

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 2 OF 2020

Somra Yadav S/o Ganeri Raut,
Major of age, Labour,
n/o Panchayat-Thandiyara,
Village – Barmasiya, P. O. Morne,
PS – Mohanpur, Thahiara, Morney,
Mohanpur, Dist.- Deoghar,
Jharkhand presently lodged at
Central Jail, Colvale Goa. ... Appellant

Versus

STATE
(Through Incharge Fatorda P. S.) ... Respondent

Mr. L. Raghunandan, Advocate for the Appellant under Legal Aid Scheme.

Mr. Gourish Nagvenkar, Additional Public Prosecutor for the State-Respondent.

**Coram:- M. S. SONAK &
SMT. M.S. JAWALKAR, JJ.**

**Reserved on : 21st July, 2020
Pronounced on : 22nd July, 2020**

JUDGMENT: (Per M. S. Sonak,J)

Heard Advocate L. Raghunandan, appointed under the Legal Aid Scheme on behalf of the appellant and Mr. G. Nagvenkar, learned Addl. Public Prosecutor for the State.

2. This appeal is directed against the Judgment and Order dated 31st October, 2019 made by the Sessions Court, South Goa, at Margao (Sessions Case (302) No.2/2018).

3. By the impugned judgment and order, the appellant, came to be convicted for offence punishable under Section 302 of the IPC and sentenced to undergo life imprisonment and to pay fine of Rs.10,000/- and in default, to undergo simple imprisonment for a period of six months.

4. The case of the prosecution is that the appellant on 15.10.2017 between 19.45 hours to 21.30 hours, behind the construction site of District Civil Hospital building, Ambaji Fatorda, Goa murdered one Mantri Marandi by hitting him with the piece of cement block on the back side of his head, thereby committing an offence punishable under Section 302 of the IPC. Upon the appellant denying the charge, the prosecution examined 13 witnesses in support of its case. The statement of the appellant was recorded under Section 313 of the Cr.P.C. But despite opportunity, the appellant, neither examined himself nor examined any defence witnesses. Ultimately by the impugned Judgment and Order, the appellant was convicted and sentenced as aforesaid. Hence the present appeal.

5. Shri Raghunandan, learned Counsel for the appellant submits that the testimony of the so called eye witness Devan Marandi (PW.6) is not at all creditworthy and the same should not have been relied upon by the Sessions Judge for convicting the appellant. He pointed out several inconsistencies and inherent improbabilities which flow from the testimony of PW.6. To elaborate upon his submissions, he pointed out that apart from the evidence of PW.6, which was itself not creditworthy, there was no other evidence to connect the appellant to the crime.

6. Mr. Raghunandan pointed out that the prosecution in the present case has failed to provide any credible explanation for non-examination of Devan Soren, who is also alleged to have been the eye witness to the incident. He therefore submits that an adverse inference is due against the prosecution.

7. Mr. Raghunandan submits that in this case the so called recovery is not at all some recovery as contemplated by Section 27 of the Evidence Act and therefore, the same should not have been relied upon by the learned Sessions Judge. In any case, he submits that the learned Sessions Judge has completely ignored material and relevant evidence regards injuries on the person of the appellant and quite erroneously inferred that the blood on the T-shirt of the appellant was the blood of the deceased which spilled over during the alleged assault.

8. Mr. Raghunandan submits that no less than 3 witnesses have deposed to their detention for 6 - 7 days by the police. He points out that such detention of the witnesses which has not been explained by the Prosecution, also casts a very serious doubt upon the prosecution case.

9. For all the aforesaid reasons, Mr. Raghunandan submits that the impugned judgment and order and the conviction recorded therein, warrant interference.

10. Mr. Nagvenkar, the learned Addl. Public Prosecutor defends the impugned judgment and order on the basis of reasoning reflected therein. He submits that PW.6 is a creditworthy witness and there was absolutely no error on the part of learned the Sessions Judge in accepting the testimony of PW.6. He submits that the testimony of PW.6, who is an eye witness to the incident, is amply corroborated by the other evidence on record, even though no such corroboration is necessary in law. He submits that the hurt certificate at the highest indicates some abrasions on the person of the appellant and, therefore, there is no error in the finding recorded by the learned Sessions Judge on the issue of the blood of the deceased spilling over the T shirt of the appellant which was recovered in terms of Section 27 of the Evidence Act.

11. Mr. Nagvenkar submits that the injuries on the person of the deceased as stand proved by the inquest panchanama and the medical evidence on record, also corroborates the testimony of PW.6. He submits that the prosecution did make efforts to secure presence of Devan Soren, who was ultimately not traceable. Therefore, there is no case made out to draw any adverse inference against the prosecution in this case.

12. For all the aforesaid reasons, Mr. Nagvenkar submits that this appeal is liable to be dismissed.

13. The rival contentions now fall for our determination.

14. The learned Sessions Judge has primarily relied upon the testimony of PW.6, since the prosecution claims that PW.6 is the eye witness to the incident and upon certain other evidence like medical evidence and the evidence in the form of alleged recovery of the T shirt with blood stains at the behest of the appellant.

15. In so far as the testimony of PW.6 is concerned, we have to note that the record bears out that the statement of PW.6 was allegedly recorded at the Police Station on 16.10.2017 and thereafter the statement of PW.6 was also recorded under Section 164(5) the Cr.P.C. before JMFC Margao on 30.10.2017. Although, the statement under Section 164(5) of the Cr.P.C. is not required to be

referred to now that PW.6 was examined substantively before the Sessions Court, it is necessary to note that PW.6, in his statement before the Judicial Magistrate had clearly stated that the deceased was his paternal cousin. However, in his substantive evidence before the Court PW.6 made a categorical statement that there was no relation between him and the deceased, except that they were from the same village.

16. The version put forth by PW.6 in his statement under Section 164(5) of the Cr.P.C and the version ultimately deposed to by PW.6 before the Court is at variance in so far as material particulars are concerned. For instance, in the statement before the JMFC, PW.6 speaks about intervening and separating the appellant and the deceased whilst they were allegedly fighting in their room. However, in the deposition before the Court, PW.6 speaks about reaching the room only after the beleaguered parties were separated from each other *i.e.* not fighting with each other. PW.6 in his statement to the JMFC speaks about the appellant running behind him, after having hurled a rock to the head of the deceased. However, in the substantive evidence before the Court, PW.6 deposes to the appellant running away from the scene of offence. There are several other discrepancies which flow from the testimony of PW.6 before the Court and the statement of PW.6 recorded before the JMFC. However, we make it clear that it is not for these grounds that we are hesitant to accept the testimony of PW.6.

17. Even by focusing almost exclusively upon the testimony of PW.6 before the Court, we find that the same is riddled with inherent inconsistencies and therefore, we feel that it will not be safe to sustain the conviction on the basis of the testimony of PW.6.

18. PW.6 has deposed that sometime after 6 p.m. the appellant had dinner at the mess, where chicken was served. He has also deposed that after some time the deceased also came alone and was served dinner. PW.6 has then deposed that after he left the mess at about 7.45 to 8 p.m. along with 2-3 labourers, he observed the deceased coming from out of his room and running towards the rear side followed by the appellant. PW.6 has deposed that one Deven Soran was following the appellant at that time. PW.6 has then deposed that it is at this time that he saw the appellant lifting one cement block and hitting it on the rear portion of the head of the deceased on account of which the deceased fell to the ground. PW.6 has then deposed that the appellant assaulted the deceased on the rear side of head with the same cement block by giving 3-4 blows. PW.6 has deposed that the appellant ran away from the place and since PW.6 was frightened he returned to his room. PW.6 has then deposed that after some time one Suresh Marandi and Mohan Singh to his room and told him that the deceased was lying on the ground with injuries and it is only thereafter that PW.6 went to the spot along with other labourers and staff. PW.6 has also deposed that

his statement was recorded on 16.10.2017 and though the statement was recorded in English its contents were not read over to him. PW.6 has accepted that he was not conversant in English language. PW.6 has also deposed that his statement was recorded on 30.10.2017 before JMFC and in the same he had voluntarily disclosed all the facts.

19. In the cross examination, PW.6 has admitted that the place where he saw the deceased running from room and followed by appellant was having sufficient light coming from street. However, thereafter the portion was in dark. PW. 6 has also deposed that at that the distance between the appellant and deceased was 5-6 metres when the appellant lifted the cement block and hurled it towards head of the deceased with both his hands. PW.6 has also deposed that he was at a distance of about 20 metres from the appellant and the deceased and that Devan Soren was little ahead of him.

20. This means that PW.6 has virtually admitted that though there may have been some light near the rooms from which the appellant and deceased commenced running, the portion thereafter was dark. This position is corroborated by the testimony of Mohan Singh PW.5 who has also deposed that the spot where the body of the deceased was ultimately found was quite dark and there was necessity of torch in order to see anything. Admittedly, PW. 6 was at a distance of almost 20 metres and therefore, it may not be safe

to rely upon the statement of PW.6 that he actually saw the appellant hurl a fairly large cement block with both his hands towards the deceased, when the deceased was at a distance of 5-6 metres from the appellant. In this case, prosecution has failed to examine Devan Soren as witness.

21. PW.6 has categorically deposed that soon-after the incident, the appellant ran away and Devan Soren actually ran in a direction of the appellant and the deceased. However, PW.6 has claimed that he was frightened and thereafter he returned to his room. Now, if PW.6 and Devan Soren were actually following the appellant and the deceased and they allegedly witnessed the appellant hurling a cement block to the head of the deceased and the deceased falling to the ground, it is only natural that even PW.6 rushes to the assistance of the deceased, particularly after the appellant had run away from the scene. The conduct of PW.6 returning to his room and thereafter coming to the site only after being informed of the deceased lying on the ground by Suresh Marandi and Mohan Singh, is, according to us, not a conduct which inspires confidence in the testimony of PW.6.

22. Further, if Devan Soren rushed towards the appellant and the deceased, it is only natural that this Devan Soren would be the first person to find the deceased lying on the ground. As noted earlier, prosecution has failed to examine said Devan Soren as a

witness in this matter. PW.6, in his statement recorded before the Magistrate has gone to the extent of stating that soon after the alleged incident, he saw the appellant go to his own room, remove the T shirt which was having blood stains on it and keep the same on the string outside his room, put another shirt and without removing his loongi which he was wearing, ran away. No doubt, all this was not deposed to by PW.6 in the course of his examination. In any case, all such statements are too incredulous to warrant any acceptance.

23. PW.6 in the course of his cross examine was asked whether he was detained in the Police Station soon after this incident, to which he replied in the negative. However, at least 3 prosecution witnesses, *i.e.* PW.5, PW.8 and PW.12 have categorically deposed that soon after the incident, they and some others, including PW.6 were actually detained at the Police Station for 6-7 days. PW.6 has deposed that at the time when his statement was recorded by the Police *i.e.* on 16/10/2017, the contractor and the father of the deceased were present at the Police Station. However, the records bears out that the contractor and the father of the deceased arrived from Jharkhand to Goa only on 17/10/2017 or 18/10/2017. All these factors render it quite unsafe to rely upon testimony of PW.6, in relation to the incident in question.

24. The evidence on record clearly establishes that there was no light or rather, the spot where the alleged incident had taken place

was quite dark. Yet PW.6 deposes to have seen the appellant hurling a stone with both his hands towards the head of the deceased, who was 5 -6 metres away from the appellant. PW.6 claims to have seen this from a distance of about 20 metres. This is itself quite doubtful. That apart, there is absolutely no explanation as to why PW.6 did not rush to the spot where the deceased had fallen, since, it is the case of PW.6 that the appellant ran away from the spot after the assault. That apart, there are other discrepancies or improvements, all of which render it quite unsafe to rely upon the testimony of PW.6 in the facts and circumstances of the present case. Therefore, only on the basis of testimony of PW.6, this was not a fit case to conclude that the prosecution has established the guilt of the appellant beyond reasonable doubt.

25. The recovery of the appellant's blackish T shirt, allegedly having blood stains on it, almost 10 days after the incident, can hardly be accepted as some recovery as contemplated under Section 27 of the Evidence Act. It is the case of the prosecution itself that the appellant, soon after the alleged incident, returned to his room, removed the blood stained T shirt, hung it on the string outside the room, changed into a different T shirt and only thereafter ran away. PW.6 in his statement before the Judicial Magistrate has stated that he, in fact, saw the Appellant do all this soon after the incident in question. It is then the case of the prosecution that this T shirt was left hanging on the string outside the appellant's room, in full

public view and access for almost for 10 days before the same was allegedly recovered on the basis of a statement made by the appellant whilst in the Police custody.

26. There is really no proper explanation for the delay of 10 days. Taking into consideration the fact that the T shirt was found hanging on the string outside the room of the appellant in full public view, we cannot discount the contention of Mr. Raghunandan that such place was accessible to one and all. Besides, PW.6 claims to have seen the appellant removed his T shirt, hung the same on the string outside his room soon after the incident before he ran away. The statement of PW.6 was allegedly recorded on 16/10/2017 *i.e.* on the date immediately following the incident. All these factors militate against the admissibility of permitting the prosecution to take aid of Section 27 of the Evidence Act in relation to the statement allegedly made by the appellant whilst in the Police custody.

27. By now it is well settled that Section 27 concerns itself not with the actual recovery of the object as such, but merely renders that part of the statement of the accused whilst in the Police custody admissible in evidence as relates to the discovery of the incriminating object. Recovery of the object is not the discovery of fact as envisaged in Section 27 of the Evidence Act. The '*fact discovered*' envisaged in this section embraces the place from which the object was produced, the knowledge of the accused as to it,

however care must be taken to ensure that the information given must relate distinctly to that effect. (see ***Bodhraj alias Bodha and others vs. State of Jammu and Kashmir***, (2002) 8 SCC 45). Applying these principles to the evidence which has come on record, we find it difficult to hold in this case that the statement of the appellant which led to the alleged recovery is to be held as admissible in evidence by resorting to the provisions of Section 22 of the Evidence Act.

28. That apart, we are satisfied that the inference which is drawn by the learned Sessions Judge in paragraph 48 of the impugned Judgment and Order is quite vulnerable and warrants interference. For the sake of convenience, we reproduce paragraph 48 of the impugned Judgment and Order :

“48. Pw13 Navlesh Dessai is the Investigating Officer who has deposed in detail about the investigation carried out by him including arrest of the accused and recovery of blood stained clothes from him under the Recovery Panchanama, which is produced at Exhibit 25. Prosecution examined Pw2 Sanjay Chawan who acted as a pancha witness and this witness deposed that the accused voluntarily disclosed in Hindi that he is ready to show the clothes which he was wearing at the time of alleged assault and thereafter he took them to the construction site and near the hutments and showed the clothes which were hanging on the string. They collected one T-shirt of blackish colour and noticed blood stains on it. The said T-shirt was packed in an envelope and marked as Exhibit ‘J’. Said Exhibit ‘J’ was forwarded to the laboratory and the report is at Exhibit

67 which show that human blood was detected on Exhibit 'J' and the blood group was found as "O". At this stage, it is required to note that the blood group of the deceased is "O" Rh positive. There is nothing on record to show that the accused was having any bleeding injury on his person at the time of his arrest and prior to it. Therefore, the only inference which could be drawn is that the blood of the deceased spilled over T-shirt of the accused during the alleged assault."

[emphasis supplied]

29. As noted earlier, the recovery itself is quite doubtful. However, even if the recovery is held as proved, we find it difficult to accept the reasoning reflected in paragraph 48 of the impugned Judgment and Order as reproduced above. There is medical evidence on record which indicates that the blood group of the deceased was O Rh positive and that of the appellant was O Rh negative. This means that the blood group of both the appellant and the deceased was 'O'. The Chemical Analyser's report in relation to the T-shirt only says that blood stains having the blood group 'O' were found thereon. There is absolutely no evidence to suggest that the blood stains were detected as O Rh positive or for that matter, O Rh negative.

30. The learned Sessions Judge in the emboldened portion above, has observed that *'there is nothing on record to show that the accused was having any bleeding injury on his person at the time of*

his arrest or prior to it'. On this basis, the learned Sessions Judge has held that 'the only inference which could be drawn is that the blood of the deceased spilled over the T shirt of the appellant during the alleged assault'.

31. According to us, there is clear evidence on record in the form of deposition of the Investigating Officer himself, as well as the hurt certificate issued by the Doctor at the Goa Medical College, who examined the Appellant soon after his arrest that there were injuries on the chest and neck of the appellant. The details of such injuries have been set out in the hurt certificate, as well as in the deposition of the IO himself. In the light of this evidence, it is not possible to accept that there was nothing on record to show that the appellant was having any bleeding injuries on his person at the time of his arrest or prior to it.

32. Mr. Nagvenkar did attempt to urge that the injuries are in the nature of abrasions and, therefore, may not have been any bleeding injuries as observed by the learned Sessions Judge. From the deposition of the IO, as well as the hurt certificate which is produced on record, it is not possible to accept this contention of Mr. Nagvenkar. In any case, it was for the prosecution to explain in the first place the injuries on the person of the appellant or at least the nature of such injuries. Even assuming that there is some doubt which arises in the matter, the benefit of such doubt will have to go

to the appellant and not the prosecution.

33. Besides, on considering the factor both the deceased, as well as the appellant had the blood group 'O' and the CA report speaks only about traces of blood with blood group 'O' being found on the T shirt in question, we are not prepared to accept that the only inference that could have been drawn in the present case was that the blood of the deceased spilled over the T shirt of the appellant. At least the impugned Judgment and Order does not reflect that the learned Sessions Judge has taken cognizance of the deposition of the IO and the hurt certificate on record in relation to the injuries on the person of the appellant.

34. Now, it is case of PW.6 that the appellant from a distance of 5-6 metres hurled a cement block towards the head of the deceased and this was noticed by PW.6 from a distance of about 20 metres at a site where there was no source of light available. In such circumstances, there is hardly any scope to infer that the blood of the deceased spilled over the T shirt of the appellant. No doubt, PW.6 has further deposed that after the deceased fell to the ground, the appellant continued to assault him. However, for reasons discussed earlier, it is really difficult to accept that PW.6 actually was in a position to see all this from a distance of 20 metres in the absence of any proper source of light. As noted earlier, Devan Soren who was nearer to the spot was never examined by the prosecution.

35. The IO has merely stated that though some efforts were made to secure presence of Devan Soren such presence could not be secured, however, no details regards such efforts have really been placed on record. Besides, at least three prosecution witnesses i.e. PW.5, PW.8 and PW.12 have categorically deposed that they, along with PW.6 were detained in the Police custody for 6-7 days from the date of the incident, though PW.6 has not admitted to this position. There is really nothing on record to disbelieve the categorical and consistent statements of not less than 3 prosecution witnesses in this regard.

36. All the aforesaid factors are sufficient to disagree with the reasoning of the learned Sessions Judge as recorded in paragraph 48 of the impugned Judgment and Order. In fact, all these factors, coupled with the factors which render the evidence of PW.6, the alleged eye witness, as uncreditworthy, render it quite unsafe to sustain the conviction recorded against the appellant. In this state of evidence, it is difficult to hold that the prosecution has established the guilt of the appellant beyond reasonable doubt.

37. The material on record, as noted earlier, bears out that the deceased, the appellant and most of the witnesses who have deposed in the matter were labourers from Jharkhand, who were working at the construction site in Goa. At least three prosecution

witnesses have clearly and categorically deposed that they along with PW.6 were detained by the Police for almost 6-7 days after the incident, in relation to the incident. The IO, in his deposition, has failed to offer any comments, much less explanation on this clear and categorical depositions of the prosecution witnesses themselves. In the state of this evidence, we find that there is something to be stated about the contention of Mr. Raghunandan that the Investigating authorities simply rounded up the labourers at the site and the needle of suspicion was pointed to the appellant on account of some fight which the appellant and the deceased had prior to dinner. Mr. Raghunandan pointed out that the medical evidence indicates alcohol in the body of the deceased; whereas no such traces were found in the body of appellant. All these factors cannot simply be ignored whilst evaluating the evidence on record.

38. The evidence on record, may at the highest, show that there was some fight between the appellant and the deceased prior to both of them having dinner on the fateful day at the mess at the construction site. Some witnesses have deposed to this fight. However, such fight, at the highest may create suspicion about the involvement of the appellant in the crime. It is well settled that mere suspicion, howsoever strong, can never take the place of proof in a criminal trial. Further, in the present state of evidence, a reasonable doubt is certainly created as to the involvement of the appellant in the actual crime and the benefit of such reasonable doubt

is required to be extended to the appellant and not the prosecution.

39. The appellant, even in his statement under Section 313 of the Cr.P.C. has clearly stated that he has been falsely implicated in this matter and made scapegoat by the Police. This plea itself may not mean much. However, such plea, if considered along with the other evidence on record, was not a plea which deserved no consideration whatsoever from the Sessions Court. If, PW.6 or for that matter Devan Soren, who has ultimately not been examined by the prosecution, were the eye witnesses to the incident, we fail to understand as to why almost 6-7 people, whose names have been stated by prosecution witnesses themselves, were detained by the police for 6-7 days after the date of the incident. There are inconsistencies in the deposition of PW.6, the alleged eye witness and the prosecution has failed to establish that there was any sufficient light at the spot of the alleged incident in which PW.6 could actually witness the incident from a distance of almost 20 metres. The running away of PW.6, even though it is the case of PW.6, that the appellant had run away after assaulting the deceased with the cement block, also casts a doubt on the prosecution version. The statement of the appellant leading to the alleged recovery or the inferences drawn therefrom, warrant no acceptance for the reasons discussed above.

40. Upon cumulative consideration of the aforesaid factors,

we are satisfied that the prosecution, in the present case, has failed to prove the guilt of the appellant beyond reasonable doubt. Therefore, we set aside the impugned Judgment and Order, as well as the conviction recorded against the appellant therein. This appeal is, therefore, allowed and the appellant is directed to be set at liberty, if not required in connection with any other case. The Registry to do the needful in the matter.

41. Before we part, we record our appreciation to the able assistance rendered by Advocate L. Raghunandan, who took pains to argue this matter through Video Conferencing. So also, we must record and appreciate the reasonable approach of Mr. Nagvenkar, the learned Addl. Public **Prosecutor** for the State.

SMT. M.S. JAWALKAR, J.

M. S. SONAK, J.