries were caused by hard and blunt object and they were simple. He was examined on 11th March, 2011 at about 12:20 am and the age of the injury is given as within 24 hours. Due to aforesaid circumstances, this Court holds that the injuries, which were found on the person of accused No.2 have not created any probability in favour of accused No.1. Due to non-explanation of these injuries, which were found on the person of accused No.2, who is acquitted, no adverse inference can be drawn against the prosecution.

26 The prosecution has established one more incriminating circumstance against accused No.1. Panch witness Yeshwant (PW-7) has given evidence that on 11th March, 2011, in his presence, accused No.1 gave statement to police that he was ready to produce axe, weapon. There is evidence of investigating officer (PW-10) also on the statement and the memorandum of the statement given under Section 27 of the Evidence Act is proved in the evidence of this witness at Exhibit-54. This witness and the investigating officer have given evidence that after giving statement, accused No.1 took police and Panchas to his house and from there accused No.1 produced axe and one *Bambu* stick. They have given evidence that blood was found on the blade of the axe and also on the handle. The witnesses have identified the axe produced in the Court as *Muddemal* property and the *Panchanama* of seizure of axe is proved at Exhibit-32.

27 Panch witness (PW-7) has given evidence that clothes of accused No.1 were seized by police under Panchanama at Exhibit-33. These articles are article Nos.7 and 8. In the cross-examination, it was suggested to him that he had paid visit to hospital and after that he had put signatures on some *Panchanamas* in the police station. This suggestion is admitted by PW-7. The other evidence shows that there is a *Panchanama* of seizure of the clothes of deceased at

Exhibit-15. Exhibit-15 is admitted by defence and it shows that Yeshwant (PW-7) had acted as Panch witness on Exhibit-15 also. Thus, vague admission obtained from Yeshwant in his cross-examination by defence, cannot help the defence in any way.

28 The evidence of investigating officer (PW-10) shows that he had sent the clothes of accused No.1, axe, earth sample taken from the spot and blood samples of accused persons and the deceased to CA office with covering letter. Exhibit-55 is office copy of covering letter and it is duly proved. This document shows that the articles were sent on 18th April, 2011. However, CA reports in respect of blood samples show that the blood samples were received by CA office on 14th March, 2011. The CA report in respect of other articles like weapon and clothes and the blood of deceased, Exhibit-56, shows that these articles were received on 18th April, 2011. It can be said that the articles seized in the present matter were not sent immediately by police. However, this circumstance has not created reasonable doubt about the case of prosecution on this circumstance. In any case, this Court has observed that even absence of such circumstantial evidence could not have gone to the root of present matter.

29 The CA report at Exhibit-56 shows that the clothes of Accused No.1 (articles 6 and 7) were having blood of group 'B'. Axe was having blood of group 'A' and 'A' was the blood group of deceased. Blood group of both the accused is 'B' and that can be seen from CA reports at Exhibits 57 and 58. It can be said that accused No.2 had sustained bleeding injury and that blood could have come to the clothes of accused No.1. The circumstance that blood of group 'A' was not found on the clothes of accused No.1, has not created reasonable doubt about the evidence given as against accused No.1 as axe is having long handle and the chop wounds were inflicted to the deceased on that night. The spot *Panchanama* also shows that there was not much blood on road even when incident had taken place on cement road.

30 The discussion of evidence made above shows that the evidence points finger only to accused No.1. This Court holds that the prosecution has proved the offence of murder as against accused No.1 beyond all reasonable doubts. In view of the nature of defence taken, number of injuries found on the dead body, site chosen for giving blows and the weapon used for the assault, the only inference, which is available is that there was either intention of murder or there was intention to cause such bodily injury, which would be sufficient to

cause the death in ordinary course of nature. There is such medical evidence on record. This Court holds that the offence of murder is proved as against accused No.1 and both part (I) and part (II) of Section 300 of the Indian Penal Code can be used against accused No.1. This Court holds that the Trial Court has not committed any error in giving conviction for the offence of murder to accused No. In the result, the following order is passed:

ORDER

The appeal stands dismissed.

[MANGESH S. PATIL, J.]

[T. V. NALAWADE, J.]

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