

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.351 OF 2002

THE STATE OF MAHARASHTRA

)...APPELLANT

V/s.

BALU CHANDAR RAJPUT

)

30, Occupation : Agriculture,

)

R/o. Jaoli, District – Satara

)...RESPONDENT

Mr.V. B. KondeDeshmukh, APP for the Appellant – State.

None for the Respondent.

**CORAM : PRASANNA B. VARALE &
V. G. BISHT, JJ.**

DATE : 13th OCTOBER, 2020

JUDGMENT : (PER : V. G. BISHT, J.)

1 This appeal is filed by the State challenging the judgment and order of acquittal dated 30th November 2001 passed in Sessions Case No.29 of 2001 by the learned 6th Additional Sessions Judge, Satara, for the offences punishable under Section 302 and 307 of the Indian Penal Code (IPC).

2 Narrated in nutshell, it appears from the evidence of PW11 Rajendra Govind Shinde, Police Head Constable that on 30th October 2000 he was attached to Police Station Phaltan. On that day, Police Sub-Inspector directed him to record statement of Bhagwan Bhiva Rajput (deceased) at P.H.C. Phaltan. At about 10.50 p.m., he went to dispensary, met Dr.Pawar and after satisfying that the deceased was a fit condition to give statement, recorded his statement.

3 It appears from the said statement which is at Exh. 49 that the accused at the relevant time was the neighbour of deceased and there always used to be quarrel between them over the straying of animals in the standing crops. On 30th October 2000 while the deceased was standing in front of his house, the accused came and enquired as to why he (deceased) had beaten his daughter and all of a sudden hit a stone on his chest. After hearing the commotion, the wife of the deceased came out of the house and she was also assaulted on her forehead by means of a sickle by accused. The accused then fled away with the sickle.

The villagers viz. Mohan Dattu Nale (PW4), Bhanudas Laxman Palve (PW5) and the family members after hearing the commotion rushed and both of them i.e. the deceased and his wife were taken to hospital. Before that, they were taken to the police station, but the police referred them to hospital with a Yadi.

4 It may be noted that on the basis of above said declaration, C.R.No.243 of 2000 under Sections 323, 324 and 504 of the IPC came to be registered. However, it is seen that during the course of treatment the deceased succumbed to the injuries.

5 It appears that PW8 Devdas Raghunath Shinde, Police Sub-Inspector attached to Phaltan Police Station started investigation and during the course of investigation, recorded statements of various witnesses and converted the charge under Section 324 to 307 of the IPC. Later on, PW10 Bajirao Bandu Patil, Assistant Police Inspector, carried out further investigation. He also recorded statements of witnesses. During the course of investigation, the accused gave a Disclosure statement under

Section 27 of the Indian Evidence Act, pursuant to which a sickle came to be seized. After completion of investigation, the charge-sheet came to be forwarded against the accused with an addition of Section 302 of the IPC.

6 In order to bring home the charge, the prosecution has examined as many as eleven witnesses and exhibited number of documents. The respondent-accused was questioned under Section 313 of the Code of Criminal Procedure (Cr.P.C.) about the incriminating evidence and circumstances and he denied all of them as false. His case is that of false implication.

7 When the matter was called out, none appeared for the respondent-accused. We have, with the able assistance of learned APP, perused the record.

8 In order to prove homicidal death, the prosecution has examined PW7 Dr.Prabhakar Baburao Bhoite. PW7 states in his evidence that on 31st October 2000 he was attached to Rural

Hospital, Phaltan, as Casualty Medical Officer. He along with Dr.Bokre and Dr.Pote performed an autopsy over the dead body of the deceased. He did not notice any external injury on the body. However, during dissection of thorax, he found effusion of blood in 5th and 6th right side intercostal space and in muscle. There was also effusion of blood in mediastinum behind upper sternum about 100 ml. There was fracture of 6th rib 3 cm. away from costochondral junction. Right and left lung were pale. Pericardium was intact. After opening reddish blood stained fluid seen containing 200 ml. of blood clots. Contusion of right auricle in between gut aspect superior and anterior vena cava of area 2 cm x 1 cm reddish congested with effusion of blood and at centre laceration of size $\frac{1}{2}$ cm x $\frac{1}{2}$ cm was seen. Cause of death was shock due to effusion of blood in pericardium with contusion of right auricle and effusion of blood in mediastinum with fracture of right 6th rib. According to him, the probable cause of death might be due to hitting of stone over the chest.

9 There is no challenge at all to the version of this witness. Having regard to the nature of injury and as also the possible cause thereof, as deposed by Medical Officer, we do not see any reason to differ from his opinion and as already noted, there is nothing in his cross-examination, we hold that the deceased died a homicidal death.

10 The prosecution case rests on dying declaration. There can be no doubt that conviction can be based solely on a dying declaration. In **Sampat Babso Kale and Another vs. State of Maharashtra**¹ the Hon'ble Apex Court has held that no doubt, a dying declaration is an extremely important piece of evidence and where the Court is satisfied that the dying declaration is truthful, voluntary and not a result of any extraneous influence, the Court can convict the accused only on the basis of a dying declaration.

11 We wish to carefully examine the sole dying declaration in the present case vis-a-vis the other evidence available on record.

1 (2019) 4 Supreme Court Cases 739

12 PW11 Rajendra Govind Shinde, Police Head Constable, in his evidence (Exh. 48) has proved the dying declaration at Exh. 49. It may be noted from his evidence that after satisfying the fitness of the deceased from Dr.Pawar (PW6) this witness recorded the statement of deceased. We have carefully perused the dying declaration at Exh. 49. It appears to us from the reading of the dying declaration that the deceased and accused were on cross terms since prior to the incident in question. On the day of incident i.e. on 30th October 2000, while the deceased was standing in front of his house, the accused came and enquired as to why he (deceased) had beaten his daughter and then all of a sudden, hit a stone on the chest of the deceased, as a result of which the deceased screamed. It further appears from the said dying declaration that after hearing his screams, the wife of the deceased came out of the house. She was also assaulted on her forehead by accused by means of a sickle and then accused fled away. It further appears from the said dying declaration that after hearing the commotion, Mohan Dattu Nale (PW4), Bhanudas Laxman Palve (PW5) and other family members of the deceased

rushed and took the deceased and his injured wife to police station and from there to Government Hospital, Phaltan.

13 From the above, it is clear that at the time of the incident and after hearing the noise of the deceased, the wife of the deceased rushed out of the house followed by PW4 and PW5 and other family members of the deceased. Here we have the testimonies of PW2 - wife of the deceased, PW4 and PW5. Their respective evidences will definitely have a bearing on the dying declaration recorded by PW11. We go one by one.

14 Before we undertake the exercise of assessing and analyzing the evidence of above noted witnesses, we would like to point it out here from the cross-examination of PW11 wherein he admitted that the deceased had gone to police station before he went to dispensary. This material witness has nowhere made it clear as to despite the presence of deceased in the police station, why his complaint/statement was not recorded at the first available opportunity. It is also not his evidence that the deceased's health condition was in a precarious condition and

warranted medical attention first, rather than going into other formalities in the form of recording of statement or complaint, as the case may be. His evidence is absolutely silent. There is no explanation much less satisfactory or sanguine, so as to encourage us to accept the recording of dying declaration of deceased by this witness at some later point of time, which could have and should have done in the police station itself. Had there been some discernible and convincing reason for not doing so, we could have considered the same in proper perspective. This is definitely a debilitating aspect which does not augur well for the prosecution.

15 Reverting back to the witness, PW2 Parvati Bhagwan Rajput states in her evidence (Exh. 27) that the accused is her nephew. There is a common house between her house and that of the accused and there is only one partition between the same and the door of the courtyard of their house is common. Their vasti is situated in the heart of the village. It is her further evidence that she is on inimical terms with accused since last five years.

16 Deposing further, she states that the incident happened at about 7 to 7.30 p.m. and at that time, she was in the chappar. The deceased was at the door of the house. At that time, the accused enquired with the deceased as to what he was doing when there were quarrels between the children over a long time. The deceased replied that he better ask the children. It is her further evidence that a stone was in the hand of the accused which he threw at the chest of the deceased. The deceased, therefore, fell down. Then again the accused hit over the chest of the deceased with a stone. According to her, she had seen this incident from a distance of about 5 to 20 feet.

17 Her evidence lastly shows that the deceased shouted as to what accused was doing and at that time, the accused inflicted one blow of sickle over the right side of her forehead. She became unconscious.

18 The oral evidence of this material witness who is none other than the wife of the deceased is not in line with the dying

declaration of her husband. Inconsistencies galore and she is totally at variance with the contents of the dying declaration.

19 From her evidence it is more than clear that at the relevant time she was in the chappar and not in the house as is revealed in the dying declaration. The genesis, as narrated in the dying declaration, does not find corroboration from the mouth of PW2 wife. The PW2 wife rather has altogether given a different story. It is also the evidence of this witness that the accused had come armed with a stone and after the deceased fell down, the accused again had hit over the chest of the deceased by means of a stone. In the cross-examination, since the above piece of evidence was not part of her statement recorded under Section 161 of the Cr.P.C., her attention was drawn, to which she fairly admitted that she had not stated so before the police nor assigned any reason. This in itself goes to show that nothing of this sort had happened and had it been so, she definitely would have stated before the police. This becomes further clear when we note from the dying declaration of the deceased that it is only after hearing

the noise, this witness came out of the house. This is suggestive of the fact that she had no occasion to see the alleged assault on the person of the deceased. Even she also admits in her cross-examination that as soon as the deceased fell down, she rushed from the cattle shed towards him. That says all about her conduct.

20 As far as her evidence showing that she was also allegedly assaulted by the accused by means of a sickle, she has nowhere made it clear as to why she was assaulted. It is also not the case of the prosecution or for that matter evidence of this witness that while she tried to save the deceased from the clutches of the accused, she was also assaulted. Therefore, at the moment, we are not satisfied with the testimony of wife of the deceased.

21 PW4 Mohan Dattu Nale states in his evidence (Exh. 29) that the incident took place on 30th October 2000 at about 7 to 7.30 p.m. in the courtyard in front of the house of the deceased and accused. He saw deceased had fallen down on the ground and his wife was shouting. At that time, according to this witness, the

accused had given a blow of sickle over the head of Parvatibai (PW2). He heard the shouts from his house and hence he rushed towards the house of the deceased and saw that the accused was hitting the stone over the chest of Bhagwan.

22 It is apparent from the evidence of above witness that at the relevant time, this witness was present in his house and it is only after hearing the shouts, he came out and rushed towards the house of the deceased and saw that the accused was being hit with stone over the chest of Bhagwan. His evidence implies that there was continuous assault by means of a stone by accused over the chest of the deceased, which is not at all the case of the prosecution. Even PW2 wife does not say so in her evidence that the accused had continuously given blows of stone on the chest of deceased.

23 Apart from above, from his cross-examination it is seen that the police recorded his statement on 31st October 2000 and 1st November 2000. There is no reason given either by this witness or by the Investigating Officer as to why the statement of this

witness came to be recorded twice. Therefore, adverse inference needs to be drawn.

24 PW5 Bhanudas Laxman Palve – a neighbour of accused and deceased, states in his evidence (Exh. 31) that on 30th October 2000, at about 7 to 7.30 p.m., he heard shouts from the house of the deceased and hence he rushed towards there. He saw the deceased lying in the cattle shed and accused pelting stone on the chest of the deceased. At the same time, accused came out of the cattle shed and gave blow of a sickle over the head of Parvati and then ran away.

25 This witness has altogether introduced a new theory in as much as according to this witness, the incident took place in a cattle shed which the prosecution has nowhere claimed. Even the dying declaration shows that at the relevant time, the deceased was standing in front of his house and the incident took place there only. The evidence of this witness then shows that he saw the accused pelting stone which is again not the case of prosecution. Further, according to him, after assaulting the

deceased, the accused came out of the cattle shed and then gave a blow of sickle over the head of wife of the deceased but then his version does not get support from the very version of wife of the deceased.

26 In the cross-examination his attention was drawn to the portion marked “A” of his statement. Portion marked “A” of his statement reads “आम्ही तिकडे जाई पर्यंत तो तेथून पळून गेला” which he denied of having said so before the police. But PW8 Investigating Officer in his examination-in-chief itself has proved the portion marked “A” at Exh. 42 by deposing that this witness had indeed stated so before him. If the portion marked “A” is anything to go by, then it speaks in itself that this witness had reached the place of occurrence after the accused had fled away meaning thereby that this witness had no opportunity to see the incident in question. From the examination-in-chief of this witness itself, we have pointed out how the testimony of this witness does not get corroboration either from the dying declaration or from the mouth of PW2 wife of the deceased.

27 PW6 Dr.Harshali Mahadeo Pawar states in her evidence (Exh. 35) that on 30th October 2000, she not only examined the deceased but the wife of the deceased viz. PW2 as well. Regarding the injury sustained by PW2, we have already commented on and therefore we do not feel it necessary to repeat the same. What is of greater significance from the evidence of this witness is the history of assault as given to this witness vide Exh. 36, which has wrongly been treated as a dying declaration by the learned trial Court. The learned trial Court assumed that the history was given by the deceased himself whereas if this certificate at Exh. 36 is read carefully, then it shows that the patient was accompanied by his son Narayan Bhagwan Rajput and history of assault was given as blows by hands and legs all over body. Pertinently enough, this certificate notes that on local examination no visible injury was seen all over body nor over chest or abdomen.

28 The evidence of this material witness and as also certificate at Exh. 36 takes out wind from the sail of the

prosecution in as much as firstly, the history of assault given was just by hands and legs all over the body which not even remotely gets corroboration either from the dying declaration or from the mouth of the PW2 wife. What is puzzling is that even after there being an alleged assault on the chest by means of a stone, not even tenderness leave apart any abrasion mark was noticed by the Medical Officer either over the chest or abdomen. In a sense, the history so given in Exh. 36 appears to be probable because there was no visible injury found over the chest or abdomen. But then it goes contrary to the theory of prosecution that the deceased was assaulted by means of a stone.

29 The only evidence available and which has been held to be proved by the learned trial Court is recovery of alleged weapon of offence namely sickle under Section 27 of the Indian Evidence Act. However, in view of several loopholes as noted hereinabove and the failure of main circumstances finding its way to connect the accused cogently and conveniently with the crime, the recovery lose its worth and force.

30 The above being the nature of evidence and obtaining circumstances the learned trial Court held that prosecution has failed to prove its case beyond reasonable doubt and extended benefit of doubt in favour of the respondent –accused. This finding of the trial Court could not be said to be perverse. It was based on a proper appreciation of evidence.

31 On perusal of the entire evidence and the law on the subject, we are of the considered view that the trial Court was right in holding that the prosecution has failed to prove its case beyond reasonable doubt and rightly extended benefit of doubt to the respondent –accused.

32 For the aforesaid reasons, we find no merit in the appeal and pass the following order :

ORDER

Criminal Appeal is dismissed.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)