

(1)

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 928 OF 2015

Umakant S/o Vasant Kumbhare (Borikar),
Age. 47 years,
R/o. Motinagar, Latur,
Tal. & District Latur.

... APPELLANT
(Orig. Accused No.1)

VERSUS

The State of Maharashtra
Through Police Station Officer,
Police Station Latur (Rural),
Tal. And District Latur.

... Respondent
(Orig. Complainant)

Mr. Abhay D. Ostwal, Advocate for the appellant
Mr. R. B. Bagul, APP for the respondent/State

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

**RESERVED ON : 10th OCTOBER, 2022
PRONOUNCED ON: 17th OCTOBER, 2022**

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

1. Appellant (original Accused) in Sessions Case No. 4 of 2013 and 118 of 2013 has taken exception to judgment and order dated 16th November, 2015 passed by Additional Sessions Judge, Latur, convicting him for offence punishable

(2)

under Sections 302, 143, 147, 148 read with Section 149 of the Indian Penal Code, by preferring this appeal under Section 374 of the Code of Criminal Procedure.

2. The appellant along with 19 other persons were charged for the offences punishable under Sections 143, 147, 148, 302, 120B read with 149 of the Indian Penal Code and under Section 135 of the Bombay Police Act. They were subjected to the trial on the basis of case of the prosecution that there was a dispute between deceased Dyanoba @ Babu and Vasant-accused No. 17 in respect of bund between their field. Vasant had also filed application for correction in revenue record in respect of the said land. There were complaints made by them against each other with the concerned police station. On 28th June, 2012 between 03.00 to 04.00 p.m. when deceased Babu was sowing his field, appellant-accused No.1 along with his associates formed unlawful assembly, picked up quarrel with deceased Babu on account of removing weeds and assaulted Babu with axe and wooden logs on his head and back. In the said assault Babu sustained severe injuries. After the incident neighbors and villagers came to the spot. Vishnu

(3)

and Macchindra took Babu on motorcycle up to Bori and from there Babu was taken to the government hospital in a pickup vehicle. Mallikarjun-PW-1 who is brother of Babu lodged report Exhibit 138 with Latur Rural Police Station and initially offence came to be registered under Sections 307, 143, 147, 148, 149 of the Indian Penal Code and under Section 135 of the Bombay Police Act. Attempt was made by Police to record statement of Babu however he was found unfit to give statement. On the same day at around 9.50 p.m. Babu died in hospital. Thereafter offence punishable under Section 302 of the Indian Penal Code came to be added against the accused. Investigation was done and on completion of investigation charge-sheet came to be filed before J.M.F.C. who in turn committed the case for trial before the Sessions Court. Initially trial commenced against Accused Nos. 1 to 16 and after subsequent arrest of Accused Nos. 17 to 20, supplementary charge-sheet was filed against them and both charge-sheets were clubbed together. On conclusion of trial except Appellant all other accused persons were acquitted.

(SUBMISSIONS)

3. At the outset learned counsel for the appellant submitted that charge framed by the learned Trial Court is defective as no particulars were mentioned therein specifying his role in the incident of assault. It is submitted that due to this appellant did not get fair opportunity to defend himself and on this ground judgment in question does not sustain. Learned counsel Mr. Ostwal for the appellant submitted that there is no evidence on record to show that the appellant had any dispute or enmity with deceased in order to provide motive for him to commit offence in question. It is submitted that admissions given by the witnesses particularly Vijaymala (PW-9) and Mallikarjun (PW-1) show that the land belonging to appellant is not adjacent to the land of deceased in order to have any dispute between them over the bund. It is submitted that prosecution witness Vijaymala (PW-9) is a got up witness as her statement is recorded after about 80 days of the occurrence of the incident and the delay caused in recording the statement is not satisfactorily explained by the prosecution. It is submitted that from cross-examination of

this witness it is abundantly clear that the witness as well as her daughter were not present when the incident of assault has taken place. According to him learned Trial Court has refused to believe version of this witness and has also observed that her presence at the spot at the time of incident is doubtful. Hence, according to him testimony of this witness could not have been made basis for conviction of the appellant. By referring to the testimonies of Mallikarjun (PW-1), Ankush (PW-2), Macchindra (PW-3) and Mangesh (PW-5), it is submitted that though these witnesses claimed that deceased after the incident of assault as well as while he was being treated in the hospital has given oral declaration to them about appellant having assaulted him but their testimonies are not consistent. The cross-examination of these witnesses according to him indicates that while Babu was being taken to the hospital he was in unconscious state and therefore, question of he making statement to these witnesses does not arise. He drew attention to medical papers indicating deceased being in semi-conscious or unconscious condition and not fit to give statement. On the point of alleged seizure of the axe at

the instance of appellant herein is concerned, it is argued that evidence of panch witness does not show that the axe in question was stained with blood and was sealed at the spot. It is also submitted that in any case when there is absolutely no evidence on record to show that Babu was assaulted with axe by appellant and further in absence of evidence to connect the said weapon with the assault, the said evidence needs to be kept out of consideration. On these amongst other submissions, accused seeks interference in the impugned judgment.

4. Learned APP Mr. Bagul for the respondent/State vehemently supported the impugned judgment with submissions that there is evidence of eye witness Vijaymala (PW-9) who has given detailed account of the occurrence of the incident of assault against her husband Babu by present appellant and others and she has also assigned specific role to him of carrying axe and causing assault on the head of the deceased with axe. It is submitted that there is further corroboration, to her version from the testimonies of other

(7)

witnesses to whom disclosure in made by the deceased about the names of the assailants. According to him minor discrepancies are required to be overlooked as the same do not affect core evidence laid by the prosecution. He also drew attention of the court to the evidence pertaining to the seizure of clothes of daughter of the deceased which was stained with blood indicating her presence at the spot of the incident and also when the deceased was taken to the hospital. He placed reliance on evidence of panch witness PW-11 in whose presence appellant made statement about concealing wooden logs and the axe in his house and pursuant to the said statement there is a recovery of axe and logs. This according to him is the circumstance which supports the case of the prosecution in order to prove to guilt of the accused beyond reasonable doubt. He further argued that merely on the ground of delay in recording statement of wife of the deceased her testimony cannot be disbelieved. It is submitted that since the lady had lost her husband, it is quite natural that some time is taken by her to come in public and to record statement. It is also submitted that accused has taken false

plea of alibi contending that he was present in the school that is his work place but evidence on record shows that on the date of incident accused was on leave and therefore the said false defence becomes additional circumstance against the accused. With these submissions prosecution has sought sustainment of judgment of conviction against the appellant.

CHARGE

5. It is the contention of the appellant that the charge framed against him is defective. It is argued that there are no particulars mentioned in the charge framed stating that he had assaulted deceased with axe on his head and therefore, he was unable to meet the precise charge which has caused prejudice to him. Perusal of charge-sheet shows that the allegation against appellant as well as co-accused was of forming unlawful assembly and for causing assault on deceased in prosecution of their common object. The charge framed is inconsonance with the material available on record. Learned counsel for the appellant was not able to show any material on record which was not considered by learned Trial

Court while framing the charge. It is settled position of law that merely on the ground of defective charge. Trial does not get vitiated and it must be necessarily shown as to what prejudice is caused to accused by non framing of the charge in particular manner and also that it has resulted in to failure of justice. In the instant case cross-examination conducted on behalf of the appellant clearly indicates that after fully knowing the charge about he allegedly assaulting deceased on his head with axe questions were put to the witnesses and defence is taken accordingly. In these circumstances since the appellant was unable to show what prejudice his caused to him by framing of the charge and as there is no failure of justice on that count, the contention of the appellant assailing the charge deserves no consideration.

HOMICIDAL DEATH

6. Prosecution in order to prove death of the deceased Babu to be homicidal examined Dr. Dudde (PW-13) who had conducted autopsy on the dead body of deceased Babu. He specifically deposed about noticing surgical sutured wounds,

CLWs, contusions, abrasions i.e. in all 24 external injuries on the dead body. Internal injuries of fracture of skull at parietal bone and contusion under the scalp were also observed. In his opinion the probable cause of the death was "head injury with multiple injuries over body". The defence has not disputed the number of injuries caused to the deceased nor it is suggested that such injuries are possible by any other way except for assault and that death is not homicidal. Thus, practically defence does not dispute the fact of homicidal death of deceased.

EVALUATION OF OCULAR EVIDENCE

7. Vijaymala (PW-9), wife of deceased is an eye witness to the incident in which deceased was assaulted. She deposed before the Court that on the date of incident she was present in the field along with her daughter Kaushalya. She further claimed to have seen appellant, his father, mother, son and wife proceeding towards deceased and the appellant holding axe, stick and knife held by others. She also stated about appellant giving blow of the axe on the head of

deceased and appellant's brother assaulting him with stick and father with knife. She further claimed that other unknown persons accompanied appellant assaulted her husband with stick. She also claimed that Bogdad Patel, Macchindra Somwanshi and other villagers came to the spot and Ankush, Macchindra and Bogdad asked Babu about the cause of assault and he told them that Umya i.e. appellant assaulted him.

8. Prosecution also relied upon testimony of Mallikarjun (PW-1) informant who claimed that on the date of incident he was cultivating his land. According to him while Babu was taking treatment in Civil Hospital he told him that appellant, Ramakant, Vasant and 5-6 unknown persons assaulted him. Similarly Ankush (PW-2) claimed to have gone to the spot after the incident of assault and saw Babu lying in injured condition. He further claimed to have made inquiry with Babu who in reply told him that appellant and his companions assaulted him. Macchindra (PW-3) reached the spot after the incident of actual assault on Babu. He is the person who brought the injured on motor bike up to Bori and

from there Babu was taken to the hospital in a pick-up vehicle. Fourth witness Mangesh (PW-5) also states that he made inquiry with Babu and was informed that appellant and others assaulted him.

9. In the cross-examination Vijaymala (PW-9) has admitted that the field where they were working is at the distance of more than half K.M. from spot where her husband (deceased) was working. She also accepted that nobody came at spot till incident of assaulting Babu was over. She further went on to accept that they reached the spot of the incident when accused brought her husband near the hut after assaulting and when they fled away. These admissions create serious doubt about her claim of witnessing incident in question. The learned Trial Court has also disbelieved the version of this witness about her presence at the spot at the time of occurrence of the incident of assault. A specific finding is recorded by the learned Trial Court in paragraph No. 45 to that effect by observing that it will be unsafe to rely upon the evidence of seizure in absence of cogent evidence establishing

presence of Vijaymala (PW-9) and her daughter Ahilya at the spot at the relevant time. The learned Trial Court has further declined to accept her testimony against accused Nos. 17 to 20.

10. Even otherwise statement of this witness is recorded after 80 days of the incident. No doubt, delay on the part of the investigating agency to record statement of the witness necessarily does not lead to discardance of testimony of such witness. However, a plausible explanation needs to be provided for not recording statement in reasonable time. No satisfactory explanation is forthcoming in this regard. Moreover Ankush (PW-2) in his statement before the Investigating Officer has stated that after his reaching to the spot, Vijaymala and her daughter came there. Though witness did not accept the same in his substantial evidence but defence has proved the same through Investigating Officer. All these circumstances appearing from record makes evidence of this witness wholly unreliable and it deserves to be kept out of consideration.

11. The learned Trial Court has laid much stress on the evidence of Mallikarjun (PW-1), Ankush (PW-2), Macchindra (PW-3) and Mangesh (PW-5) to whom deceased made oral dying declaration. Testimony of Mallikarjun shows that as per his claim while Babu while taking treatment in Civil Hospital disclosed to him that Umakant, Ramakant, Vasant and 5-6 other unknown persons assaulted him. In this regard it would be relevant to take note of the testimony of Mangesh (PW-5). This witness claims that after reaching to the spot he along with others took Babu to the Civil Hospital at about 7.00 p.m. and immediately thereafter he was admitted there. According to him his father i.e. Mallikarjun (PW-1) was waiting outside the hospital. According to Mangesh (PW-5) Babu was admitted in hospital at 7.00 p.m. Requisition of police (Exhibit 213) for ascertaining condition of injured for recording statement shows that as per opinion of Medical Officer he was not fit to record statement. Sandipan (PW-4) in whose presence inquest on the dead body of the deceased was done has admitted in the cross-examination about he having seen Babu with injuries on his person in Civil Hospital. He further stated that Babu was

unconscious at that time. These statements create doubt about claim of Mallikarjun about disclosure made to him by Babu in hospital.

12. Ankush (PW-2) also claimed that after occurrence of the incident he went to the spot and had seen Babu in injured condition and on inquiry he was told that appellant and his companions assaulted him. It has come in his cross-examination that after hearing the shouts it took half an hour for him to reach to the spot and when he went there Babu was lying there in semi unconscious state. There is no dispute about the fact that this witness is friend of the deceased. Another witness Macchindra claims that he went to the spot and took Babu on motorcycle and at that time when he made inquiry about the incident, Babu told him that he was beaten by the appellant. In the cross-examination, however, he candidly admitted that Babu was unconscious while he seated on the motor bike. He has also accepted that Babu was not in a position to sit on the motor bike and was required to be held by him.

13. There is no dispute about the fact that Babu had sustained number of injuries as reflected in the PM notes (Exhibit 187). There is also evidence on record to show that had initially Babu was in semi unconscious condition and thereafter while he being taken to the hospital became unconscious. In view of this fact it is not conceivable that all witnesses one after another made inquiry with person who was seriously injured and to all of them Babu responded. It is pertinent to note that there is no consistency in the statement made by these witnesses about the disclosure made to them by Babu. If such disclosure was made it ought to have been consistent to all. Learned Trial Court has overlooked the said discrepancies by branding them as minor discrepancies owing to the perception of individuals. In this regard it is necessary to consider that these witnesses do not make any statement as to what and how they have witnessed any incident for coming in to play their perception which may lead to causing discrepancies. Since Babu has disclosed about the assailants to these witnesses there ought to have been consistency in their statements. In these circumstances it would be unsafe to rely

upon inconsistent statements of the witnesses about disclosure made to them by Babu giving the names of the assailants.

RECOVERY OF WEAPON

14. Shaikh (PW-11) is panch witness in whose presence appellant said to have made statement about axe and wooden logs being kept in his house at Moti nagar. He thereafter took police to his house with wooden logs and axe (article E). According to the witness those articles were seized under panchnama Exhibit 167. He, however, does not say that those articles were sealed at the spot. Even there is no reference about sealing of the axe at the time of seizure in panchnama (Exhibit 167). In the cross-examination this witness has also admitted that there is no label affixed on the axe bearing his signature. Thus, seizure and sealing of weapon at the spot has not been proved by the prosecution. As far as wooden logs are concerned neither its use is attributed against appellant nor those articles are incriminating as in substantial evidence panch witness does not claim having seen any blood stains therein. Chemical Analyzer report indicates that the axe is

stained with blood group of deceased. In absence of evidence to show that the axe was sealed and kept in sealed condition till it was sent to FSL, the CA report indicating blood there on cannot considered incriminating against accused.

15. Apart from this, there is no evidence on record to show that the very same axe was used to cause assault on the head of the deceased. The weapon in question was never referred to the Medical Officer for seeking his opinion about the possibility of causing of injury to the head of the deceased with the axe (article E) recovered at the instance of accused. In absence of such evidence the said weapon cannot be connected with injury to head allegedly caused by Appellant.

16. The learned Trial Court has acquitted all other accused except appellant. However, the appellant is convicted for the offence punishable under Section 302 of the Indian Penal Code by holding that it was appellant who had assaulted deceased on his head with axe. There is no evidence on record to show that appellant used axe in order to cause assault on

the head of the deceased. Even in the oral dying declaration made by the deceased to the witnesses there is no mention as to how he was assaulted much less any specific statement to the effect that appellant assaulted him with axe on his head. Once evidence of Vijaymala (PW-9) is discarded, there remains absolutely no evidence to hold that it was Appellant herein who only assaulted the deceased in his head with axe and that injury to head is caused by axe. Learned Trial Court also proceed to hold that Appellant was armed with deadly weapon but after not believing presence of Vijaymala at spot at time of occurrence of incidents there is no material to record such finding.

UNLAWFUL ASSEMBLY/ COMMON OBJECT

17. The appellant is also convicted for the offences punishable under Sections 143, 147, 148 read with Section 149 of the IPC. In order to convict him for those offences there ought to have been evidence on record to show that he along with 5 or more persons formed unlawful assembly and in furtherance of common object of said such assembly assaulted

deceased. Perusal of the statements made by the deceased to the witnesses do not show involvement of more than five persons in the incident in question. Since, testimony of Vijaymala is not being found convincing by the Trial Court and evidence of Mallikarjun is not worthy of credence, there is no other evidence to prove involvement of in all 5 or more persons in the incident in question. As observed earlier there is no evidence to hold that it was Appellant who had assaulted deceased on head with axe and there was formation of unlawful assembly with common object, Section 149 of IPC cannot be invoked to make Appellant liable for the acts of others. Learned Trial Court has acquitted appellant for offence punishable under Section 120B of the IPC. Thus, it is not case of criminal conspiracy between Appellant and others. The prosecution alleges bund dispute between deceased and Vasant to be motive for commission of crime, but evidence shows that their lands are not adjacent to each other. Thus, reason of dispute between the parties is not substantiated.

CONCLUSION

18. It is cardinal principle in a criminal case that the

accused is innocent till the guilt is proved against him beyond reasonable doubt. Having regard to the nature of evidence and unreliable testimony of eye witness and inconsistent versions of the witnesses to whom oral declaration is made by the deceased about cause which led his death, it would be unsafe to convict the accused for the offence in question. Since evidence on record does not fulfil requirement of proof of charges beyond shadow of reasonable doubt, case of prosecution must fail.

19. In view of the above discussion, impugned judgment cannot sustain and deserves to be set aside. In the result Appellant/ Accused No. 1 in Sessions Case No. 4 of 2013 and 118 of 2013 is hereby acquitted. Appellant be released forthwith if not required in any other case. He is entitled for refund of fine amount. Appellant to comply provision of Section 437A of the Code of Criminal Procedure.

(R. M. JOSHI, J.)

(R. G. AVACHAT, J.)