

1. **IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL NO.343/2018

1. Waghya alias Manoj Bhaiyalal Uke,
aged about 29 years, Occ. Labourer,
2. Sandip s/o Bhaiyalal Uke,
aged about 28 years, Occ. Labourer,

Both r/o Station Fail, Wardha,
Dist. Wardha.

.....APPELLANTS

...V E R S U S...

The State of Maharashtra,
through P.S.O. Wardha (City),
Tq. Dist. Wardha.

...RESPONDENT

Mr. Amit Band and Mr. Ashwin Wasnik, Advocates for appellants.
Mr. Sanjay Doifode, A.P.P. for respondent-State.

CORAM:- V. M. DESHPANDE AND
AMIT B. BORKAR, JJ.

DATE:- AUGUST 31, 2021

ORAL JUDGMENT (Per: V. M. Deshpande, J.)

1. This appeal is directed against judgment and order of conviction passed by learned Sessions Judge, Wardha dated 09.05.2018 in Sessions Case No.115/2015. By the impugned judgment, the learned Sessions Judge found both the appellants guilty of committing the offence punishable under Section 302 read with Section 34 of the Indian Penal Code (IPC) and, therefore, directed them to suffer imprisonment for life and to pay a fine amount of Rs.5,000/- by each of them with default clause.

2. We have heard Mr. Amit Band with Mr. Ashwin Wasnik, learned counsel for appellants and Mr. Sanjay Doifode, learned A.P.P. for respondent-State. Learned counsel for both the appellants argued identically.

3. The main plank of their submission is that Jayshri Waghmare (PW4), who is examined as an eye witness in this prosecution case, is not an eye witness and, in fact, she is planted by the police. Their another submission is that if evidence of Jayshri (PW4) is discarded then there is no evidence to connect the appellant in the crime in question. They are also making a submission that the prosecution has not proved motive for committing murder of Pintu, the deceased. Alternatively, it is their submission that, in any case, role attributed to appellant no.2-Sandip is that he assaulted by fists and kicks. Therefore, he cannot be held guilty for the offence under Section 302 of the IPC. So far as appellant no.1-Waghya is concerned, their submission is that the incident has occurred in a spur of the moment, therefore, at the most, he could be convicted for the offence punishable under Section 304-I of the IPC.

4. Per contra, learned A.P.P. vehemently opposed these submissions. From reading of the evidence of Jayshri (PW4), he submitted that it cannot be said that she is a planted witness. He also submitted that the Chemical Analyser's (CA) report corroborates the prosecution case inasmuch as the blood having group "B" was found on the clothes of both the appellants. The said blood group belongs to the deceased. He, therefore, submitted that the appeal be dismissed.

5. Wheels of criminal justice system were set into motion by Narayan Sonwane (PW1), father of the deceased. On 29.07.2015, he came to police station and lodged his report stating therein that he came to his house after finishing his duty and he was resting. In between 09.00 to 09.15 p.m., one boy came to his house and informed that his son Pintu is assaulted near Motghare Bichayat Kendra by one Waghya and his brother and he has been taken to Civil Hospital, Wardha. Therefore, he and his wife Suman came to the Government Hospital. From there, as per the FIR, he was referred to Sewagram and he was taken in ambulance. When he has accompanied Pintu, Pintu made oral dying declaration to him that both the appellants assaulted on him when he asked them to give side.

6. Murlidhar Burade (PW9) is the investigating officer of crime No.348/2015, which was registered on the basis of the report lodged by Narayan (PW1). He has conducted the entire investigation. During the investigation, he has seized various articles including the articles from the places which were shown by both the accused persons when their statements under Section 27 of the Evidence Act were recorded, when they were in Police Custody Remand. He also recorded statements of witnesses. He sent the muddemal to the CA. His evidence would show that after completion of the usual investigation, he filed final report in the Court of learned jurisdictional Magistrate who found that the offence is exclusively triable by the Court of Sessions. He, therefore, committed the same to the Sessions Court. After the case was committed to the Sessions Court, it was registered as Sessions Case No.115/2015. Learned Additional Sessions Judge framed the charge against both the accused. Both the accused abjured their guilt and claimed for their trial.

7. In order to bring home guilt of the accused, the prosecution has examined in all nine witnesses and also relied on various documents duly proved during the course of trial. After the prosecution tendered pursis of closure, both the appellants

were examined by the learned trial Judge under Section 313 of the Code of Criminal Procedure. Not only that, they examined one defence witness Sanjay Gharde (DW1).

After a full dress trial, the learned Sessions Judge found that the prosecution is successful and, therefore, passed the impugned judgment.

8. The investigating officer, in presence of pancha witness Sanchin Suryawanshi (PW3) has done inquest over the dead body. Inquest panchanama is at Exh.-50. Various injuries were found while conducting the inquest.

The dead body was sent to Mahatma Gandhi Institute of Medical Sciences (MGIMS) for post mortem. Post mortem was conducted by Dr. Pavin Zopate (PW8). Unchallenged version of this autopsy surgeon shows that till that time he has conducted more than one thousand post mortems. Thus, it is very clear that the doctor was very experienced doctor. His evidence would show that he along with one Dr. Ashish Salankar have conducted autopsy over the dead body of Pintu. The post mortem started at 11.40 a.m. and completed at 1.50 p.m. on 30.07.2015. He found following external injuries :

“i) Puncture wound size 2 cm x 1 cm x muscle deep (insertion of probe to assess the depth is upto the muscular intercostals structure between 5th and 6th ribs) oblique in direction over right side of chest 13 cm from medical end of right clavicle in 6th intercostals space. Both angles are acute, margins are clean cut, reddish in colour.

ii) Puncture wound size 2 cm x 1 cm x muscle deep (insertion of probe to asses the depth is upto the bone of 8th rib) oblique in direction over right side of chest 15 cm from medical end of right clavicle over 8th rib. Both angles are acute margins are clean cut, reddish in colour.

iii) Stab wound size 2 cm x 1 cm x parenchyma deep (insertion of probe to asses the depth is from the intercostals space between of 8th and 9th ribs upto soft tissues of liver) oblique in direction over right side of chest 17 cm from medical end of right clavicle over 8th rib. Both angles are acute margins are clean cut, reddish in colour.

iv) Puncture wound size 2 cm x 1 cm muscle deep (insertion of probe to asses the depth is upto the intercostals space between 3^d and 4th rib) oblique in direction over right side of chest 5 cm from

medical end of right clavicle over 4th intercostals space. Both angles are acute, tailing of 3 cm is seen directing towards the nipple, margins are clean cut, reddish in colour.

v) Puncture wound size 2 cm x 1 cm x muscle deep over left side of public bone 48 cm from medial end of left clavicle oblique in direction over left public bone. Both angles are acute, margins are clean cut, reddish in colour.

vi) Puncture wound size 2 cm x 1 cm x muscle deep over right lateral side of lower abdomen 40 cm from medial end of left clavicle oblique in direction over lower abdomen. Both angles are acute, margins are clean cut, reddish in colour.

vii) Puncture wound size 2 cm x 1 cm x muscle deep over right lateral side of right forearm 4 cm from lateral olecranon process of radius of right hand oblique in direction over right forearm. Both angles are acute, margins are clean cut, reddish in colour.

viii) Linear abrasion of 4 cm in length over right side of neck 4 cm above the medial end of right clavicle reddish in colour.

ix) Abrasion of 4 cm X 2 cm over right side of back cm in length over right side 40 cm below the tip of right shoulder joint reddish colour.”

9. Various internal injuries were also found when the dead body was opened during the course of autopsy by autopsy surgeon. The doctor has also pointed out corresponding injuries when he examined internal injuries, as it could be seen from his evidence as under:

“3. Injuries found on the persons of deceased were antemortem. During internal examination, we found on opening of scalp subgaleal hematoma was present involving right and left occipito parietal and temporal region. On thorax fracture of 8 rib of right side of chest is seen on anteromedial aspect. Effusion of blood was seen in intercostals spaces of right side of chest in the region of fracture and 6th, 9th and 4th intercostal spaces is correspond to injury no.1, 2 & 3 found on external examination. Around 300 ml of frank blood was seen in right side of thoracic cavity. Pleura showed tear of 0.8 long parentchyma deep on anteromedial side of lower robe of right side of lung which correspond to the fracture of 8th right side of chest. Both lungs were pale, laceration of size 0.8 cm. parenchymal deep seen over anteromedial aspect of lower rub of left lung.

4. *On internal examination of abdomen, we found puncture wound of 2 cm. X 1 cm. X muscle deep over left lateral side of lower abdomen, which was corresponding to the injury no.6 found on external examination. All organs were in situ round 300 ml. Of blood was seen in the right flank region of abdomen.*

5. *On internal examination of liver, it was pale, stab wound of 2 cm. X 0.5 cm. X 4 cm. deep over lateral lobe of liver which correspond to injury no.3 found during external examination. On cut section hepatic parenchyma was pale, the depth of wound was 4 cm. over the lobe, Gall bladder was partially filled with dark, green bile. The large bile ducts were patent and non dilated.*

6. *During post-mortem, we preserved viscera, blood sample and cloths in sealed condition. Cause of death hemorrhage and shock in a case of assault.”*

10. Dr. Zopate proved post mortem report, which is at Exh.76. According to Dr. Zopate, the injuries found in the post mortem were sufficient to cause death even if moderate force is applied. From the inquest panchanama, post mortem report, evidence of Dr. Zopate, it is clear that Pintu died unnatural death and it was a homicidal one.

11. According to the prosecution, appellants are the persons who are responsible for the homicidal death of Pintu whereas the learned counsel for the appellants would submit that there is no evidence by which they could be implicated as culprits.

12. Learned counsel for the appellants would submit that there was no motive on the part of the appellants to commit murder of Pintu. From examination of the prosecution witnesses, it is clear that the prosecution could not point out any motive. Whether that is sufficient to acquit the appellants is the question that is posed to this Court being decided. The law is well crystallized. It would be beneficial for us to refer to the authoritative pronouncement in Mani Kundaswami Shettiyyar Vs. The State of Maharashtra; reported in 2014 ALL MR (Cri) 3436, wherein a coordinate bench of this Court, by keeping reliance on the apex Court decision in Mulakh Raj Etc. Vs. Satish Kumar & Ors.; reported in 1992 SC 1175, held that when there is an eye witness account and the eye witnesses are very clear in respect of the assault, the motive loses its importance. Therefore, we will have to examine whether there is any eye witness account in the prosecution case or not.

13. Number of eye witnesses does not matter, what is important is the quality of the evidence of the witness who gives eye-witness account. If the evidence of the eye witness inspires confidence in the judicial mind and if it is found that evidence of such a witness is trustworthy and it has passed the test of searching cross-examination then the evidence of the solitary eye witness is sufficient to record the finding of guilt.

14. To assail the evidence of Jayshri (PW4), who was eye witness in the case, learned counsel for the appellant submitted that her police statement is recorded after the period of two days of the incident that casts serious doubt about the character of Jayshri (PW4) as an eye witness. They also invited our attention to the evidence of Sanjay Gharde (DW1) to show that on the date of incident, Jayshri (PW4) did not visit his shop to purchase grocery as claimed by her.

15. Evidence of Jayshri (PW4) shows that she knows both the accused since childhood they being residing near her house. Similarly, she states that she knows deceased Pintu who was photographer by profession. This particular version that she knows the deceased has gone unchallenged.

According to this prosecution witness, on 29.07.2015 at about 08.00 p.m., she has gone to purchase sugar in the grocery shop of Sanjay (DW1) and when she was returning, she noticed appellant no.1-Waghya was abusing in filthy language at a square near Motghare Bichayat Kendar. That time, deceased Pintu was coming on his motorcycle from the side of Dayal Nagar. Appellant Waghya was standing on the road. Therefore, the deceased asked him to give side so that he could pass from that point. According to this prosecution witness, thereupon Waghya flared up and said, “Kisko Side Me Hone Ko Bol Raha.” Thereafter, he stopped his vehicle, caught hold of his scalp hair, dragged him from the motorcycle and assaulted by kick and fists. In the meantime, according to her version, Waghya went inside the house and brought Gupti. Thereafter, appellant no.2-Sandip caught hold of the deceased and thereafter appellant no.1 assaulted on the deceased. The autopsy surgeon has found in all nine injuries, puncture, stab wounds, etc. on the vital parts, which were stated by Jayshri (PW4).

16. Though Jayshri (PW4) was cross-examined at length by two different learned defence counsel, her evidence has remained unshaken qua the participation of the appellants and the role

attributed to them by Jayshri (PW4). Even before this Court, nothing could be pointed out by both the learned counsel for the appellant to show anything different.

17. The incident has occurred on 29.07.2015 and police statement of Jayshri (PW4) was recorded on 31.07.2015. In this background when the cross-examination of this witness is minutely seen, it will be crystal clear that she is the witness, who has firstly informed to the police about the incident. This particular portion is brought on record in her cross-examination. Not only that, she offered explanation also as to why at that point of time she did not disclose name of the appellants to the police because she was frightened.

During the course of cross-examination, it is brought on record and reproduced as under:

“When police came to the spot, I informed police about the incident. However, it was not reduced into writing on the same day.”

18. From this version, it is clear that this witness did not lose precious time in informing the incident to the police. However, if the police are not recording her statement

immediately that is the lapse on the part of police machinery. However, for the lapse on the part of police machinery, the character of Jayshri (PW4) as an eye witness cannot be doubted on that count. It is also pointed out during the course of submission that there is an omission on the part of Jayshri (PW4). It appears that the omission is not about the assault made by the appellants but the omission is about the part of the body i.e. stomach. Merely because that particular portion of the body is found to be the improved version, entire prosecution case cannot be said to be in the shadow of doubt, especially when deceased received various injuries. Once it is specifically deposed by Jayshri (PW4) about the assault and the role played by each of the accused, this Court is giving stamp of approval to the judgment of the learned Sessions Court that evidence of Jayshri (PW4) is found to be trustworthy and free from any falsehood. In our view, the motive loses its importance.

19. Diwakar Tijare (PW2) is pancha witness. In his presence, both the accused gave their discovery statements. Admissible portion of the discovery statement of appellant no.1-Waghya is Exh.-32. Whereas the recovery panchanama is at Exh.-33. Waghya led police party as per his discovery statement and

reached to his own house from where he took out the clothes and Gupti. Those were seized in presence of Diwakar (PW2). That time clothes of Waghya, full pant and T-shirt were found to be blood stained and also Gupti was having blood stains. The substantive evidence of Diwakar as well as contemporaneous documents Exh.-33 show that on the spot itself after seizure investigating officer has properly sealed the articles.

20. Similarly, admissible portion of discovery statement of appellant no.2-Sandip is at Exh.-34 and recovery panchanama is at Exh.-35, which show that he took out blood stained clothes of his from the place which were in his exclusive possession. Those were also property seized and sealed as per the evidence of Diwakar (PW2) and contemporary document Exh.-35.

21. Another pancha witness Sachin (PW3) was also examined during the course of trial who proved spot panchanama Exh.-45. Blood stained clothes of two persons by name; Anish Dongre and Pankaj Waghmare who took the deceased from the spot to the hospital. These two witnesses were not examined by the prosecution. However, on examination of the entire record of this case it shows that their clothes which were seized and sent

to the CA were also having blood stains of blood group-B of the deceased.

22. Devendara Masram (PW6), has drawn map of this spot. Sheikh Chand (PW7), took weapon from Police Station to the doctor for obtaining his opinion as to whether the injury found on the dead body could be caused by Gupti. Dr. Zopate (PW8) has given his query report i.e. Exh.-77. Evidence of Dr. Zopate would show that the weapon which was brought to him was having a blade and both the edges were sharp from the tampering end was 3 cm. The blade of weapon was curved to 9 cm. at proximal end. Dimension of weapon – length 27 cm., blade length 24 cm. and maximum width of blade was 2 cm. at the tampering end which was curved. According to Dr. Zopate, all the injuries which were found by him while conducting post mortem could be caused by the said weapon.

23. The investigating officer has sent muddamal to CA under Exh.-104. As per the CA report Exh.-110, blood group of the deceased was 'B'. Similarly, as per Exhs.-108 and 109, the blood of both the appellants were also found to be 'B'. When the blood of very same group was appearing on the clothes of the

appellants, it was expected from them to offer explanation. However, they utterly failed to give any explanation as to how blood group 'B' is appearing on their clothes.

The charge framed against the appellants that they assaulted on the deceased is found to be proved in view of the ocular account and the said eye witness account is found to be duly corroborated by CA report, Exh.-111.

24. The alternate submission of the learned counsel, in our view, is also required to be rejected. The deceased was proceeding to his house. He was not having enmity whatsoever with any of the accused. Appellant no.1 was found to be obstructing the way and he was hurling abuses. What was the mistake that was committed by the deceased was that he asked appellant no.1 that he should give way so that he could proceed. Upon that, the appellants assaulted on him. It appears that from the crime-chart, which is at Exh.-115 and 116, both the appellants are having past criminal record. No doubt true that Gupti blow was given by appellant no.1 alone, however, we cannot forget that before assaulting the deceased by means of Gupti, even appellant no.2 assaulted the deceased by fist and kick blows. His role does not end there. When he was assaulting by kick and fist blows,

appellant no.1 went to his house and brought Gupti and thereafter appellant no.2 firmly caught hold of the deceased and appellant no.1 gave assault by means of Gupti, resulting into the numerous injures which were found in the post mortem report.

25. In that view of the matter, in our view, the learned Sessions Judge has rightly applied the law laid down in Manik Das & Ors. Vs. State of Assam; reported in AIR 2007 SC 2274, and rightly found appellant no.2 guilty for the offence under Section 302 of the IPC taking the aid of Section 34 of the IPC.

26. Before parting with the judgment, it would be useful to make reference to the evidence of Jayshri (PW4) in which she stated from the witness box that constantly she was receiving threats from the family members of the appellant. Therefore, she was required to file report against the relatives and upon her report, crime was registered vide Crime No.757/2017. This crime was registered on 29.03.2017. That shows that anyhow both the appellants were intending to see that Jayshri (PW4), is frightened and she will not depose before the Court and State the truth.

27. On reappreciation of the entire prosecution case afresh, we are of the view that the learned Sessions Judge has not committed any error in convicting both the appellants for the offence punishable under Section 302 read with Section 34 of the IPC. Consequently, the appeal is dismissed.

JUDGE

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