

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 560 OF 2015

Dinesh Arjunsingh Thakur
age 23 years, occ. Labour
r/o At Sai Residency, Pratapnagar
Tq. & Dist. Latur

Appellant

Versus

The State of Maharashtra

Respondent

Mr. R. S. Deshmukh, Senior Counsel, instructed by Mr. Govind
Kulkarni, Advocate for the appellant.
Mr. A. M. Phule, APP for the State.

CORAM : R. G. AVACHAT &
R. M. JOSHI, JJ.

RESERVED ON : 13th OCTOBER, 2022.
PRONOUNCED ON : 19th OCTOBER, 2022.

JUDGMENT : (PER R. M. JOSHI, J.)

1. By this appeal under Section 374 of the Code of Criminal Procedure, appellant-accused takes exception to the judgment and order dated 16th June, 2015 passed in Sessions Case No. 236/2012, by the Additional Sessions Judge -4, Aurangabad, wherein he is

convicted for the offence punishable under Sections 302 and 385 of the Indian Penal Code.

2. In short it is the case of the prosecution that on 4th February, 2012, at about 6.30 am, Vitthal Kamble (deceased) left house for visiting the unit run by his wife as 'Bachat Gat'. At about 7.45 am, ASI Mote received wireless message from the control room informing about a person being lying in injured condition near Devanagari railway track. He, therefore, went to the spot and found a person lying with bleeding injury to the left side of stomach. He was taken to hospital and from his mobile phone, his family members were contacted. He lodged report vide Exhibit 21 and the law was set in motion. Investigation started and police recorded statement of injured as well as got his statement recorded through the Executive Magistrate on 8th February, 2012, while the deceased was admitted in Ghati hospital. He also informed to his wife about the incident. While taking treatment, the injured succumbed to his injuries on 11th February, 2012.

3. Accused came to be arrested after one month of incident. It is claimed by the investigating agency that the accused made

statement under Section 27 of the Indian Evidence Act giving disclosure about the motorcycle being parked at railway station and knife was recovered from the panel of said motorcycle at his instance. Seized muddemal is referred to and Forensic Science Laboratory CA report shows that the said knife was stained with blood group that of deceased. Apart from this, prosecution has sought to place reliance on testimony of Eknath Maghade (PW 9) and PW Avinash Gawali (PW 10) to whom extra judicial confession statements were made by the accused in respect of the incident in question.

4. Learned advocate for the appellant submitted that evidence relied upon by the prosecution is not sufficient to prove guilt of the accused beyond the shadow of reasonable doubt. According to him, oral dying declaration as well as dying declarations recorded by police and Executive Magistrate are not reliable. In order to support his statement, he drew attention of this Court to the testimony of relevant witnesses and submitted that considering the circumstances appearing on record it is not probable that the injured could have made those disclosure statements. Apart from this, he submitted that the statements made by the injured are inconsistent and hence cannot be made basis of conviction. He placed reliance on the

judgment of the Honourable Apex Court in the matter of Uttam vs. The State of Maharashtra in Criminal Appeal No. 485/2012 in support of his argument challenging dying declaration.

5. On the point of recovery of knife, he drew attention of the Court to the cross examination of panch witness Shaikh Azimuddin s/o Shaikh Khawjamiya (PW 7) who admitted that police told him that accused had committed murder and kept the weapon in the motorcycle at railway station and that weapon has to be seized. He also referred to the admission of Investigating Officer who claimed that the key of the motorcycle was with accused and there is no mention about the same in the panchanama. In this regard, reference is made to the arrest panchanama wherein findings of key on the person of the accused is not recorded. It is therefore submitted that the said recovery should be discarded and consequently, CA report indicating blood on the seized knife has lost its relevance. He has also raised contention before this Court that assailant is not appellant Dinesh Thakur, but can be some other similarly named person, referred by the injured and that he is falsely implicated. On these amongst other submissions, he seeks acquittal of the accused.

6. Learned APP supported the impugned judgment by pointing out that there is no enmity between the injured/deceased and his family members with the accused in order to falsely implicate him in this crime. According to him, since there is no eye-witness to the incident, the prosecution has proved the circumstances with help of statements made by injured about the cause of his injury which, has resulted into his death and now treated as dying declaration. Attention of the Court is also drawn to the evidence of panch witness in whose presence recovery of knife was done and since the said knife was stained with the blood that of deceased, the said weapon can be connected with the crime in question. Reference is also made to the evidence of Medical Officer and, on the basis of the entire evidence on record, the finding recorded by the Trial Court about homicidal death of the deceased is supported.

7. Raosaheb More (PW 27) ASI attached to Osmanpura Police Station, deposed about visiting spot of incident after receipt of wireless message and having seen one person in injured condition, who was taken to Ghati Hospital. Dr. Chinchole (PW 1), treating doctor, testified admission of Vitthal on 4th February, 2012, in Ghati Hospital, with history of stab injury of chest and abdomen.

According to him, injured was operated on that day. According to Indubai (PW 5), wife of Vitthal, her husband/injured died on 11th February, 2012 in hospital. Dr. Nitin ((PW 19) conducted autopsy on dead body and noticed sutured wound over left lateral lower chest and sutured wound over left hypochondria region, which were found to be anti mortem injuries. The cause of death was complications following stab injuries to vital organ. He also opined about possibility of said injuries being caused by knife (Article 9). It has further come in evidence that spleen was removed and that it is a vital organ. Defence raised questions about nature of injuries and its probability by weapon seized. Medical Officer, however, has maintained his opinion about probability of causing of injuries by seized weapon.

8. It is suggested by defence to Medical Officer that with more injuries patient may survive. He however candidly stated that there is most probability that he may die. Autopsy Doctor is asked about possibility of complications during operation but no such suggestion is made to Dr. Chinchole (PW 1), who was treating doctor. Thus, prosecution by leading cogent evidence has prove that death of Vitthal is homicidal. Defence was unable to create any doubt in the said evidence, to consider possibility of death due to complications

during medical treatment and not result of injuries caused to deceased.

9. There is no eye witness to the incident and considering the early hours at which incident in question has occurred, that possibility is strong. In absence of any direct evidence, it is obligatory on part of prosecution to prove the circumstances and chain of evidence leading to sole conclusion of guilt of the accused, excluding commission of offence by any one else. The first circumstance relied upon by the prosecution in order to connect accused with this crime is the statements made by deceased while he was in the hospital taking treatment for the injuries suffered in the incident in question. Indubai Kamble (PW 5), the wife of deceased, deposed about receiving information about the incident of assault on her husband on 4th February, 2012, at about 8.00 to 8.30 am. She categorically deposed about he (deceased) being admitted in the hospital and that he was unconscious for two days and regained consciousness thereafter. She claimed to have asked her husband on 8th February, 2012 at 5.00 to 6.00 pm about the incident, who informed her that Dinesh Thakur demanded Rs. 20,000/- as extortion/protection money (*khandani*) and as he refused to pay the

said amount to him, Dinesh Thakur had assaulted him with knife and ran away on motorcycle.

10. In the cross-examination of this witness, it has come on record that on 8th February, 2012, at around 5.00 to 6.00 pm she had a talk with her husband in the hospital. Though she has not written down whatever was stated by her husband, however, there appear no reason for her to falsely name Dinesh Thakur to be assailant as informed by her husband. It is nobody's case that Dinesh Thakur had any enmical terms with deceased or his family members or any previous dispute for his false implication.

11. It is tried to be argued that with the help of doctors at Ghati Hospital, false dying declarations were prepared in order to support the case of the prosecution. Said argument however, does not get support from the material evidence and circumstances appearing on record as from 4th February, 2012 to 8th February, 2012, continuously, the Medical Officers of said hospital have refused to certify fitness of deceased for making statement. Had it been a case of creation of false record with the help of doctors, then nothing could have prevented the concerned from creating such record

immediately i.e. on admission of injured in hospital and not after 4 days of admission. Ordinarily, the question of creation of false record would come only where the deceased or his relatives are interested in securing conviction against a particular person owing to some sort of dispute or enmity. In this case, admittedly, there is no enmity between family of deceased and accused herein. This very fact is sufficient to rule out possibility of concoction or fabrication of evidence.

12. It has also come on record during cross-examination of this witness that though the business was in name of Bachat Gat but entire capital for the same was invested by deceased. This fact brought on record by defence, supports theory of prosecution and statement of deceased about he being asked money by way of extortion (खंडणी) and refusal thereof has resulted incident of assault on him.

13. Apart from this, statement of injured was recorded on 8th February, 2012 by the Investigating Officer as well as by Special Executive Magistrate. Krushna Shinde (PW 9), Special Executive Magistrate, claimed to have visited Ghati Hospital and ascertained

medical condition of patient. According to him, after examination of patient, Medical Officer passed endorsement (Exhibit 27) giving condition of patient. He thereafter recorded statement of patient (Exhibit 47) and obtained thumb impression of Vitthal. Even after completion of statement, condition of patient was examined by Doctor and endorsement (Exhibit 23) was made. Insofar as mental and physical condition of patient and he being conscious and oriented during entire period of recording of statement has been duly duly established by prosecution by examining Dr. Chinchole (PW 1). There is thus evidence to hold that statement of deceased (Exhibit 47) was recorded by Special Executive Magistrate after ascertaining his fitness to give statement and that no doubt is created about its voluntariness.

14. No doubt, in one of statements the deceased refers about the weapon as 'knife' whereas in another statement (Exhibit 47), the weapon is described as *Gupti* (mentioned as *Gutti*). Defence is trying to harp upon the said discrepancy in narrating the nature/type of weapon by the deceased. Said objection of the defence however, does not hold any water for the reason that seizure panch witness Shaikh Azimuddin s/o Shaikh Khawjamiya (PW 7) in his evidence has

claimed it to be a big knife. Seizure panchanama shows that total length of knife was 14 inch with 10 cm blade. Investigating Officer calls that weapon as 'dagger'. If the description in seizure panchanama (Exhibit 41) is considered, then there is every possibility of creation of confusion in mind of to anyone about type/name of waeapon. The injured who sustained sudden injury from the assailant committing error in describing the weapon in question as knife or gupti is obvious. On consideration of oral as well as written dying declaration, there appears no material inconsistency and thus dying declarations made by deceased inspire confidence. It is settled law that dying declaration free from suspicion and voluntary should be accepted. It is only rule of prudence that Court seeks validation of dying declaration from attending circumstances.

15. As far as recovery and seizure of the said weapon of assault is concerned, as per the evidence of Shaikh Azimuddin s/o Shaikh Khawjamiya (PW 7), the accused made statement in his presence about the motorcycle being kept in the parking lot of railway station at Aurangabad and the knife being kept in the panel of the said motorcycle. Though in the cross examination he admits that police told him that accused had committed murder and had kept the

weapon in the motorcycle at railway station, but there is no statement as to in which motorcycle i.e. make or colour of vehicle, such knife is kept. His testimony further shows that it was the accused who took them to the railway station and had shown one black colour motorcycle of Hero Honda company bearing registration No. MH 20 BM 6011. It has further come in his evidence that number of two wheelers were parked at railway station parking lot. Since the accused did not mention about the number, make or colour of the motorcycle when the statement was made and recorded in the police station, the particular motorcycle was only within the special knowledge of the accused and since the said disclosure led to discovery of knife, the said recovery clearly attributes to the accused as contemplated under Section 27 of the Indian Evidence Act.

16. Panch witness (PW 7) claims that accused removed the knife from the panel of that motorcycle and that the said knife was seized with affixing labels with signatures of panch witnesses thereon. Perusal of Exhibit 40 and 41 shows that said knife was sealed on the spot. The witness has proved the contents of panchanama (Exhibit 41) and the factum of sealing of the knife has not been challenged during cross-examination.

17. Learned counsel for the appellant has tried to create doubt about said recovery by referring to the cross-examination of the Investigating Officer wherein he has stated that the panel was opened with the key which was with the accused. Since there is no mention about the key in the seizure panchanama of the articles belonging to the accused, it is sought to be argued that this creates possibility of planting of knife by police. First of all, there is no such suggestion made to the Investigating Officer that the knife was planted by police in the motorcycle. Secondly, oral statement of Investigating Officer recorded after two years of the incident cannot be given weightage over the panchanama which is duly proved by the prosecution through PW 7. In the said panchanama, it is specifically recorded that the panel was opened by pushing the same by accused. It is, therefore, clear that there is no substance in the contention of defence that any doubt is created about recovery of weapon at the instance of accused on the basis of statement of the Investigating Officer. There is nothing brought on record to infer planting of weapon by police against accused. It is material to note that no reason is forthcoming on record to falsely implicate appellant in this crime.

18. The seized weapon was sent to Forensic Science Laboratory and CA report Exhibit 61 indicates that the said knife was stained with the blood group 'O' belonging to the deceased. Thus, there is more than sufficient evidence to connect recovery of knife to the assault caused on deceased.

19. Dying declaration of deceased shows that accused had asked for protection money of Rs. 20,000/- from the deceased and for refusal to of the same, he was assaulted. Once the said statement is accepted to be voluntary and made while injured was in conscious and oriented condition, the same provides an additional link between the accused, incident in question and death of the deceased.

20. Though during the course of argument it is argued that accused is not 'Dinesh Thakur' one who might be referred by deceased and there can be any other person of similar name. No such defence however was taken during entire trial nor even in statement under Section 313 of the Code of criminal Procedure.

21. Evidence of Avinash (PW 10) shows that police made enquiry with him about Dinesh Thakur as his whereabouts were not

known. Appellant is arrested after one month of incident. There is no explanation as to where he had been during this time. The evidence on record suggests his abscondance, which provides additional link for accepting his involvement in the crime in question.

22. From consideration of facts and circumstances appearing on record, the conclusion of guilt of the appellant is inevitable. Learned Trial Court has rightly considered the entire evidence on record and the reasons assigned for convicting accused cannot be faulted with. In the result, no case is made out for interference in the impugned judgment of conviction. Hence, appeal stands dismissed.

(R. M. JOSHI)
Judge

(R. G. AVACHAT)
Judge

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