

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 879 OF 2013

1. Ramdas s/o. Baban Marne

Age: 42 yrs., Occ: Painter/Agri.

R/o. Marnewadi Taluka Mulshi,

District- Pune. (since deceased)

2 Raju s/o. Sadhu Shedge,

Age: 38 yrs., Occ. : Agri./Labour,

R/o. Rihe, Shedge Wadi,

Taluka- Mulshi, District-Pune.

... Appellants.

(Appellant No. 2 at present at Yerwada
Central Prison.)

V/s.

State of Maharashtra

... Respondent.

WITH

CRIMINAL APPEAL NO. 1321 OF 2013

State of Maharashtra

(Through Paud Police Station)

... Appellant.

V/s.

1. Baban Chapaji Marne.

Age 68 yrs., Occ: Agri./Labour.

R/o. Ramnagar, Warje Malwadi, Pune.

Originally from Marnewadi,

Taluka Mulshi, District-Pune.

2 Bharat Baban Marne,

Age 31 years, Occ. Labour/Agri.

R/o. Ramnagar, Warje Malwadi, Pune.

Originally from Marnewadi,

Taluka Mulshi, District-Pune.

... Respondents.

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Mr. Satyavrat Joshi a/w. Mr. Nitesh Mohite, advocate for appellants in appeal No. 879 of 2013 and for respondents in Appeal No. 1321 of 2013.

Ms. P.P. Shinde, APP for the State.

**CORAM : SMT. SADHANA S. JADHAV &
N.J. JAMADAR, JJ.**

**RESERVED ON : OCTOBER 8, 2020.
PRONOUNCED ON : OCTOBER 22, 2020.**

JUDGMENT (PER SMT. SADHANA S. JADHAV, J)

1 The appellants herein take exception to the Judgment and Order dated 28/6/2013 passed by Additional Sessions Judge, Pune, thereby convicting the appellants herein for the offence punishable under section 302 read with section 34 of the Indian Penal Code and sentencing him to suffer R.I. for life and to pay fine of Rs. 5,000/- each i.d. to suffer further R.I. for 3 months.

2 The appellant No. 1 Ramdas, Son of Baban Marne is original accused No. 2. He has been convicted alongwith appellant No. 2/accused No.4 Raju s/o. Sadhu Shedge. That Ramdas Marne was enlarged on bail during the pendency of the appeal vide order dated 28th October, 2013. It is informed that the appellant No. 1-Ramdas

Marne has expired. Hence, the appeal stands abated as against Appellant No. 1- Ramdas Marne.

3 Such of the facts necessary for the decision of this appeal are as follows :

On 30/11/2011 when Savitribai Marne P.W. 2 was at home and at that time, she was informed by one woman that her husband was assaulted at village Urawade. Savitribai P.W. 2 rushed to the spot. She saw her husband lying in a pool of blood. She noticed that he was assaulted on his head and a part of his skull was lying near him. Upon inquiring, her husband had allegedly informed her that the present appellant No. 2 had assaulted him on his head by scythe, whereas the accused No. 2 had caught hold of him, and accused No. 1 and 3 were exhorting accused Nos. 2 and 4 to eliminate him. That, police had reached the spot with ambulance. While they were passing Bhugaon, the injured had again reiterated the transaction, in which he had sustained injury and then had fallen unconscious.

4 The injured was taken to Hardikar Hospital at Pune. While at Uruwade Phata, she had informed her son Laxman, who was at

Warje, Malwadi about the incident. She met her son in Hardikar Hospital and informed him about the disclosure statement made by her husband. Laxman P.W. 1 had then accompanied the police to Paud Police Station and lodged a report against all the accused. On the basis of which, Crime No. 184 of 2011 was registered at Paud Police Station for the offence punishable under section 302 read with section 34 of the Indian Penal Code.

5 After Laxman had set criminal Law into motion, in the course of investigation, the police had recorded the statements of several witnesses. At the trial, the prosecution has examined 12 witnesses to bring home the guilt of the accused. The accused have also examined 3 defence witnesses.

6 The case of the prosecution mainly rests on the evidence of P.W. 1 Laxman Marne, son of the deceased Barku Marne; P.W. 2 Savitribai Marne, wife of the deceased to whom, the deceased had made a statement that he was assaulted by the accused persons i.e. accused Nos. 1 and 3 were holding the deceased to facilitate the assault by accused No. 4 and that accused Nos. 1, 2 and 3 were exhorting the

accused No. 4 to assault the injured; P.W. 5 Shankar Phale, a panch to the recovery of weapon and bloodstained clothes at the instance of the present appellant No. 2; P.W. 6 Dr. Yogesh Choudhary, who was attached to Hardikar Hospital and had examined the deceased on admission; P.W. 7 Dr. Ajay Tawade, who performed autopsy on the dead body of the deceased Barku Marne; P.W. 9 Sachin Gokulsing Pardeshi, who was attached to Paud Police Station as PSI on 30/11/2011 and was the first police personnel who had reached the spot and had conducted investigation at the initial stage; P.W. 12 Sahadeo Dhakane, who had taken over investigation in the present case on 30/11/2011.

7 At the trial, P.W. 1 Laxman Marne, who is son of the deceased Barku, in his testimony before the Court has stated that there was a dispute between his father-Barku and accused No. 1 Baban Marne, who happens to be his uncle. That they were in possession of their share in the ancestral agricultural land, but no mutation to that effect was recorded in the record of rights and that his father was insisting upon giving effect to the partition in the record of rights. According to him, on 30/11/2011 at about 8 a.m. he had received a phone call from his mother informing him that his father has been

assaulted at Urawade phata at the hands of the four accused persons i.e. his uncle Baban, two sons of Baban i.e. accused nos. 2 and 3 and Raju Shedge(present appellant No. 2) who happens to be the nephew of Baban and the deceased. He was also informed that Raju has mounted assault with the aid and instigation of Accused Nos. 1, 2 and 3. After reaching Urawade Phata, P.W.1 learnt from the passers by that the injured was taken to Hardikar Hospital and hence, he reached Hardikar Hospital at about 11 a.m. The police had enquired with him about the incident. He accompanied the police to Paud Police Station and lodged the report against the accused persons. According to him, 5 months ago, his father had lodged a report against the present accused persons. P.W. 1 has conceded that the accused Nos. 1 and 3 are residing in Warje Malwadi, whereas the accused No. 2 was suffering from serious ailment.

8 Smt. Savitribai P.W. 2, wife of deceased has deposed before the Court about the dispute between accused No.1 and her husband. According to her, on the day of the incident, her husband had departed from the house on his M-80, as he was to visit Sutardara. In the morning, she was cleaning utensils and at that time, one woman had

informed her that her husband was assaulted within the limits of village Urawade. She reached the spot within 20 to 25 minutes. It is the admission of P.W. 2 that Urawade Phata is situated at 20 to 25 minutes walking distance, but she could cover the distance within 10 to 15 minutes by running and fast walking. She had taken the head of her husband on her lap and at that time, he had disclosed to her that accused No. 4 had assaulted him by scythe on his head at the behest of accused Nos. 1 and 3 and that time, accused No. 2 had caught hold of him. The same narration was reiterated in the ambulance while they were passing Bhugaon, which is almost 25 kms. from Urawade Phata. Thereafter, the injured had become unconscious and succumbed to the injuries in Hardikar Hospital. Therefore, this is a case, which rests upon the oral dying declaration of deceased Barku.

9 P.W. 3 Noormahamad Mulani runs mutton shop at Urawade. The deceased was lying injured in front of his shop. He has resiled from his earlier statement and has feigned ignorance about the incident of assault or disclosure made by the deceased to P.W. 2. P.W. 4 is also declared hostile by the prosecution.

10 Dr. Yogesh Chaudhari, P.W. 6 was attached to Hardikar Hospital. According to him, Barku Marne was admitted by his relatives in the hospital at about 12 noon. The history was narrated by Shankar Marne stating that the injured was assaulted by 2 to 3 persons. The injured was admitted in ICU. He was unconscious and in gasping condition and therefore, his B.P. and pulse were unrecordable. His pupils were not reacting to light. The injuries as noticed by P.W. 6 are as follows :

- i) There was 10 cm. cut wound over left side cheek extending from left lower eye lid to left ear upper surface.
- (ii) There was cut wound of 10 cm. over left side cheek extending from left ear upward 4 cm. to scalp.
- (iii) There was 6 cm. cut wound over parietal region of the scalp.
- (iv) There was 2 cm. cut wound over occipital parietal region of scalp. There was depressed comminuted fracture over left parieto temporal. Bone was exposed, with skin loss. There was crepitus over fracture site.

The admission and treatment papers are marked at Exh. 63. It is candidly admitted by P.W. 6 in his cross-examination that before the above said injured was admitted in the hospital, he was treated by Dr. Sandeep Marne of Ratnadeep Hospital, Ghodewadi Phata, Pirangut.

But the wounds were sutured in Hardikar hospital.

11 At the threshold, it is clear that the accused were arrested on the basis of the FIR on the basis of the information given by P.W. 2. The distance between the house of the deceased and P.W. 2 from the place of incident as conceded by P.W. 2, is such that, normally, it requires about 25 minutes to reach the spot. It is the specific case of P.W. 2 that one woman, whose identity was not brought on record by the prosecution through P.W. 2, must have taken about 25 minutes to reach to P.W. 2 and equal time spent by P.W. 2 to reach the injured. Therefore, a question arises as to whether after sustaining such injuries, the injured was in a position to speak.

12 It is therefore, necessary to discuss the nature and gravity of injuries to ascertain as to whether the injured would be conscious and in a fit state of mind to speak to P.W. 2, who reached the spot almost after more than half an hour of the alleged incident.

13 P.W. 7 Dr. Ajay Tawade had performed autopsy on the dead body of the deceased Barku. He has noted several chop wounds. He

has noticed following injuries.

- 1) 3 stitched chop wounds over left side of face, from left nostril to 1 cm. above left ear, antero posterior 8 x 0.5 cm. angles margins were clean cut.
- 2) 4 stitched chop wounds from 1 cm. above and behind left eyebrow upto 6 cm. behind and above left ear 13 x 1 cm. angles and margins were clean cut.
- 3) Chop wound over left parieto occipital region of head. 6 x 0.3 cm. angles and margins were clean cut.
- 4) Tangential chop wound over left temporo occipital region oval 2 cm. behind left ear. 8 x 7 cm. scalp tissue and 1/3rd layer of bone missing. Remaining bone showing displaced communitated fracture. Margins clean cut.
- 5) Chop wound starting from center of injury No. 4 running horizontally on right side over occipital region. 5 x 0.5 cm. Angles and margins clean cut.
- 6) Incised wound starting from lower aspect of injury no. 4 running horizontally on right side over occipital region. 7 x 0.5 cm. Angles and margins were clean cut.
- 7) Incised wound 0.5 cm. below injury no. 6. 3 x 0.5 cm. angles and margins were clean cut.
- 8) Incised wound 3 cm. below injury no. 7. 2 x 0.3 cm. margins and angles were clean cut.
- 9) Abrasion over right arm middle 1/3rd region. Postero laterally 2 x 0.2 cm. red in colour.

On internal examination, P.W. 7 had noticed hematoma in the skull in the left side all over. There were linear clean cut injuries 1 to 3 and 5 of column No. 17 and sub-archonoid hemorrhage all over at the places. The brain matter was odematus and the cause of death is due to chopped injuries sustained over head. In the cross-examination, Doctor has specifically stated that injury no. 4, as 1/3rd layer of bone was missing. It amounts to fracture of skull bone. All injuries indicated profused bleeding leading to instantaneous death.

14 P.W. 9 Sachin Gokulsing Pardeshi was attached to Paud Police Station as PSI on 30/11/2011. He was informed by PI to visit village Urawade where a person was assaulted. He had reached the spot but at that time, injured was moved to Hardikar Hospital. He then visited Hardikar Hospital. Upon enquiry, the doctor had informed that the injured was not in a fit state to make statement. Inquest panchanama which was drawn at the hospital by P.W. 9 is at Exh. 74. Then alongwith P.W. 3 and one Vikas Veer, he had been to the spot and recorded scene of offence panchanama which is marked at Exh. 75. P.W. 9 had recorded statement of Rafiq Mulani, Vinayak Rairikar, Haridas Shelar and Pradeep Botre. Upon recording the statement of

the said witnesses, it had transpired that they were present at the spot at 8.20 a.m. and they had seen the injured lying in a pool of blood.

15 The prosecution has led evidence of recovery of weapon at the instance of present appellant No. 2 on 4/12/2011. The recovery of weapon is proved through P.W. 5 Shankar Phale and it is marked at Exh. 58. According to P.W. 5, panchas and police were led by accused No. 4 to his house in village Rihe. There were dung cakes stored on the loft in the house and the accused had unearthed the scythe alongwith one shirt, trouser and other clothes from beneath the dung cakes. The said articles were seized by the police and the panchanama is marked at Exh. 59. The said witness is resident of Lonawala, which is almost 72 kms. from Marnewadi. That no banian was seized under the panchanama at Exh. 57. Exh. 57 pertains to seizure of clothes of deceased Barku.

16 It is admitted in the cross-examination that on 30/11/2011 itself, Paud police had asked him to visit the police station on 4/12/2011, the day on which recovery panchanama was to be drawn. The recovery panchanama shows that a motor cycle belonging to the

appellant bearing registration No. MH 14- 6189 was also seized at the relevant time. Similarly, scythe and the clothes of appellant were shown to be recovered in Exh. 58.

17 P.W. 9 has also admitted that since P.W. 3 was residing near the spot, he was called to act as panch, while recording the scene of offence panchanama, but no enquiry was made from him. The scene of offence was shown to the police by P.W. 1. There is no mention of seizing a banian from the scene of offence in the scene of offence panchanama at Exh. 75.

18 Sahadev Dhakane P.W. 12 had taken over the investigation in the present case on 30/11/2011, although, initial investigation of the said offence was carried out by P.W.9. The recovery of weapon from the present appellant is recorded at Exh. 58. P.W. 12 conceded that in front of the house of accused No. 4, a motor cycle bearing No. MH-14-Y-6189 was parked and there was heap of cow dung cakes and beneath that, the accused had concealed a red colour polythene bag containing blood stained scythe, blood-stained faint purple colour full shirt with ash colour bloodstained trouser and the under garment,

which was recovered at his instance under section 27 of the Indian Evidence Act. All the articles were wrapped separately in a brown paper and were sealed in the presence of panchas. The muddemal property seized on 4/12/2011 alongwith blood samples of the present appellant which was taken on 2/1/2012 was sent to forensic laboratory on 13/2/2012.

19 PW.12 has affirmed the statement of P.W. 2 to the extent that Paud police had called the ambulance. The injured was taken to Hardikar Hospital by the said ambulance. In the very next breath, it is admitted that the police had never been to spot so long as the injured was there, hence, there was no question of recording statement of the injured by the police, pursuant to the disclosure by P.W. 2 and therefore, the portion marked “A” of the evidence of P.W. 2 has been refuted. It is also conceded by P.W. 12 that the injured was initially taken to hospital at Pirangut and then to Hardikar Hospital. However, no investigation was carried out by P.W. 12, as he had no information about the hospital at Pirangut, as P.W. 2 had also not disclosed about it.

20 Learned Counsel for the appellant vehemently submits that the bloodstained clothes and the scythe recovered at the instance of appellant No. 2 by effecting panchanama, which is at Exh. 59, nowhere mentions that the alleged scythe and clothes were sealed in the presence of panch witnesses and there is no cogent evidence on record to show that the sealing which was allegedly effected by the investigating agency by effecting the panchanama below Exh. 58 was such that the same could not have been tampered with. And therefore, according to the learned Counsel, report of forensic science laboratory shows that the blood groups on the scythe recovered at the instance of the appellant indicates that the blood-stains on the scythe were of “O” group. In any case, the muddemal was sent to the forensic laboratory on 13/2/2012 and there is nothing on record to indicate that they were kept in safe custody, after sealing in the intervening period.

21 PW. 12 has made a frail attempt to offer an explanation for the delayed recording of statement of PW. 3 and PW. 4 by saying that he was busy in apprehending the accused.

22 At this stage, it would be necessary to note that the

prosecution has not adduced evidence of Pradeep Botre and therefore, the accused have examined him as a defence witness.

23 On the basis of the statement of the witnesses, it had transpired that **no relative of the injured had been on the spot till he was shifted to the hospital.** It is admitted by P.W. 9 that the statement of Pradeep Botre(D.W.1) was recorded on 30/11/2011.

24 D.W. 1 Pradeep Botre has deposed before the Court that on 30/11/2011 at about 8.30 a.m., he had been to Urawade Milk diary to deliver milk. Thereafter, while he was chatting with other companions, someone informed them that an unknown person is lying in an injured condition nearby. They rushed to the spot. He noticed that the injured had sustained injuries, which were profusely bleeding. The injured was unconscious and thereafter, the injured was carried by Piago vehicle to the hospital. Police had arrived thereafter. The police had taken the phone number of Pradeep Botre and instructed him to visit Paud Police Station in the evening. D.W. 1 had then been to the police station, where his statement was recorded by the police officer. D.W. 1 has denied the suggestion that he had learnt the identity of the

assailants of Barku Marne. He has specifically stated that no family member of the injured was present on the spot so long as he was there. He had asserted that the injured was unconscious.

25 As far as the defence witness No. 1 is concerned, his evidence could not have been discarded only because he was a defence witness. In fact, his statement was recorded on the day of incident i.e. 30/11/2011.

26 In the case of **Dudhnath Pandey v/s. State of U.P reported in (1981) 2 SCC page 166**, the Apex Court has held that -

“Defence witnesses are entitled to equal treatment with those of the prosecution. And, courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often they tell lies but so do the prosecution witnesses.”

In the present case, there is no reason for the defence witness to depose in favour of the accused as the accused were also strangers to him.

27 Similarly, in the case of **Munshi Prasad and others v/s. State of Bihar reported in (2002) 1 SCC 351**, the Apex Court while

placing reliance on the case of **Dudhnath Pandey (cited supra)** has held that -

“Before drawing the curtain on this score however, we wish to clarify that the evidence tendered by the defence witnesses cannot always be termed to be a tainted one by reason of the factum of the witnesses being examined by the defence. The defence - witnesses are entitled to equal respect and treatment as that of the prosecution. The issue of credibility and the trustworthiness ought also to be attributed to the defence witnesses at par with that of the prosecution - a lapse on the part of the defence witness cannot be differentiated and be treated differently than that of the prosecutors' witnesses.”

28 The statement purportedly made by the deceased to P.W. 2 is in the nature of oral dying declaration under section 32 of the Indian Evidence Act.

29 The papers of Hardikar Hospital would show that the injured was admitted in the hospital at 10.30 a.m.. There was profuse bleeding from the head injury. His blood pressure, oxygen level, pulse rate were very low. He was unconscious. At the time of admission, Shankar Marne i.e. son of P.W. 2 and Ankush Maruti Sathe i.e. a close relative of P.W. 2 were present. The injuries noted are “injuries over

scalp left side, bleeding present, patient was shifted to local hospital and from there to Hardikar Hospital. Patient brought in unconscious condition. The injuries were sutured. B.P, Pulse were not recordable, declared dead at 1 p.m.” The history as given by the relatives was that the patient was assaulted by 2 to 3 persons at Marne wadi in the morning by some sharp metal object.

30 Learned Counsel for the appellant vehemently submits that while admitting in the hospital, names of the assailants were not disclosed. All that was stated is that the patient was assaulted by 2 to 3 persons at Marnewadi. This would be a ambiguous statement. Specific role was attributed to each of the accused persons which according to the learned Counsel for the appellant would make it a clear case of false implication of the present appellant alongwith acquitted accused. Learned APP submits that this is a case which rests upon the statement of the deceased made to P.W. 2 which can be read under section 32 of the Indian Evidence Act and that a conviction is sustainable on the basis of a dying declaration.

31 No doubt that a conviction can be recorded on the basis of

the oral dying declaration provided, it is truthful and inspires confidence of the Court. In the present case, corroboration would be necessary after taking into consideration the nature of the injuries, coupled with the fact as to whether the injured was conscious and fit to make a statement to P.W. 2, when she reached there.

32 Learned Counsel for the appellant has placed reliance upon the Judgment of this Court in the case of **Milind Ramchandra Gharat reported in 2015 (1) Bom. C.R. (Cri.) 724**. However, in the said case, the scribe of the dying declaration had not written the exact words in which the deceased had narrated the incident. The contents of the dying declaration were not proved and therefore, in the facts of that case, the Court has held that -

“Apart from that, an oral dying declaration is primarily a weak piece of evidence and unless the Court finds that implicit reliance can be placed on the evidence relating to oral dying declaration, no conviction can be based on the oral dying declaration.”

33 It is true that Barku Marne had died homicidal death on

30/11/2011. What falls for determination is as to whether the oral dying declaration is corroborated and would inspire the confidence of the Court. Corroboration to a dying declaration is a rule of prudence, since the deponent is not available for cross-examination.

34 At this stage, it is the contention of the learned Counsel for the appellants that upon considering distance between the scene of offence and the residential house of the deceased from where P.W. 2 has rushed to the spot, it is doubtful as to whether Barku Marne was in a position to speak and could have narrated the incident to P.W. 2. It is also submitted that it is the contention of the P.W. 2 that she had reached the scene of offence and thereafter, police had reached the spot alongwith ambulance, are not worthy of any credence to the said claim. There is no material to show firstly, as to who had informed the police, so that they could reach the spot with ambulance. Secondly, it is doubtful as to whether the injured was not noticed by any one else before arrival of P.W. 2. In fact, the evidence of D.W. 1 cannot be ignored. He was one of the few persons who had seen the injured before the arrival of police and P.W. 2. The incident had occurred on a public road. There are no eye witness to the incident.

35 Learned APP submits that there is no reason to disbelieve P.W. 2 since according to her, the police had reached the spot with ambulance. The fact that the police had reached alongwith ambulance is not established beyond reasonable doubt after taking into consideration the evidence of defence witness No. 1.

36 The trial Court could not have been oblivious to the fact that the the deceased was very seriously injured, so much so that the injured became unconscious immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. Moreover, there is evidence that injured was first taken to Ratnadeep Hospital at Pirangut and was treated by Dr. Marne. According to P.W. 2, the injured was not treated at Pirangut but was examined by the doctor in the ambulance itself and, thereafter, was referred to Hardikar Hospital.

37 In the case of **Waikhom Yaima Singh Vs. State of Manipur reported in (2011) 13 SCC 125**, the injured was lying in an unconscious state on the road when he was found by one of witnesses

who called other people, his friends and other relatives who had found that the deceased was unconscious. He was given some treatment and according to the prosecution, he had given a dying declaration but succumbed to the injuries within few hours. In the said case, the trial Court had disbelieved the dying declaration. However, the High Court had placed implicit reliance upon it. The Apex Court had set aside the Judgment of the High Court and restored the Judgment of the trial Court. The observations of the Apex Court are as follows :

“14. It is also to be seen that the deceased was very seriously injured, so much so that according to the witnesses, he died immediately after allegedly making the said dying declaration, the time of which is not fixed by the prosecution. The most important circumstance about this dying declaration is that, firstly, it is oral and secondly, there is no medical evidence suggesting that the deceased was in a fit medical condition to make such a dying declaration.

15. There can be no dispute that dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the present case also, the exact

words are not available.”

38 At the cost of repetition, P.W. 9 had recorded the statement of Pradeep Botre, defence witness No. 1 and he had categorically stated that at the time, when people reached on the spot, the injured was unconscious and that he was taken to nearby hospital in Piago vehicle. P.W. 9 has further stated that it had transpired in the course of investigation that by the time the police had reached the scene of offence, injured was taken to the hospital. However, according to P.W. 12, there is a specific assertion that the police had never been to the spot as long as injured was there and hence, there was no question of recording of statement by the police. There is also no link evidence to show the time when the police had received the information. It would also be pertinent to record that when the police was informed about the said incident, there was no question of the police taking an ambulance alongwith them. It is the specific contention of D.W. 1 Pradeep Botre that the injured was taken in PIAGO vehicle. It is also stated by D.W. 1 that at the relevant time, when the injured was taken in PIAGO vehicle, none of the relatives had reached the scene of offence. The trial Court ought to have weighed the evidence of D.W. 1

in the same scale as that of prosecution witnesses.

39 In the present case, considerable time was lost by the time, P.W.2 had learnt about the said incident. D.W. 1 and others were first to reach the spot and it is a part of evidence that the injured was taken in a PLaGO Vehicle. Police had reached the spot subsequently and then, ambulance was called. The injuries were so grievous that part of the skull was lying by the side of the victim and in the said condition there is no possibility that the injured may have been in a position to speak to P.W. 2. P.W. 2 was aware of the disputes between the accused and the deceased and, therefore, had arrived at a conclusion that the accused were perpetrators of the crime.

40 Moreover, on the basis of same set of evidence, learned Sessions Judge had disbelieved that the accused Nos. 1 and 3 had any role to play in the brutal assault, although it was a specific contention of P.W. 2 that her deceased husband had disclosed to her that accused Nos. 1 and 2 had caught hold of him to facilitate the assault by accused No. 4 and had also exhorted the accused No. 4 to give the fatal blow.

41 The dying declaration has to be read as a whole. The Apex Court in the case of **State of Punjab Vs. Parveen Kumar reported in (2005) 9 SCC 769** has held that -

“10. While appreciating the credibility of the evidence produced before the Court, the Court must view evidence as a whole and come to a conclusion as to its genuineness and truthfulness. The mere fact that two different versions are given but one name is common in both of them cannot be a ground for convicting the named person. The court must be satisfied that the dying declaration is truthful.”

42 The Division Bench of this Court to which one of us was a party (Smt. Sadhana S. Jadhav, J), in the case of **Laxmibai Moon and anr. V/s. State of Maharashtra reported in 2012 (4) AIR Bombay R 536** has held that-

“It is not that a conviction cannot be recorded on the basis of the dying declaration unless there is corroborating evidence. However, the truthfulness has to be borne out from the plain reading of the dying declaration without addition or subtraction. A dying declaration in fact stands on the same footing as any other piece of evidence and has to be judged in the light of the surrounding circumstances and with reference to the principles governing the weighing of evidence. Though corroboration is not

essential, its introduction and existence is otherwise expedient to strengthen the evidentiary value of the declaration.”

“14. A dying declaration has to be read as a whole. One cannot pick and choose the contents of the dying declaration and convict on the basis of incriminating material. The consistency has to be as a whole.”

43 Merely because the overt act of causing assault is attributed to the appellant No. 2, he cannot be held guilty. There is no prelude to the incident. A dying declaration has to pass all the tests of reliability, as declarant is not available for cross-examination.

44 Another incriminating circumstance, according to the prosecution, is recovery of the scythe and bloodstained clothes of the appellant No. 2. Scythe was allegedly concealed below the heap of dung cakes stored in the house of the appellant No. 2. The house was occupied by several members. The bloodstained clothes and the scythe was sent for forensic examination practically after more than 2 months of recovery. Moreover, bloodstained banian of the deceased was allegedly seized from the scene of offence. It is not the case of P.W. 2 that the injured had been denuded of his shirt and banian, when she saw him at the scene of offence. Therefore, the seizure of bloodstained

banian belonging to the deceased from the scene of offence would indicate that there is suppression of the genesis of the incident and the manner, in which criminal law was set into motion. The possibility that the recovered clothes were tampered with, cannot be ruled out and therefore, it would not be appropriate to hold recovery of scythe and bloodstained clothes as incriminating circumstance against the accused/appellant No. 2.

45 To substantiate his contention, the learned Counsel for the appellants placed reliance upon the case of **Ashraf Hussain Shah v/s. State of Maharashtra** reported in 1996 Cri. L.j. 3147. The Hon'ble Court has held that :

“A Division Bench of this Court to which one of us (Vishnu Sahai J) was a party in the case of [Deoraj Deju Suvarna v. State of Maharashtra](#), reported in 1994 Cri LJ 3602, after considering a large number of authorities has held that not only should the prosecution adduce evidence that after seizure the articles were sealed but should also lead link evidence to the effect that till being sent to the Chemical Analyst they were kept throughout in a sealed condition. This is done to eliminate the suspicion that blood might not have been put on the articles subsequent to the recovery and prior to being sent to the Chemical Analyst.”

46 It is true that in the present case, the prosecution has not placed on record any material to show that the muddemal articles were kept in safe custody till they were sent to forensic science laboratory.

47 The whole incident of assault and the manner in which criminal law was set into motion, seems to be shrouded with suspicion and hence, the conviction recorded by the learned Sessions Judge deserves to be quashed and set aside.

CRIMINAL APPEAL NO. 1321 OF 2013

48 The State, being aggrieved by the Judgment and Order dated 28/6/2013 passed by Additional Sessions Judge, Pune, thereby acquitting the accused Nos. 1 and 3 i.e. Respondent Nos. 1 and 2 in has preferred Criminal Appeal No. 1321 of 2013.

49 According to the learned APP, in the dying declaration which was given to P.W. 2, the deceased had categorically stated that he was caught hold by the accused Nos. 1 and 3 to facilitate brutal assault by accused No. 4 and that the accused Nos. 1 and 3 need to be

necessarily held as perpetrators of the crime.

50 In Criminal Appeal No. 879 of 2013 above, we have already discussed the evidence holding that the extenuating circumstances in which law was set in motion against accused on the basis of the statement of the injured is doubtful, as it is seen from the evidence that in all probabilities the injured was in no condition, physical or mental to make a statement to PW. 2. He was lying in a pool of blood. A part of his skull was lying next to him because of the deep chop wound. That soon after he had made statement, he had fallen unconscious.

51 The prosecution has failed to establish the time when the incident occurred, the time when the police was informed about the incident and the time when he was taken to the hospital. Hence, it would not be safe to rely upon the said dying declaration.

52 According to the learned APP, the accused had a motive to eliminate the deceased. However, it is not necessary that every motive would be translated into action. A family dispute over property may

not always be a good reason to eliminate a person in day light without there being some prelude to the incident.

53 According to the learned Counsel for the respondents, the quarrel between the accused persons and deceased was only in respect of recording names in the record of rights and in any case, they can take recourse to the appropriate proceedings and therefore, it cannot be said that the same was a motive to eliminate the deceased.

54 In totality of the facts of the present case and the aforementioned reasons, the Judgment and Order dated 28/6/2013 passed by Additional Sessions Judge, Pune acquitting the respondents calls for no interference.

55 Hence, following order is passed in both the appeals.

ORDER

(i) Criminal Appeal No. 1321 of 2013 filed by State is dismissed.

(ii) Criminal Appeal No. 879 of 2013 stands abated in case of

Appellant No. 1 Ramdas Marne.

(iii) Criminal Appeal No. 879 of 2013 is allowed in case of Appellant No. 2 Raju s/o. Sadhu Shedge.

(iv) The conviction and sentence imposed vide Judgment and Order dated 28/6/2013 passed by Additional Sessions Judge, Pune is hereby quashed and set aside.

(v) The appellant No. 2 Raju s/o. Sadhu Shedge is acquitted of all the charges levelled against him.

(vi) The appellant No. 2 Raju s/o. Sadhu Shedge be released forthwith, if not required in any other case.

(vi) Fine amount, if paid, be refunded forthwith.

56 This order will be digitally signed by the Private Secretary of this Court. All concerned will act on a digitally signed copy of this order.

(N.J. JAMADAR, J)

(SMT. SADHANA S. JADHAV, J)