

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 871 OF 2002

The State of Maharashtra

... Appellant
(Ori. Complainant)

V/s

Eknath Bhila Khairnar

Age 45 years,
R/o. Arai, Now at Lohner,
Tal. Satana, Dist. Nashik.

... Respondent
(Ori. Accused).

Mr. V.B. Konde-Deshmukh, APP for the State-Appellant.

None for Respondent.

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

DATE : 4th DECEMBER, 2020.

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

This Appeal is filed by the State challenging the judgment and order of acquittal dated 24th April, 2002 passed in Sessions Case No. 8 of 1999 by 3rd Additional Sessions Judge, Malegaon, for the offence punishable under Section 302 read with 34 of the Indian Penal Code 1860 (for short “IPC”).

2 Narrated in nutshell the prosecution case is that:

(a) The informant's father, namely, Pundlik Laxman Jadhav (since deceased) was having ancestral land at village Lohner. The said land was given by the deceased to his nephew, namely, Popat Rajaram Gujar (A-1) (since deceased) on crop share basis. It is alleged that A-1 got the said land mutated in his name fraudulently and, therefore, a civil suit came to be filed against him and the proceedings in the said suit is pending.

(b) According to prosecution, on 11/06/1998 the deceased left for Tahasildar Office at Kalvan but did not return in the night.

(c) On 12/06/1998 the informant-daughter came to know about the injuries sustained by the deceased and his admission at Government Hospital, Satana. She rushed to the hospital and found the deceased unconscious. Since the deceased was unconscious, the informant was not able to ascertain as to how the deceased had sustained injuries.

(d) As per prosecution, the relations between the deceased and A-1 and also the relative of A-1 viz. A-2 were not cordial and therefore, she suspected that it were accused, who might have assaulted the deceased.

(e) On the basis of the report of the informant, Crime No. I-57 of 98, under Section 307 read with 34 of the IPC came to be registered by Satana Police Station.

(f) It appears from the record that PW-5 Lakhanlal Hari Mathure, Police Inspector and Investigating Officer, pursuant to the registration of the First Information Report ('FIR' for short) visited the place of occurrence and prepared spot panchanama (Exh.23) and recorded the statements of witnesses. During the course of investigation, he also collected the revenue record pertaining to the disputed land. On 22/06/1998 as he received the information that the deceased had scummed to the injuries on 21/06/1998, therefore, Section 302 of IPC was added to the charge-sheet.

After completion of investigation, the accused came to be charge-sheeted accordingly.

3 To substantiate the charge against the respondent-accused, the prosecution has examined as many as 5 witnesses and exhibited number of documents. The respondent-accused was questioned under Section 313 of the Code of Criminal Procedure, 1973 (for short “the Cr.P.C.”) about the incriminating evidence and circumstances and he denied all of them as false.

4 Mr. Konde-Deshmukh, learned APP, submitted that the learned trial judge erred in disbelieving the evidence of PW-1, PW-2 and PW-3 despite same being cogent, convincing and reliable. The learned trial judge also failed to take into consideration that the relations between the respondent-accused and the deceased were strained and the accused had motive to eliminate the deceased. According to learned APP, the whole case of prosecution was based on oral dying declaration given by the deceased to PW-3 son in the hospital and it was wrong on the part of the learned trial judge to say that the dying declaration was not worthy of credence. Thus, for all these reasons the Appeal deserves to be

allowed, argued learned APP.

5 When the matter was called out, none appeared for the respondent-accused.

6 At the very outset, we place on record that the Postmortem Report (Exh.30) is duly admitted in evidence by the defence during the course of trial. This being so, it seems that the prosecution did not bother to examine the autopsy surgeon, who conducted the postmortem over the dead body. Column No. 17 of the postmortem report shows the following injuries:

17. *Surface wounds –*

- 1) CLW over posterior occipital region 3 x 3 cm.
- 2) Chemical Burns over –
 - (i) (Rt) thigh and knee 7cm x 2cm, 5cm x 2cm.
 - (ii) (Rt) forearm 17cm x 5cm.
 - (iii) Post aspect of (Rt) thigh in totally burns.

18. *Other injuries –*

No fracture.

7 The opinion as to the cause of death is that the death was due to head injury.

8 The findings of the postmortem report is duly admitted in evidence by the defence which clearly go to show the various injuries sustained by the deceased. Since in the opinion of the autopsy surgeon the cause of death was head injury, we do not find any reason to disbelieve that the death of the deceased was otherwise than homicidal.

9 PW-1 Hirubai Ramchandra Garude, informant and the daughter of deceased, in her substantive evidence (Exh.20) has broadly corroborated the contents of FIR which we have already narrated while giving factual backdrop of the prosecution case.

10 What is apparent from the evidence of the PW-1 informant is that there were strained relations between the deceased and the accused over the agricultural land which was allegedly given by the deceased to A-1 on *batai* basis and since A-1 allegedly and fraudulently had gotten mutated the agricultural land in his name, a civil suit was going on between the deceased and A-1. Because of this strained relations and as also having regard to an earlier incident, she suspected that the respondent-accused along with deceased-accused might have assaulted the deceased-father.

11 It is also pertinent to note from her evidence that after reaching the hospital she tried to ascertain from the deceased-father about the incident but her father was not in a position to tell anything because of the injuries sustained by him. Thus, quite obviously the informant-daughter could not gather the information under what circumstances her father was gravely injured.

12 PW-2 Ramesh Shankar Bacchao states in his evidence (Exh. 25) that he owns fast-food cart. He also knew deceased-A-1 who was Circle Officer at Satana. It is his evidence that around 4 years ago, three persons came to him to purchase snacks. One of them was accused before the Court i.e. A-2. Other person was Popoat i.e. deceased A-1 and the third person was an old man of about 80 to 85 years of age. Next day he came to know that the old man died.

13 By examining this witness, the prosecution wanted to show that PW 2 had lastly seen the deceased in the company of respondent-accused. It is also clear from the evidence of this witness that he was not knowing old man, who was of 80-85 years of age. Although, his evidence shows that he came to know that the old man died on the next

day but his evidence nowhere shows that he personally verified that it was the same old man who had been to his food cart to have snacks. It further becomes clear from his cross-examination when he states that he was never called by the police for test-indentification parade. If this was so, he could not have stated in his examination-in-chief that he became aware of the same old man of having died who had visited his food cart in the previous night. Therefore, in our considered opinion, the testimony of this witness does not help the prosecution in any manner.

14 In **Darshana Devi Vs. State of Punjab**¹, the Hon'ble Apex Court held as under:

“Even though an oral dying declaration can form basis of conviction in a given case, but such a dying declaration has to be trustworthy and free from every blemish and inspire confidence. The reproduction of the exact words of the oral declaration in such cases is very important.”

15 Keeping in mind the above proposition, we appreciate the evidence of PW-3. PW-3 Dadaji Pundlik Jadhav (Exh. 26) states in his evidence that on 12/06/1998 PW-1 came to him and told that the accused had beaten their father and his body was lying behind the S.T.

Stand of Lohner. She also told that their father was admitted in Rural

¹ 1996 Supreme Court Cases (Cri) 38

Hospital, Satana. He, therefore, rushed to the hospital. His father had sustained injuries on head and he also found right hand, leg and private part in burnt condition. He was unconscious.

16 It is his further evidence that on the same day his father was removed to Nashik Civil Hospital where he regained consciousness within 1-2 days. His father told him, his sister (PW-1) and brother that on 12/06/1998 at about 3-00 p.m. he was taken by Popat (deceased A-1) and Eknath (A-2) from Bhowada to S.T. Stand. His father further told them that deceased A-1 asked him to withdraw the case about land and on his refusal to withdraw the case, deceased A-1 mounted blows on his head by means of a stick while A-2 assisted him. His father died on 21/06/1998 at Nashik Civil Hospital.

17 The testimony of this material witness can be assailed on number of grounds. Firstly, PW-1 informant, who is none other than the sister of this witness, nowhere corroborates the version of PW-2 that after having received the information as to the injuries sustained by the deceased-father she firstly rushed to this witness and apprised him of the precarious condition of the deceased-father.

Secondly, although PW-3 claims that the deceased-father had given an oral statement as to the cause of injuries sustained by him in his presence and in the presence of his sister (PW-1) and another brother but surprisingly, this important fact does not get corroboration from the mouth of PW-1 informant. On the contrary, not only FIR but the substantive evidence of PW 1 clearly shows that she tried to ascertain from her deceased-father as to the circumstances leading to his pathetic condition because of injuries but could not do so as her father was unconscious.

Thirdly, even assuming that some sort of statement was given by the deceased-father to his son PW-3 but then no medical evidence is forthcoming showing that the deceased was in a fit condition to make statement.

Fourthly, although this witness was allegedly told by the deceased-father about the cause of the injuries on 12/06/1998 yet he did not approach the police immediately. His cross-examination shows that he gave his statement only when he was approached by the police on 22/06/1998. This means from 12/06/1998 till 22/06/1998 although this witness was knowing that it was the respondent-accused, who were behind murderous assault on his deceased-father, he maintained an eerie silence. This is something which is not palatable. Rather, an

adverse inference deserves to be drawn against this witness. Thus, for all the aforesaid reasons, we are not prepared to place reliance on the testimony of PW-3.

18 In our considered opinion, the learned trial judge has taken into consideration all the aforesaid lacunae, which are noted by us in proper perspective. The prosecution, in our opinion, has failed to establish and connect the respondent-accused with the crime and has thus not been able to bring home the guilt of the respondent-accused beyond reasonable doubt.

19 We are of the considered view that the learned trial Court is right in holding that the prosecution has failed to prove its case beyond reasonable doubt. This finding of the learned trial judge could not be said to be perverse. It was based on a proper appreciation of evidence.

20 For the aforesaid reasons, we find no merit in the Appeal and the same is dismissed accordingly.

(V. G. BISHT, J.)

(PRASANNA B. VARALE, J.)