

VISHWANATH
SATYANARAYANA
SHERLA

apeal.282.2001 (J).doc

Digitally signed by
VISHWANATH
SATYANARAYANA
SHERLA

Date: 2021.12.23
14:55:56 +0530

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

CRIMINAL APPEAL NO.282 OF 2001

The State of Maharashtra

... Appellant
(org. accused)

Vs.

Dashrath Krishna Waghwankar
age 24 years, Occu.: Labour work
r/of Ruthetali, Tal. Rajapur
District Ratnagiri

New address:

Room No.9, Ground floor,
Datta Sad Gowari building, Kamothe Gaon
kamothe, Panvel, Navi Mumbai

... Respondent

Mr.S.S. Hulke, APP, Appellant – State

Mr.Atal B. Dubey with Mr.Rahul Mishra for Respondent - accused

**CORAM: S.S. SHINDE &
SURENDRA P. TAVADE, JJ.**

**JUDGEMENT RESERVED ON: DECEMBER 8, 2021
JUDGEMENT DELIVERED ON: DECEMBER 23, 2021**

JUDGEMENT (PER S.S. SHINDE, J.):

1. This appeal is filed by the appellant-State challenging the judgment and order dated 11th January, 2001, passed by the learned Additional Sessions Judge, Ratnagiri in Sessions Case No.18 of 1995, thereby acquitting the accused for the offence punishable under Section 302 of the Indian Penal Code, 1860.

2. The prosecution case in short can be summarized as under:-

The accused Dashrath and the complainant Madhukar (PW1) are the residents of village Runthetali. Deceased Asha was the minor daughter of the complainant Madhukar Ghanekar. On 13th July, 1994, Asha and her cousin Jayashri (PW2), went to Patkaltali for grazing their cattle. The accused Dashrath was also present there with his cattle. At about noon, Asha went to bring back her two bulls which had gone to the place where the accused was grazing his cattle. However, since Asha did not return even after about 10 minutes, PW2 Jayashri went to the said place. Prior to that, she gave shouts and called Asha, however, at that time, as it was raining and the atmosphere was windy, Jayashri felt that Asha might not have heard her shouts. So, when Jayashri went to the said place, she saw that the accused Dashrath was assaulting Asha with a scythe and was giving repeated blows of scythe on Asha. She saw that because of such blows of scythe, Asha fell down on the ground. Thereupon, the accused saw Jayashri. So, Jayashri was afraid that she would also be assaulted and, therefore, she ran away from that place and came to the

residence. At residence, she disclosed about the incident to Madhukar and his wife. Thereupon, Madhukar, his wife and their son alongwith Jayashri went back to the said place. They all found that Asha was lying on the ground with severe injuries on her person and she was dead. Thereafter, the Police Patil of the village went to the Rajapur police station. The police persons went to Runthetali about 9pm on the said day. PW5 PSI Bagave also went to the village about 11pm. Thereupon, he recorded the complaint of Madhukar. The said complaint was sent to Rajapur Police Station for registration of crime, which was registered at C.R. No.76 of 1994 with the Rajapur Police Station against the accused.

Investigation commenced. Accused was arrested from his home. Chargesheet was submitted. Thereafter, charge was framed for the offence under section 302 of the Indian Penal Code. The defence of the accused was of total denial and hence, the trial proceeded accordingly. After completion of trial, the learned Additional Sessions Judge, Ratnagiri acquitted the accused. Hence, this Appeal by the State against the said acquittal.

3. Learned APP appearing for the Appellant – State submitted that the trial Court has failed to consider the evidence adduced by the prosecution in proper perspective and erred in acquitting the respondent – accused. He submitted that the trial Court has erred in coming to the conclusion that the deposition of PW3 panch witness for arrest of the accused was contrary to the panchanama recorded. He submitted that the trial Judge has erred in holding that the discovery at the instance of the respondent – accused has not been properly proved under section 27 of the Indian Evidence Act. He also submitted that the trial Judge erred in coming to the conclusion that there was delay on the part of the complainant to lodge the complaint. He further submitted that the learned trial Judge has erred in not believing the evidence of PW2 Jayashri on the ground of absence of considerable blood stains on the shirt of the accused seized by the Investigating Officer. He has, therefore, prayed that the impugned judgement and order dated 11th January, 2001 be reversed and the accused be dealt with in accordance with law.

4. On the other hand, learned Counsel appearing for the Respondent – accused has relied on the contents of and the

reasoning given in the impugned judgement and order passed by the trial Court and submitted that no interference be called for and the Appeal be dismissed.

5. We have considered the submissions of the learned APP appearing for the appellant – State and Mr.Dubey, learned Counsel appearing for the respondent – accused. With their able assistance, perused the evidence on record and the findings recorded by the trial Court. In order to prove the prosecution case, the prosecution had examined as many as six witnesses. The complainant Madhukar Ghanekar as PW1; Jayashri Sahadeo Ghanekar as PW2; panch witnesses Ganapat Anant Ware as PW3; panch witness Anant Ramchandra Bandabe as PW4; PSI Ragho Ramchandra Bagave as PW5; and Dr.Dhnyaneshwar Arjun Aiwale who conducted postmortem on the dead body of Asha, as PW6.

6. In order to find out whether the death of Asha was homicidal, accidental or suicidal, the prosecution examined Dr.Dhyaneshwar Aiwale, who, at the relevant time, was the Medical Officer at the Primary Health Center, Dhartale. He deposed that on 14th July, 1994, the dead body of Asha was received by him for postmortem.

On the same day, the dead body was taken to Rajapur for postmortem at Rajapur Municipal hospital as there were no postmortem facilities available at Dhartale. Accordingly, on that day in between 3pm to 4pm, the postmortem was performed by him. He had deposed about the injuries observed by him which were mentioned in his evidence. He noticed, in all, 10 injuries and he had opined that all the 10 injuries suffered by Asha were caused with sharp and hard object.

In cross-examination of the said witness, there was nothing for the accused to put forth for disputing the injuries caused to Asha. So also, nothing was put to the said witness by the defence council for disputing the cause of death and other such details. Therefore, it is concluded by the trial Court that Asha died a homicidal death.

7. PW1 Madhukar Ghanekar, the complainant, had deposed that due to a quarrel in the past between his daughter Asha with one Pushpa Krishna Waghvankar, sister of the Respondent accused Dashrath Waghvankar, the family members were on cross terms with the accused, although the same was settled by the villagers. At the relevant time of quarrel, the accused had said

that he will commit murder of at least one person from the family of Ghanekar. On 13.7.1994, Madhukar's daughter Asha and niece Jayashri had gone to nearby fields for grazing their cattle at which place accused had also gone to graze his cattle. On that day, Madhukar was at his residence. At about 1pm, Jayashri came running to his residence in a frightened mood and she told Madhukar that Dashrath was assaulting Asha with scythe at Patkaltale. So, Madhukar alongwith his wife, son Ashok went to the said place where they saw that Asha was lying on the ground. There were injuries on her neck and Asha was in a pool of blood and in fact dead. After hearing their cries, villagers gathered there. He deposed that on the said date it was raining and somebody from the village had informed the police and thereupon at about 11pm, the police came to his residence, at which time, his complaint was recorded at exh. 40. In the cross-examination, he stated that it is incorrect to say that there was quarrel with Vaghvankar by him with regard to paying subscription to the committee. He also stated that he did not inform the police about the past incident involving Sitaram Waghvankar, cousin brother of the accused, as he was not enquired by the police about it and there was no occasion for him to inform it to the police.

8. The real question which is to be determined in the present Appeal is who was the author of the injuries caused to Asha resulting in her death. The prosecution claims that the incident was witnessed by Jayashri Ghanekar, who was examined as PW2. She stated that in 1993, she and Asha had gone to Hanuman temple for cleaning. At the temple, there was quarrel between Asha and Pushpa Waghvankar. Accused Dashrat also participated in the said quarrel and gave abuses. He also gave threat of committing murder of at least one person from Ghanekar family. However, the quarrel was settled by the villagers.

On the day of the incident i.e., on 13th July, 1994, at about 8.30am, she and Asha went to Patkalwatali for grazing their cattle. The accused Dashrath was also present at the said place for grazing his cattle. It was raining and the atmosphere was windy. At about 12.30pm, Asha went to look for her bull at the place where the accused was grazing his cattle. Thereafter, for about 10 minutes, Asha did not return and, therefore, she (PW2) gave shouts for Asha, however, she suspected that the shouts went unheard because of rain and wind. Therefore, she went to the place where Asha had gone. There, she saw that scuffle was

going on between Asha and the accused. She saw that the accused was assaulting Asha with a scythe due to which Asha fell on the ground. Thereafter, the accused noticed her there (PW2 Jayashri) and she got afraid that the accused would assault her also and, therefore, she ran away to her residence. At the residence, she disclosed about the incident to the father of Asha and his wife. Then they all went to the place where Asha was being assaulted. At that time, Asha was found dead. She has deposed that the villagers also followed them to that place.

9. Thus, it is evident from a careful perusal of her evidence that, the alleged incident had taken place at about 12.30pm at Patkalwatali. She returned home immediately and told the said incident to her uncle and his wife. They proceeded towards the spot followed by the villagers. During her cross-examination, a suggestion was put to her that there was dispute between the family of Dashrath Waghwanekar and the father of Asha for subscription of committee and to resolve that dispute, a meeting was called. However, the said suggestion was denied by PW2. During her cross-examination, she admitted that on 13th July, 1994, the police came at about 7pm for enquiry about the incident. The

enquiry was made by the police with her about the incident. It was stated that her statement was recorded by the police on 13th July, 1994 at about 11pm. She further stated that her statement was also recorded at Rajapur. She further stated in her cross-examination that within 5 minutes after seeing the incident, she started running to the residence. She left the place and at that time the accused was continuing the act of giving blows on the person of the deceased Asha. Within seconds, after reaching the house, her uncle and the wife of her left the house and proceeded towards the spot of incident. It is stated that within 10 minutes, they went to the spot of the incident followed by the villagers. When they went to the spot, the accused was not present at the said place. She admits that 2 - 3 villagers had accompanied them. However, she had no talk with those persons about the incident. The news was spread in the entire Wadi. Thereafter, the villagers were making enquiry with her about the incident.

She further deposed that on 14th July, 1994, at about 11am, PW5 PSI Ragho Ramchandra Bagave came to her residence and at that time, her statement was recorded by PW5. She stated that at that time, she did not know that one is required to file a

complaint about such incident. She deposed that the incident had taken place at about 12.30pm on 13th July, 1994.

10. Upon a careful perusal of the evidence of PW2, it is clear that within 10 minutes of seeing the accused assaulting Asha, she reached her residence and her uncle and his wife and the other villagers went to the spot. However, none of the witnesses saw the accused either assaulting Asha or running away from the spot or nearby the spot of the incident. It is also strange to note that PW2 did not tell anything to the villagers about the said incident. She claims that her statement was recorded on 13th July, 1994 at 11 pm by the police. The said statement has not been relied upon by the prosecution or suppressed by the prosecution and her statement which was recorded on 14th July at 11am was only brought on record before the trial Court. Though she stated that the police came at 7pm and she narrated the incident to the police, there was no such evidence brought on record by the prosecution before the trial Court. It appears that the Police Patil, who accompanied PW2 and her uncle to the spot, went to the police station at about 6.45pm, and informed about death of Asha, and on the basis of said information, the police present in the police

station entered the information in the police station diary. However, he did not tell as to who were the assailants. It is stated that to travel between the said village and the police station, it takes about 1 hour. However, as per the claim by PW2, the police visited their village at about 7pm. There was no reason for the said police personnel not to record the complaint or at least orally inform the police station in charge officer about the incident. However, there is no evidence on record to suggest that at about 7pm, Jayashri informed the said police about the incident and those police personnel, who were present in the village, as claimed by PW2, had either recorded the statement of the complainant or the statement of PW2. Therefore, in absence of any other evidence on record and with the only statement of PW2 dated 14th July, 1994 at 11am on record, the trial Court has drawn a reasonable inference that if Jayashri was the star witness of the prosecution case, who claimed that she saw the incident, her statement should have been recorded by the police with promptitude. The delay in recording the statement of PW2 belatedly by more than 22 hours from the happening of the alleged incident would cast doubt about the claim of the prosecution that PW2 had actually witnessed the incident.

11. It appears that the concerned police officer visited the village at 11pm and thereafter, the First Information Report was registered. The narration of PW1 ie., the complainant in his deposition was certainly relying upon the information given by PW2 Jayashri. It is also strange to note that even the complainant did not tell name of assailant to the villagers and the Police Patil. In the aforesaid background, the trial Court recorded the finding that there was delay in lodging the First Information Report so also about the conduct of the prosecution witnesses not telling the villagers name of the assailant.

12. The prosecution claimed that there was recovery of clothes from the house of the accused between 2am to 3am on 14th July, 1994 as stated by the Investigating Officer PSI Bagve (PW5). However, PW4 Anant Ramchandra Bandabe, who was panch witness to the said seizure panchanama, stated that the said recovery of clothes was in between 7pm to 8pm on 13th July, 1994. The trial Court keeping in view the evidence of panch witness and the Investigating Officer, recorded a finding that there is a complete mismatch in the timing of such recovery and seizure and, therefore, the said alleged recovery of clothes cannot be relied

upon and accepted. The trial Court has also seen the C.A. report. It has also observed that neither the blood group of the deceased nor the accused was determined by the prosecution and in absence of such exercise, merely finding alleged blood stains on the clothes of the accused which were allegedly recovered from his house, is of no use. The learned trial Judge has also commented on the procedure followed at the time of seizure of clothes and articles and also the manner in which the said recovered articles were sealed and seized and the delay caused in entire process.

13. The prosecution claimed that the weapon i.e., scythe and the clothes were recovered pursuant to the memorandum statement of the accused when he was under arrest. The panch witness PW4 Anant deposed that the accused mentioned the place in the house where the scythe was kept. The trial Court upon perusal of the evidence on record noticed that the said scythe and akadi were not hidden and were not in a concealed position but the same were kept at an open place. The said panch witness PW4 also deposed that at the relevant time, the accused was handcuffed. It is well established that when the accused is

handcuffed and is asked to give the memorandum statement and pursuant to such statement, certain discovery is made, it is of no use, since by various pronouncements by this Court and the honourable Supreme Court, it is held that if the accused is handcuffed and at his instance, his memorandum statement is recorded and pursuant to informaton given by him, a recovery is made, the same cannot be believed being with a shadow of doubt in making such voluntary statement.

14. Upon perusal of the evidence of the Investigating Officer PSI Bagave (PW6), he failed to offer explanation before the trial Court about serious lacunae in the investigation.

15. Upon appreciating the entire evidence on record, we are of the view that the evidence of PW2 Jayashree cannot be believed in absence of corroboration to the said evidence. The alleged recovery of the clothes and seizure of weapon is disbelieved by the trial Court for cogent reasons with which we are in full agreement in the light of the discussion in the foregoing paragraphs. On the whole, the prosecution case suffers from inadequacies and also from a clear, cogent and clinching evidence to reverse the order of acquittal by the trial Court. The findings

recorded by the trial Court appears to be in consonance with the evidence on record. We have minutely examined the findings recorded by the trial Court. In the light of the evidence on record, however, we did not find even a single finding perverse or contrary to the evidence on record. For the moment, even if it is assumed that on the strength of the evidence available on record that another view is possible, is no ground to cause interference in the order of acquittal if plausible view is taken by the trial Court in view of the settled position in law by a catena of decisions of the High Court and the honourable Supreme Court. The order of acquittal passed by the trial Court is of 11th January, 2001. We are hearing this Appeal in the year 2021 and in absence of clear, cogent and convincing evidence on record, we are unable to persuade ourselves to accept the prosecution case and reverse the finding of acquittal.

16. In that view of the matter, the appeal filed by the State shall fail and accordingly, the same stands dismissed.

(SURENDRA P. TAVADE, J.)

(S.S. SHINDE, J.)