

R.M. AMBERKAR  
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1159 OF 2012

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| <p>1. <b>Ramesh Komathi Madavi</b><br/>Age : Adult, Occu. : Labourer,</p> <p>2. <b>Suresh Pakhari Madavi</b><br/>Age : Adult, Occu. : Labourer<br/>Both R/at Dasve, Tal. Mulshi,<br/>Dist. Pune.<br/>[Presently at Yerwada Central Prison)</p> <p style="text-align: center;"><b>Versus</b></p> <p><b>The State of Maharashtra</b></p> | <p><b>Appellants</b><br/>.. (Org. Accused Nos. 1 and 2)</p> <p><b>.. Respondent</b></p> |
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- .....
- Mr. Chaitanya Sakhare, Appointed Advocate for the Appellants
  - Ms. M.M. Deshmukh, APP for the State
- .....

CORAM : SMT SADHANA S. JADHAV &  
MILIND N. JADHAV, JJ.

DATE : APRIL 20, 2022.

P.C. [PER MILIND N. JADHAV, J.]:

1. This is an Appeal against conviction filed by the Appellants under Section 374 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") against the judgment and order of conviction dated 23.02.2012 passed by the 8th Additional Sessions Judge, Pune (**Trial court**) in Sessions Case No. 830 of 2008. Appellant No. 1 is Ramesh Komathi Madavi (**Ramesh**) and Appellant No. 2 is Suresh Pakhari Madavi (**Suresh**). The name of the deceased is Birju Madavi (**Birju**) and name of the injured is **Suresh Narute**.

**2.** The case of the prosecution is that the Appellants in furtherance of common intention voluntarily caused hurt to Suresh Narute by means of a kitchen knife and thereafter with the same knife committed the murder of Birju on 08.06.2008. The Trial court convicted the Appellants under Section 235(2) of the Cr.P.C. for the offences punishable under Section 302 r/w 34 of Indian Penal Code, 1860 (IPC) and sentenced them to suffer life imprisonment and to pay fine of Rs. 500/- each and in default to suffer rigorous imprisonment for one month.

**3.** Brief facts necessary for the disposal of this appeal are as follows:-

**3.1.** The Appellants along with Birju and Suresh Narute hail from Gadchiroli district. They along with Malu Bhaiya Pungati (PW-5), Lalu Atram, Mansai Manji, Shankar Majji, Cheku Majji and Ramesh Madavi were working for Raj Group of Companies who had undertaken contract for construction work at village Dasva in Lavasa Project. These persons along with other labourers resided at the site of construction in tin sheds. Malu Pungati, Birju, Lalu Atram, Mansai Manji and Ramesh resided together in one room and Suresh Narute, Suresh, Shankar Majji and Cheku Majji resided together in the adjacent room. There were about 50 labourers residing at the site. Birju and Suresh Narute were also working as contractors on the site.

Appellant No. 2 Suresh persisted with Birju and Suresh Narute to allow him to work as the third contractor on the site, but they resisted and hence, Suresh was aggrieved.

**3.2.** On 08.06.2008 at about 3.00 p.m., Birju and Suresh Narute paid wages to the labourers including the Appellants. Appellant No. 2- Suresh was unhappy as he was paid amount towards his salary only and was not paid any additional amount towards contractorship. At about 08.00 p.m., a quarrel ensued between Appellant No. 2 - Suresh and Suresh Narute because of the aforesaid issue. Appellant No.1- Ramesh intervened in the quarrel and caught hold of Suresh Narute by his collar and attempted to lift him. In the meanwhile, it is alleged that Suresh Narute was stabbed on the back by someone with a kitchen knife. Thereafter both Appellants went into the adjoining room where Birju was sleeping. It is alleged that Suresh stabbed Birju on his chest with the same kitchen knife.

**3.3.** Both Birju and Suresh Narute sustained bleeding injuries and were taken to Dasve Primary Health Centre by Malu Pungati (PW-5) the first informant. Considering their medical condition, they were advised to be taken to the hospital for treatment. Both injured were initially taken to Sanjeevan hospital, Pirangut. Suresh was admitted, but doctor advised that Birju be taken to another hospital. Birju was taken to Hardikar hospital where he was refused admission, then

taken to Shashwat hospital where again he was refused admission and was finally admitted to Sassoon hospital. Suresh Narute was admitted in Sanjeevan hospital from 08.03.2008 to 23.03.2008 for treatment of his injuries. Birju succumbed to the injury while undergoing treatment on the next day.

**3.4.** On 09.06.2008 Malu Pungati (PW-5) lodged report in Paud Police Station wherein Crime No. 83 of 2008 came to be registered against the Appellants for offences punishable under Sections 302 and 324 r/w 34 IPC.

**3.5.** The Investigating Officer (I.O.) Shahaji Jadhav (PW-12) sent the dead body of Birju for postmortem and collected the advance death certificate from Sassoon hospital wherein it was opined that the death was due to traumatic and hemorrhagic shock due to blunt thoraco abdominal injuries. The I.O. visited the spot of incident and prepared the spot panchnama and seizure panchnama of towel having reddish colour stains, clothes of the deceased at the time of the incident having blood stains. On 11.06.2008, Appellants were arrested, their blood samples were collected and sent for C.A. report. On 14.06.2008, on the basis of extra-judicial confession given by Appellant No. 2-Suresh in the presence of panchas, the weapon (knife) used in the crime was recovered and seized. The I.O. seized the hospital register of Dasve Primary Health Centre wherein the two

injured were initially taken immediately after the incident, completed the investigation and filed chargesheet in the court of learned Judicial Magistrate First Class (JMFC) Court No. 6, Pune on 05.09.2008. As the offence was punishable under Section 302 IPC and exclusively triable by the court of Sessions, the learned Judicial Magistrate committed the case to the court of Sessions under the provisions of Section 209 of the Cr.P.C. Charges were framed against the Appellants (accused) and read out in vernacular language. Both Appellants denied their complicity in the offence by claiming total denial and claimed to be tried.

**4.** The prosecution examined 14 witnesses in all to bring home the guilt of the Appellants (accused). PW-1, PW-2, PW-3, PW-9 and PW-10 are pancha witnesses. PW-3, PW-4, PW-5 and PW-6 are the employees / workers of the company working at the construction site. PW-3 - Nilesh Madanlal Mundada is the site engineer and PW-4 Raju Maqbool Pathan is the site supervisor. Their evidence is not relevant as they were not present at the time of the incident. PW-5 Malu Bhaiya Pungati is the eye witness and first informant. PW-6 Suresh Narute is the injured. The medical witnesses are PW-11 Bhushan Dilip Pisal, nursing assistant working in Dasve Primay Health Centre was the first person to have seen the injured i.e. Birju and Suresh Narute when brought to the centre; PW-13 Dr. Ashok Hiralal Sharma is the

medical superintendent at Paud who examined both the Appellants (accused). PW-14 Dr. Azim Mubarak Shaikh is the medical officer in Sanjeevan hospital, Pirangut who treated injured Suresh Narute and PW-7 Dr. Ajay Aniruddha Taware is the doctor who conducted postmortem on the dead body of Birju and gave his report. No witnesses were examined before the Trial court by the defence.

**5.** The entire case of the prosecution rests on :-

- (i) the evidence of the eye witness PW-5 Malu Bhaiya Pungati;
- (ii) partially on the evidence of the eye witness, PW-6 Suresh Narute (injured) who turned hostile and refused to say anything against the assailants;
- (iii) theory of motive and common intention as Appellants wanted to work as contractors on the construction site and that was opposed by Birju and Suresh Narute;
- (iv) extra judicial confession of Appellant No. 2 Suresh before Dr. Anil Waghmare in Dasve Primary Health Centre; and
- (v) corroborative evidence in the form of circumstantial evidence seized by the I.O. i.e. stained clothes, hospital register and knife (weapon) used by the Appellants in the commission of the crime;

**6.** We have heard Mr. Chaitanya Sakhare, learned Advocate appointed for the Appellants and Ms. M.M. Deshmukh, learned APP for the prosecution at length and with their assistance perused the entire evidence of the prosecution witnesses and the relevant exhibits.

**7.** It is seen from the evidence that apart from the Appellants (accused), Birju and Suresh Narute (the injured) were residing with several other co-workers in the tin shed rooms at the construction site. The names of the co-workers which have come on record are Malu Bhaiya Pungati, Cheku Majji, Lalu Atram, Mansai Manji, Shankar Majji and others. Malu Pungati PW-5 ) and Cheku Majji were the persons who had taken both injured to Dasve Primary Health Centre immediately after the incident. Hence when the incident occurred, there were other workers present who were eye witnesses but the prosecution has only examined Malu Pungati and no other eye witness. Hence, the deposition of PW-5 Malu Pungati assumes importance.

**7.1.** PW 5 has stated that he along with Birju (deceased), Lalu Atram, Mansai Manji and Ramesh were residing in one room and Suresh Narute, Suresh Madhavi, Shankar Majji and Cheku Manjji were residing in the adjacent room; that Suresh Narute and Birju Madhavi were contractors; that accused Suresh had told Birju and Suresh Narute that he would like to work with them as contractor and

accordingly, Birju and Suresh Narute had consented for it; that on 08.06.2008 at about 07.00 to 08.00 p.m. after having dinner, they were lying on the bed; at that time, he heard the quarrel between Suresh Narute and accused Suresh in the adjacent room; that on that day Ramesh was sleeping in the kitchen room; that after hearing the quarrel, Ramesh came out of the kitchen room and went in the room where the quarrel was taking place and lifted Suresh Narute by holding the collar of his shirt and at that time, accused Suresh assaulted Suresh Narute with the knife on his back; that Suresh Narute came out of the room screaming and Lalu Atram and Mansai Maji took Suresh Narute to the hospital; that thereafter Appellants went in the kitchen room and assaulted Birju with the knife on his chest.

**7.2.** In his cross-examination, PW-5 has stated that in their room, there was no electricity connection and admitted that due to darkness, he did not see the incident of assault and it is only after hearing the discussion of other workmen, he came to know about it. He stated that along with him, the company officer was at Paud Police Station for lodging the report. He admitted that as per the instructions of the company's officer, the police prepared the report; that he did not read the contents of the report and signed it on the say of the company's office.

**7.3.** As seen above, the prosecution's eye witness has specifically

and categorically admitted that due to darkness he did not see the incident of assault and it is only from the discussion of others i.e. hearsay he came to know about it. He has stated that he has filed and signed the report as per the instructions of the officer of the employer who accompanied him.

**8.** The officer of the company who accompanied PW-5 on the next day of the incident is PW-3 Nilesh Mundada, the site engineer. He has deposed that since November 2007, the accused, the deceased and other persons were working with contractor Vivekanand Devali; he was called to the hospital on 08.06.2008; he saw Birju was lying on the stretcher and another labourer Suresh Narute was admitted in the hospital; the doctor advised to shift both patients to some other hospital; he saw injuries on chest of Birju and on the back of Suresh Narute; that when he was in hospital both the accused came there to inquire about the injured and the deceased, that on inquiry, Suresh (accused No. 2) disclosed that he and Ramesh Madhavi (accused No. 1) assaulted them with knife; that before arrival of both the accused persons in the hospital, other three labourers Chikku, Manji and Lalu had come to the hospital and they disclosed about the assault by Suresh and Ramesh; that the doctor recorded the disclosure made by these three labourers and both the accused persons in the hospital register and obtained signature of accused Suresh thereon as assailant

and his signature as witness; that the contents were in hindi and in the handwriting of Suresh; that Suresh Narute was admitted in Sanjeevan hospital, Pirangut but doctor advised them to admit Birju in an other hospital; that at 08.00 a.m., Mansai Manji informed him that he had been to Sassoon hospital but Birju had expired; that two labourers Malu Pungati (PW-5) and Shankar Majji met him and he told them to meet Suresh Narute and thereafter go to Paud Police Station; that on the say of Malu Pungati (PW-5), police recorded the report.

**8.1.** In his cross-examination, PW-3 has stated that in the tin sheds where the labourers were living, there was no electricity supply; that he had no occasion to obtain signature of the labourers or to see their signature; that before both accused came to the Primary Health Centre, three labourers accompanied the injured and disclosed about the incident to the doctor on duty; that before the two accused reached there, there were about 10 persons in the Primary Health Centre and the medical officer was Dr. Anil Waghmare; that till 12.45 a.m., the injured were at the Primary Health Centre; when he left the centre at about 01.00 a.m., Birju was complaining about pain, the doctor told him to take Birju to another hospital at about 12.30 a.m. to 12.45 a.m.

**9.** PW-6 Suresh Narute, the injured and the second eye witness according to the prosecution in his deposition has stated that at about

10:30 p.m., there was a quarrel between him and Appellant No.2 Suresh and while he was talking with Appellant No.1 i.e. Ramesh caught hold of his collar and there was an assault on his back by knife; that he did not see the person who assaulted him as it was dark; that he called for Birju when both Appellants went into Birju's room and he heard the shouts of Birju; that there was complete darkness in the rooms at the time of the incident as well as outside the rooms; that on the day of the incident all workers had drunk liquor and thereafter went to sleep and that he did know who assaulted Birju. It is pertinent to note that this witness did not mention the name of the assailants throughout his hospitalization; that the narrative given by Suresh Narute does not mention the name of the Appellants as assailants; that he did not see in what condition and how Birju had gone in his room and who were the other workmen who were sleeping in the room along with Birju at the time of the incident.

**10.** PW-7 Dr. Ajay Aniruddha Taware, the Medical Officer who conducted the postmortem on the dead body of Birju in his deposition has stated as under:-

- (i) On 09.06.2008, postmortem was conducted on the dead body of Birju at 4.30 p.m. to 5.15 p.m.;
- (ii) that on external examination two injuries were noticed viz., two stitched wounds seen over on left side of

chest, 1.5 cm medial and below the left nipple; and  
puncture mark of injection seen over dorsum of left  
hand;

(iii) that on internal examination there was haematoma in  
left 4th to 6th Inter Costal Space anteriorly in 4 x 4 cm  
area in thorax; the inferior wall of heart was ruptured  
in 1 x 0.7 cm area cavity deep and fluid blood was seen  
in the left ventricle; that haematoma of 6 x 4 cm size  
was observed over left abdominal dome of diaphragm  
containing fluid blood; that haematoma was observed  
in left kidney along with contusion; thus cause of death  
was because of traumatic and hemorrhagic shock due  
to blunt thoraco abdominal injuries.

**10.1.** In his cross examination PW-7 has however stated that the  
principal injury on Birju was caused due to a blunt object or weapon  
and not by a sharp object; that he was not shown the weapon or  
informed about the alleged weapon due to which the injury was  
caused; that there was no corresponding injury related to the internal  
abdominal injury on Birju; and that before death the deceased had  
consumed liquor.

**10.2.** As seen PW-7 has stated the reason for cause of death being  
because of traumatic and hemorrhagic shock due to blunt thoraco

abdominal injuries. The medical evidence thus is not consistent with the ocular evidence of the two eyewitnesses in so far as the weapon is concerned. Further in his cross examination PW-7 categorically admits that he had not describe the injury in his report and that a sharp weapon would never produce a blunt injury. It is pertinent to note that the postmortem report does not state that the death of Birju was homicidal and most importantly the seized weapon (knife) was never shown to PW-7 for obtaining his opinion pertaining to the injury caused to Birju. The prosecution's case is that the said weapon was burnt in a fire in the forensic lab but no evidence is placed on record of the fire incident in the forensic lab. The only reference to the weapon (knife) is in the panchanama seizure report of recovery of the knife which is placed on record as Exhibit '41'. The weapon which is recovered is a 27 cm long kitchen knife having a wooden handle of 11 cm x 3 cm and the actual knife having dimension of 16 cm x 1 cm. These dimensions clearly show that the said weapon cannot be a lethal weapon and the evidence of prosecution is that of a kitchen knife. Further it is confirmed that Birju (deceased) had consumed liquor and so also the other co-workers at the time of incident, then the altercation which took place between them due to the alleged motive therefore cannot rule out the possibility of provocation and sudden fight at the scene of crime.

**11.** In this connection, it is pertinent to refer to the evidence of PW-10 the pancha who has signed the panchanama pertaining to the recovery of the weapon (knife). PW-10 has stated that on 14.06.2008 he visited the Tehsil office at a distance of 40 kms for his village to get 7/12 extract of his land and waited there for 2 to 3 hours for the office to open; however since the office did not open while he was sitting outside the office, at that time one police person called him to the police station and when he went to the police station, the police constable was writing the seizure panchnama. After waiting for 10 to 15 minutes the writing was completed and he was asked to sign the seizure panchanama. This discovery panchanama is Exhibit '41' and placed on record at page Nos. 116 and 117 of the appeal paperbook. In view of the evidence given by PW-10, it is clear that the discovery panchanama of the weapon was being written in the presence of the pancha witness without the witness having seen seizure of the said weapon and therefore cannot be relied upon as proved beyond reasonable doubt due to the following reasons:-

- (i) PW-10 Suresh More in his cross-examination admits that "When I went to police station, the police constable was writing the panchanama. After writing was completed I was asked to sign it. I was there for about 10-15 minutes." Therefore, the said discovery

panchanama was not written in presence of the pancha;

- (ii) PW-10 Suresh More in his examination-in-chief says that before even going out of the police station for discovery panchanama, during the memorandum panchanama the accused (Suresh Madavi / accused No.2) said that the accused will take out one big knife used in the crime, which was concealed by him in the bushes of Karwandi at Lavasa. However, the memorandum panchanama does not mention any such statement given by the accused at page No. 115 of the paper book;
- (iii) Further, neither the pancha, nor the panchanama, nor the I.O. says that the knife was pointed and sharp;
- (iv) No lakha seal was affixed on the muddemal seized by the I.O.
- (v) In the CA report the blood group found on the knife is Group B; the case of prosecution that the said knife was used in assault but the CA report of the blood group of the deceased Birju and the injured Suresh Narute is inconclusive.
- (vi) The said seized knife was never shown to any medical officer or the Doctor who deposed for expert opinion to confirm whether the injuries on the deceased and the

injured were possible because of the said knife;

(vii) The hospital register was seized on the same day when the discovery panchanama was done i.e. on 14.06.2008; however the panchanama of seizure of hospital register was typed but the discovery panchanama was handwritten; the I.O. did not seek opinion of Dr. Anil Waghmare or any doctor at the Dasve Primary Health Centre at Lavasa regarding the seized knife, when the said knife was available with the I.O. during seizure panchanama of the hospital register.

**12.** Next we come to the evidence of PW-14 Dr. Azim Mubarak Shaikh, the Medical Officer who examined the injured Suresh Narute when he was admitted to Sanjeevan hospital at Pirangut. PW-14 has deposed that informed him Suresh Narute that quarrel had taken place with 2 to 3 persons and he was stabbed in the back by somebody whom he did not see; that there was a stab injury on his back at the right infracapuler region by a sharp and pointed object; that the said injury could be caused by a kitchen knife and that the said injury was sufficient in the ordinary nature to cause death as it was on a vital part and grievous in nature. However in his cross-examination PW-14 has stated that though the injury appeared grievous and there was profused bleeding, in the entire case papers the dimensions and gravity of the

said injury was not mentioned and most importantly the injury did not affect any vital part of the body. From the evidence of PW-14 it is apparent that the injured Suresh Narute did not name any of the Appellants / accused as being his assailants in the history given to PW-14 and most importantly PW-14 was not sure if the injury was grievous and no surgery was done on the injured despite the fact that he remained admitted and was treated in Sanjeevan hospital for 14 days. This shows that the injury inflicted on the back on Suresh Narute was not grievous in nature.

**13.** The prosecution has also referred to and relied upon the evidence of PW- 11 Bhushan Dilip Pisal who was the Nursing Assistant at Dasve Primary Health Centre and the first person to have seen the injured. He has deposed that on 08.06.2008 at around 11 p.m. Suresh Narute was brought in first and he disclosed that he was stabbed on his back by some weapon; there was a bleeding injury suspected to be by means of a knife on his back; at that time Birju was brought in and he had a deep injury in the left chest which was profusely bleeding which could have been caused by a knife. He has stated that both patients were brought by Nilesh Mundada PW-3 the site Manager and he was advised to take the injured to the hospital at Pirangut. He has thereafter deposed about the extra judicial confession recorded by the Appellants at Dasve Primary Health Centre and stated that the

Appellants visited the centre, spoke to Dr. Anil Waghmare who was on duty at that time, gave their names and stated that they had assaulted Birju and Suresh Narute with knife and both signed the endorsement made by Dr. Anil Waghmare in the hospital register. The prosecution has heavily relied upon the extra judicial confession recorded in the hospital register and signed by the Appellants to indict the Appellants. It is an admitted position that the endorsement made by Dr. Anil Waghmare is placed on record by the Appellants, but the prosecution had failed to examine Dr. Anil Waghmare who is the scribe of the said statement. PW-11 has further stated that the information reduced into writing by Dr. Anil Waghmare was not shown to him; that Suresh Narute did not disclose the name of his assailant who assaulted him in his back; admittedly the endorsement of Dr. Anil Waghmare if seen does not bear the signature of Appellant No.1; though Birju (deceased) was in a fit condition to talk but did not disclose the name of his assailant nor was any writing obtained from Birju by them; that the baniyan of Birju was torn and removed in the Primary Health Centre and was lying in the garbage dustbin in the centre for two days after the incident and most importantly there were no blood stains on the clothes of the two persons who brought the injured to the centre. From the evidence given by PW-11 the following facts are determinable:-

- (i) Neither the injured witness nor the deceased disclosed to the doctor who had assaulted them;
- (ii) that contents of the hospital register i.e. the extra-judicial confession does not say that both the accused assaulted Birju and Suresh Narute with knife nor does it bear the signatures of both of them;
- (iii) that PW-11 did not identify any of the accused in court;
- (iv) that hospital register cannot be considered as proved the Exhibited scribe, Dr. Anil Waghmare is not examined by the prosecution;
- (v) that the contents written in the hospital register are not stated by the accused persons and therefore it cannot be treated as a confessional statement of the accused.

**14.** Before we proceed to analyse the evidence, it will be appropriate to first comment upon the theory of motive propagated by the prosecution. It is an admitted position that there is no evidence placed on record after investigation by the prosecution that the Appellants wanted to become contractors and had persisted with Birju and Suresh Narute to allow them to become contractors at the constructions site. There is no material whatsoever brought on record by the prosecution to highlight the aforesaid position. It is a mere allegation and statement in the statement recorded by the prosecution

without any basis or substantiation. If the theory of motive was to be proved, then admittedly there were several other workers who were also present and living at the time of the incident in the two rooms which were the scene of crime. It is pertinent to note that the prosecution has examined only PW-5 Malu Pungati who has incidentally not supported the case of the prosecution. This witness Malu Pungati has clearly admitted that he did not see the incident of assault due to darkness and he came to know about the incident from others. On the contrary this witness has stated that when Appellant No.2 had told Birju and Suresh Narute that he would work with them as a contractor, both Birju and Suresh Narute had consented for the same. In the face of such evidence it is clear that the theory of motive and intention to harm Birju and Suresh Narute remains unsubstantiated. PW-5 has further deposed that the FIR was scribed and written by the police, that he signed the said report without reading the contents on the instructions of Nilesh Mundada (PW-3) the site engineer who had taken him to the police station. Further if the prosecution's case is to be proved, then other eye witnesses who were sleeping in the rooms should have been examined. The prosecution did not examine any of such eye witnesses i.e. the other co-workers admittedly present at the scene of crime when the two incidents took place, hence the theory of motive fails completely and cannot be taken as a ground to indict the Appellants.

**15.** From the evidence given by PW-5 and PW-6, it is clear that there was a quarrel between Appellant No.2 - Suresh and the injured Suresh Narute (PW-6) and at that time Appellant No.1 - Ramesh was sleeping in the kitchen. It is also come on record that there were several co-workers who were sleeping in both the rooms and therefore in that view of the matter the prosecution has failed to lead cogent and material evidence to prove the theory of motive.

**16.** It is pertinent to note that at the time of incident there were six other co-workers present who have witnessed the incident. None of them have been examined. Further the precise role of Appellant No.1 - Ramesh in the commission of the offence does not go beyond the fact that he had caught hold of the shirt collar of injured Suresh Narute in so far as the first incident is concerned. It has also not been proven that the act of Appellant No.1 in holding Suresh Narute was with the intention of causing such bodily harm or grievous injury to him. None of the witnesses have been examined who have seen the assailants having attacked Suresh Narute on his back from behind. In so far as the evidence in respect of the second incident pertaining to the attack on Birju is concerned, there are no eye witnesses to the said incident. It is alleged that both the Appellants entered into the room where Birju was sleeping and Appellant No.2 - Suresh assaulted Birju with the same knife in his chest. As seen, the ocular evidence does not

corroborate with the medical evidence placed on record by the prosecution. The weapon i.e. the knife used in the offence for committing both the offences against Birju and Suresh Narute has not been placed on record or shown to the doctor examined by the prosecution during the trial. This is not in dispute. Therefore, there is no material evidence placed on record beyond reasonable doubt so as to come to the conclusion that the stab injuries caused to deceased Birju and injured Suresh Narute are by the alleged kitchen knife. It has come on record in the evidence of the witnesses that deceased Birju was alive and complaining about pain when he was taken to Dasve Primary Health Centre and even thereafter. It is surprising to note that Birju's statement was not recorded by the doctor on duty i.e. Dr. Anil Waghmare. It is further surprising to note that the information of the crime was only given to the police authorities on the next day at 1.05 p.m. by PW-5 at the instance of PW-3, the site engineer. The site engineer was present from 12.30 onwards in Dasve Primary Health Centre. Birju was thereafter taken to Hardikar hospital, from there to Shashwat hospital and finally admitted in Sassoon hospital. None of the doctors present in the aforesaid hospitals recorded the statement of Birju until it was informed on the next day that Birju has expired in the morning. From the evidence placed on record the time of death of Birju is not forthcoming clearly. From the inquest panchanama it is apparent that Birju had expired well before he was admitted to

Sassoon hospital. It has not come on record as to who took Birju to the various hospitals and finally to Sassoon hospital as the inquest panchanama placed at Exhibit '31A' states that Birju was lying unconscious in the hall of Sassoon hospital in front of ward No. 60 and nobody was found near his body and he was found dead, hence intimation was given to the police head constable of Sassoon hospital chowky who came to the hospital and prepared the inquest panchanama of the dead body of Birju as an unknown person. It is interesting to note that Dr. Anil Waghmare instead of recording the statement of Birju, has recorded the statement of the Appellants in the hospital register and obtained the signature on the said extra-judicial confessional statement of Appellant No. 2. All that the prosecution had to do was examine Dr. Anil Waghmare, the scribe of the confessional statement. The said Dr. Anil Waghmare had not been examined and therefore it leaves a serious doubt on the case of the prosecution.

**17.** It is seen that the incident had taken place at around 10 - 10.30 p.m. on 08.06.2008 and the report was lodged by PW-5, the first informant at 1.05 p.m. on 09.06.2008. There is no explanation for this delay explained by the prosecution through any of its witnesses. The only evidence against Appellant No.1 which has come on record is of Suresh Narute, the injured who has stated that he had seen the

Appellants entering in the room where Birju was sleeping at night. As seen, Birju was not sleeping alone but there were others also in the room who were alarmed and woken up initially by the incident with Suresh Narute and the quarrel which had taken place. Hence merely to base a conclusive finding on the ocular evidence of Suresh Narute who had seen the Appellants entering in the room where Birju was sleeping cannot be determined as conclusive evidence of an eye witness having seen the commission of the crime. Because of these inconsistencies in the evidence, the prosecution has failed to prove beyond reasonable doubt that the assault on Birju was indeed committed by the Appellants. The circumstantial evidence on record does not inspire the confidence of this Court and appeal to us so as to indict the Appellants for the commission of the offence charged by the prosecution. Both Appellants therefore certainly deserve the benefit of doubt.

**18.** The learned counsel appearing for the Appellants has referred to and relied upon the following judgments in support of the Appellants' case:-

- (i) *Manohar Singh s/o Inder Singh Vs. The State*<sup>1</sup>;
- (ii) *Narayana Reddy alis Babu Vs. State of Karnataka*<sup>2</sup>;
- (iii) *State of Rajasthan Vs. Taran Singh and Anr.*<sup>3</sup>;

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1 1953 Cri.L.J. 1761

2 2017 Cri.L.J. 745

3 AIR 2004 SC 1080

- (iv) *Dinesh and Anr. Vs. State of Haryana*<sup>4</sup>;
- (v) *Kailash Potlia Vs. State of A.P.*<sup>5</sup>;
- (vi) *Kojja Sreenu Vs. State of A.P.*<sup>6</sup>;
- (vii) *Heramba Brahma and Anr. Vs. State of Assam*<sup>7</sup>;
- (viii) *Durbal Vs. State of U.P.*<sup>8</sup>;
- (ix) *Sirima Narasimha Rao etc. Vs. State of A.P.*<sup>9</sup>;
- (x) *Ashraf Hussain Shah Vs. State of Maharashtra*<sup>10</sup>;
- (xi) *Kashinath Baban Palkar Vs. The State of Maharashtra*<sup>11</sup>;
- (xii) *Satyanarayan Vithal Ambat Vs. State of Maharashtra*<sup>12</sup>.

**19.** The sum and substance of the ratios of the aforesaid decisions is that for appreciation of evidence no predominance can be given merely to the ocular evidence of the witnesses unless the same is corroborated by the recovery evidence, forensic evidence and most importantly the medical evidence. In the present case, it is observed that there is variance between the ocular evidence on the one hand and the recovery evidence read along with the medical evidence on the other hand. In our judgment, examination of other independent eye witnesses of both the incidents, namely the other co-workers who were sleeping and present in the rooms at the time of both the incidents would have lent considerable reassurance to the ocular

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4 AIR 2002 SC 2374

5 1995 Cri.L.J. 4183

6 AIR 2004 SC 1101

7 1983 Cri.L.J. 149

8 2011 Cri.L.J. 1106

9 2010 Cri.L.J. 769

10 1996 Cri.L.J. 3147

11 1995 (1) ALL MR 412

12 2006 Cri.L.J. 3662

account of the incident narrated by PW-5 and PW-6. In any event PW-5 has in his cross-examination categorically denied having witnessed any incident. Further he has signed on the report prepared by the police at the instance of PW-3 the site engineer and did not know the contents thereof. In the same fashion, PW-6 has not identified or named his assailants. In these circumstances the conviction of the Appellants cannot be sustained in the absence of direct evidence of independent witnesses. The learned Trial court in paragraph No. 57 has come to the conclusion that the C.A. report placed on record are not beneficial to the prosecution as the said results are inconclusive in respect of the so called blood stains found on the clothes of the accused and it has entirely based its findings on the eye witness on account of PW-5 and PW-6. This is another aspect which does not add to the completion of the chain of circumstances. The medical evidence brought on record by the prosecution is debatable as to whether the injury was caused by a sharp weapon or a blunt object. The extra-judicial confession for the reasons alluded to hereinabove cannot be considered as Dr. Anil Waghmare has not been examined.

**20.** In view of the above discussion and findings, on totality of the circumstances we are of the opinion that the present Appellants deserve the benefit of doubt as the prosecution has failed to bring home the charges against the Appellants beyond reasonable doubt.

**21.** We accordingly allow this Appeal and set aside the judgment of the Trial court. Hence, we pass the following order:

- (i) Appeal is allowed;
- (ii) Conviction and sentence recorded by the Additional Sessions Judge, Pune vide judgment and order dated 23<sup>rd</sup> February 2012 in Sessions Case No. 830 of 2008 is hereby quashed and set aside;
- (iii) Appellant No.2/Original Accused No.1 and Accused No.2 be released forthwith, if not required in any other offence;
- (iv) Bail Bonds of Appellant No.1/Original Accused No.1 and Accused No.2 stand cancelled;
- (v) Learned counsel Mr. Sakhare was appointed to espouse the cause of the Appellants and we appreciate the effort put in by Mr. Sakhare. He is entitled to the professional fees in the sum of Rs. 15,000/- to be paid by the High Court Legal Aid Committee within three months from today;
- (vi) Fine amount, if paid, be refunded;
- (vii) Appeal is disposed of accordingly.

[ MILIND N. JADHAV, J. ]

[SMT. SADHANA S. JADHAV, J.]