



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

CRIMINAL APPEAL NO.271 OF 2019

Vishnu S/o Jagganath Gund,
Age-27 years, Occu:Nil,
R/o-Gangewadi (Gundewadi),
Taluka-Ashti, District-Beed,
Presently at Central Prison,
Harsul, Aurangabad.

**...APPELLANT
(Ori. Accused)**

VERSUS

- 1) The State of Maharashtra,
Through Police Inspector,
Ashti Police Station,
Taluka-Ashti, District-Beed,
- 2) Ashok S/o Vishwanath Dhawan,
Age-40 years, Occu:Labour,
R/o-Gangewadi, Taluka-Ashti,
District-Beed.

...RESPONDENTS

...
Mr. Vilas P. Savant Advocate for Appellant.
Appellant - Vishnu S/o Jagganath Gund present through
Video Conferencing.
Mr. S.D. Ghayal, Additional P.P. for Respondent No.1.
Mr. S.M. Sangale Advocate and Mr. P.B. Kadam Advocate
for Respondent No.2.
...

**CORAM: SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.**

DATE : 18th DECEMBER, 2023

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Original accused – present appellant takes exception to challenge his conviction for the offence punishable under Sections 302 and 326 of the Indian Penal Code by the learned Additional Sessions Judge, Beed in Sessions Case No. 11 of 2017 on 25th February 2019. Appellant has been charged for committing murder of one Raosaheb Bhau Dukare and causing voluntary grievous hurt to witness Ashok Vishwanath Dhavan.

2. The law has been set into motion by PW-2 Vijay Raosaheb Dukare – son of the deceased Raosaheb, by filing First Information Report (for short “the FIR”) on 9th October 2016 with Ashti Police Station, District-Beed vide Crime No. 245 of 2016. At that time, it was for the offence punishable under Sections 302, 323 read with Section 34 of the Indian Penal Code. In the FIR, as per the prosecution story, it was contended that deceased was residing with his wife and three sons. His daughter was married and was residing at her matrimonial home. The sons were also married. Two to three months prior to the FIR, the family of the deceased had decided to open a hotel and therefore, by giving

earnest amount of Rs.1,20,000/- to one Vishal Kaswa, took his place but they had not executed any document. The sale deed was to be executed on the basis of said oral agreement to sell by giving remaining amount of Rs.1,30,000/- at the time of Diwali. However, with the consent of the land owner, family of Raosaheb had started construction of the hotel. The construction material was placed at the site and therefore, Raosaheb used to go to the said place for guarding, at night time. Two days prior to the incident, accused – appellant had demanded amount from Raosaheb on credit and in the *Chowk* he had abused and assaulted Raosaheb. The said quarrel was then separated by the informant and his brothers. On the earlier night of the FIR, around 8.00 p.m. the accused had again met Raosaheb in the *Chowk* and demanded amount for consuming liquor. Raosaheb refused and therefore, again the accused had assaulted and abused Raosaheb. That quarrel was separated by the cousin brother of the informant.

3. It is the further prosecution story that informant had received a phone call from one Ramesh Ramu Pachrud at 5.00 a.m. on 9th October 2016 stating that when he was passing from

the road in front of the proposed hotel, he heard cries of Raosaheb. Thereupon the informant went to the said place. He had called his cousin brother Deepak at the said place. Informant again went and brought vehicle of his friend. He put Raosaheb in the vehicle and asked him as to what had happened. At that time, Raosaheb told him that he was assaulted by the present appellant, Ashok Dhawan and two to three other persons. After Raosaheb was brought to Government Hospital, Ashti, first aid was given and he was asked to be taken to Ahmednagar. However, when the vehicle was in front of Pandit school, Raosaheb expired and therefore, the vehicle was again taken to Government Hospital, Ashti, where, upon examination Raosaheb was declared dead. Thereafter the FIR was registered.

4. After registration of the offence, investigation was undertaken. The inquest panchnama was prepared and dead body was sent for postmortem. With the help of two panchas and the informant, panchnama of the spot was got executed and the clothes of the deceased as well as certain articles from the spot were seized. It was then revealed that Ashok Dhawan was admitted at Civil Hospital, Beed. Thereupon his statement

appears to have been taken. Present appellant came to be arrested. Statements of witnesses were recorded. Documents were collected. The seized *Muddemal* was sent for chemical analysis and after the investigation was over, charge-sheet only against the appellant was filed before learned Judicial Magistrate First Class, Ashti.

5. After committal of the case, charge came to be framed against the present appellant and upon denial to plead guilty, trial has been conducted. Prosecution has examined in all nine witnesses to bring home the guilt of the accused. After hearing both sides and perusing the evidence on record, the learned trial Judge has held that the offence has been proved beyond reasonable doubt. The accused came to be convicted and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 302 of the Indian Penal Code. Further, he has been sentenced to suffer rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default to suffer rigorous imprisonment for six months for the offence punishable under Section 326 of the

Indian Penal Code. An amount of Rs.5000/- has been directed to be paid to PW-5 Ashok Dhawan, out of the fine amount, under Section 357(1) of the Code of Criminal Procedure. The set off has been granted under Section 428 of the Code of Criminal Procedure to the accused. This is the order under challenge in this Appeal.

6. In view of the order passed by this Court on 26th March 2019, injured PW-5 Ashok came to be added as respondent No.2. Respondent No.2 was represented by Advocate, however, it has been submitted by the learned Advocate that respondent No.2 is not giving instructions to the Advocate. It is to be noted that appellant is in jail since the date of his arrest and to be specific, from 9th October 2016. It took long time to serve respondent No.2 and therefore, now we do not want to adjourn the matter. When an opportunity was given to respondent No.2 to appear through Advocate, he ought to have given instructions to his Advocate. Further the scope for the learned Advocate for respondent No.2 would have been to protect the order of compensation only and not as regards other merits of the case. In view of this fact, we have heard learned Advocate Mr. V.P.

Savant for the appellant and learned Additional P.P. Mr. S.D. Ghayal for respondent No.1 – prosecution. Perused the record.

7. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. In the FIR itself, PW-2 Vijay had come with the case that when he had reached the spot where his father was found in injured condition, then while shifting him to hospital, the father had given oral dying declaration stating that he has been assaulted by present appellant, Ashok Dhawan and 2 to 3 other persons. That means the offence was registered against Ashok Dhawan also. If we consider the examination-in-chief of PW-2 Vijay, then in Paragraph No.4 he has stated about the said oral dying declaration exactly in the same way as in his FIR Exhibit-28. However, in Paragraph No.8 he has taken a somersault and has stated that he met Ashok on 10th October 2016 at Civil Hospital, Ashti and came to know from Ashok that when Ashok as well as deceased Raosaheb were sleeping in the hotel, around 3.00 to 4.00 a.m. he received one stroke due to which he woke up. He saw accused armed with bamboo stick. He asked accused as to why he has beaten him. At that time

accused replied that it was by mistake and then accused started assaulting Raosaheb with same bamboo stick on his leg and head till it broke into pieces. Thereafter accused had assaulted Raosaheb with wood stick. According to PW-2 Vijay, his supplementary statement has been recorded, wherein he has stated that Raosaheb died due to assault by the present appellant only. But if we consider the statement of PW-2 Vijay under Section 164 of the Code of the Criminal Procedure recorded by the learned Judicial Magistrate First Class, Ashti on 19th October 2016, then it contains only the same recitals as per his FIR Exhibit-28. Such person who changes his version, ought not to have been believed by the learned trial Judge. The learned trial Judge has given more importance to the information given by PW-5 Ashok than to the oral dying declaration given by deceased Raosaheb to the informant.

8. It has been further submitted on behalf of the appellant that in the remand report given by PW-9 Gawali, then Police Inspector of Ashti Police Station, it can be seen that he has not come out with the case that after the alleged supplementary statement of the informant PW-2 Vijay was recorded, he had

given report under Section 169 of the Code of Criminal Procedure to the learned Magistrate. Such communication has not been produced and proved though PW-5 Ashok was arrayed as accused in the said remand report. Learned trial Judge appears to have more relied on the testimony of PW-5 Ashok as he has been considered as eye witness. However, the learned trial Judge failed to consider that PW-5 Ashok was arrayed as an accused and therefore, his interested words to exclude himself cannot be taken as true version. Learned trial Judge failed to consider that PW-9 Police Inspector Gawli had recorded the statement of PW-5 Ashok after a gap of 64 days of the incident. He has tried to put a lame excuse by saying that he recorded statement of Ashok under Section 164 of the Code of Criminal Procedure after so many days as Ashok was injured and he could not trace Ashok out. The injury certificate of PW-5 Ashok got proved through PW-7 Dr. Balaji Gutte would show that Ashok had received two simple injuries and third injury was contusion on right eyeball and then the opinion in respect of the injury was reserved. There is nothing in examination-in-chief of the medical officer that the injuries were life threatening. Though according to the medical officer, injury No.3 was dangerous to life, but how

it was dangerous when it was to the eyeball, is a question. Further the cross-examination of PW-7 Dr. Balaji would indicate that when Raosaheb was brought to the hospital he was in unconscious state. Then question arises, as to whether Raosaheb was conscious and in a fit state to give the statement when PW-2 Vijay had brought him from the spot. If we consider the testimony of PW-4 Deepak Maruti Jadhav, who is the cousin brother of the informant Vijay, then he says that when he himself and Vijay were taking deceased to Ashti hospital, at that time deceased told that accused had assaulted him. That means, Deepak has not disclosed that Ashok was present there and he was also assaulting. That means his testimony is contrary to FIR Exhibit-28. When these major lacunas were left by the prosecution, the learned trial Judge ought not to have held that the offence is proved beyond reasonable doubt.

9. Per contra, the learned APP strongly supported the reasons given by the learned trial Judge while convicting the appellant. The testimony of PW-2 Vijay is consistent with his FIR Exhibit-28 in respect of role assigned to the present appellant. Further, it corroborates to the testimony of PW-4 Deepak, who was also

present at the time when deceased had given the oral dying declaration. Prosecution has also examined PW-6 Ramesh Pachrud, who had heard the cries of deceased and seen him first in point of time. The star witness was PW-5 Ashok, who is the eye witness. Though initially the offence appears to have been lodged against him, yet after his statement was recorded it was revealed that he was rather eye witness to the incident. It appears that statement of Ashok under Section 161 as well as 164 of the Code of Criminal Procedure has been recorded. No fault can be found in the same. This witness had received injuries in the incident and those have been proved through PW-7 Dr. Balaji. In clear terms the opinion has been given by the medical officer that injury No.3 - contusion to right eyeball was life threatening. It was a grievous injury, that too caused with the help of stick. The offence under Section 326 of the Indian Penal Code was made out. PW-9 PI Gawli had given the account of the investigation he had carried out. The spot panchnama shows that the weapon i.e. stick used in the commission of offence and other articles were seized. Those were blood stained and then the C.A. Report supports the said panchnama. Death of Raosaheb was homicidal in nature, as column No.17 of the

postmortem report would show that there were in all 11 external injuries and column No.18 shows that there were 3 fracture injuries, first to the left parietal bone, second to left tibia and fibula upper 1/3 and third fracture to right tibia and fibula upper 1/3. It has come in the evidence of PW-2 Vijay as well as PW-4 Deepak that on the earlier night the accused had demanded the amount from deceased Raosaheb to consume liquor and when it was not given, Raosaheb was abused and assaulted. This was the motive for the accused to commit murder of Raosaheb and it appears that in the said process, accused has caused grievous injury to PW-5 Ashok. There is no merit in the Appeal and it deserves to be dismissed.

10. Herein this case, as aforesaid, the law was set into motion by PW-2 Vijay by filing FIR Exhibit-28. In his FIR, he has clearly stated that his father Raosaheb had given oral dying declaration to him when he was shifting Raosaheb to hospital and it appears that informant intended to say that even PW-4 Deepak was along with him when the oral dying declaration was given. We reiterate that the oral dying declaration was that he has been assaulted by the accused, PW-5 Ashok Dhawan and other 2 to 3

persons (" विष्णू गुंड व अशोक ढवन व इतर दोन तीन जनांनी मारहान केली ") Thereupon the offence came to be registered against present appellant as well as Ashok Dhawan. The remand report which is on record, forming part of the documents with Judicial Magistrate First Class, dated 10th October 2016, whereupon after the arrest of the present appellant on 9th October 2016, he was produced before the learned Judicial Magistrate First Class, along with which case diary was produced, arrays Ashok Vishwanath Dhawan and other 2 to 3 unidentified persons as accused and it is specifically stated that Ashok Dhawan is injured and admitted in Civil Hospital, Ashti. Thereafter Exhibit-66 and 67 are the letters dated 24th October 2016, given to Assistant Director, Forensic Science Laboratory, Aurangabad, one is for forwarding the seized articles and another is for forwarding viscera, also shows that along with appellant, Ashok and other 2 to 3 unknown persons have been shown as accused. Interestingly, PW-9 Gawli, investigating officer in his examination-in-chief says that he recorded the supplementary statement of the informant on 13th October 2016 wherein it was stated that Ashok Dhawan has not assaulted Raosaheb. Then the question arises, as to how still Ashok Dhawan has been arrayed as accused on 24th October

2016 in Exhibit-66 and 67. Testimony of PW-9 Gawli is silent on the point that he has forwarded report under Section 169 of the Code of Criminal Procedure as against Ashok Dhawan. When the FIR was against two known persons and 2 to 3 unknown persons, then unless a proper recourse has been adopted, the investigating officer could not have, on his own whims, dropped PW-5 Ashok from the array of the accused and therefore, there is a fatal blow to the prosecution story.

11. Before turning towards the facts further, we would assess the testimony of PW-2 Vijay in its entirety. Perusal of the testimony of PW-2 Vijay would show that he has supported his FIR in true letter and spirit till Paragraph No.5, wherein the FIR came to be exhibited. In Paragraph No.4 he was firm enough in saying that his father had given oral dying declaration to him that the present appellant, Ashok Dhawan and 2 to 3 other persons have assaulted him. Later on, it appears that he has taken a somersault as regards the then accused Ashok Dhawan is concerned. He says that 2 to 3 days after the incident he came to know that Ashok Dhawan was accompanied with his father in the hotel in the night of the incident. Then he met Ashok on 11th

October 2016 at Ashti Civil Hospital. He made inquiry with Ashok and then Ashok told him the things which we have already narrated while considering the submissions by learned Advocate for the appellant. For the sake of brevity, the same are not reproduced here. Thus, taking conjoint reading of the examination-in-chief of PW-2 Vijay and PW-9 Gawli, what we could get is that PW-2 Vijay claims that he met Ashok on 11th October 2016 and thereafter his supplementary statement was recorded and according to PW-9 Gawli, the investigating officer, it was recorded on 13th October 2016. In spite of recording of the said supplementary statement, PW-9 Gawli in his cross-examination, at the first place when it was admitted by him that he has recorded statement of Ashok after a gap of 64 days of the incident, told that he cannot assign any reason as to why he recorded statement of Ashok so belatedly, but then he has stated that he recorded statement of Ashok belatedly because Ashok was injured and he could not trace out Ashok. This appears to be a blatant wrong statement. When in the supplementary statement it appears that PW-2 Vijay had disclosed that he had met Ashok in Government Hospital, Ashti on 11th October 2016, then PW-9 Gawli could have taken

informant Vijay along with him to show where Ashok was. A specific question was asked regarding belated statement which the investigating officer was not able to explain and therefore, the role as well as statement of PW-5 Ashok has been rendered doubtful. It appears that PW-2 Vijay as well as PW-9 Gawli, both have given more importance to the statement of Ashok than the oral dying declaration that was allegedly given by Raosaheb to PW-2 Vijay. At the cost of repetition it can be stated that since PW-5 Ashok was arrayed as accused and there was no proper legal steps taken by PW-9 PI Gawli to discharge him, the entire testimony of the alleged eye witness will have to be discarded after branding it as interested testimony.

12. Another aspect that is required to be noted is that PW-2 Vijay says that he had met Ashok on 11th October 2016 in the hospital and thereafter came to know the alleged real incident and then his supplementary statement came to be recorded on 13th October, 2016. Still we find that the statement of the informant under Section 164 of the Code of Criminal Procedure recorded by the learned Judicial Magistrate First Class, Ashti on 19th October 2016 i.e. six days after his alleged supplementary

statement, the same is supporting the FIR in which it was stated that oral dying declaration was given by Raosaheb while being shifted to Asti Civil Hospital that he was assaulted by Vishnu Gund and Ashok Dhawan. PW-2 Vijay has absolutely not stated anything in his statement under Section 164 of the Code of Criminal Procedure, whatever he has stated in the supplementary statement on 13th October 2016. Therefore, the investigation carried out by PW-9 PI Gawli is under the shadow of doubts. He appears to be not fair in carrying out the investigation. He has intentionally caused delay in recording the statement of PW-5 Ashok. In fact PW-9 Gawli has made a false statement that he could not trace out PW-5 Ashok. Exhibit-62 is the Medico Legal Certificate issued by Rural Hospital, Ashti to Police Inspector, Ashti Police Station informing that Ashok Dhawan has been admitted in the said hospital around 6.30 a.m. on 10th October 2016. The Police Station In-charge has taken a station diary entry vide Entry No. 20 of 2016 at 20.00 hours on the same day i.e. 10th October 2016 and gave it for further inquiry to Police Naik Bhise, B. No. 894, under the orders of PW-9 PI Gawli. Further in his evidence when certain Court questions were asked, PW-9 Gawli has given answers to the

same in Paragraph No.24, wherein he admitted that his Police Station had received Exhibit-62. He has then also admitted that they had received letter on 12th October 2016 regarding shifting of Ashok Dhawan to Ambejogai or Aurangabad, when referral card issued by the medical officer, District Hospital, Beed was shown to him. Therefore, it was not impossible for PW-9 Gawli to trace out PW-5 Ashok when he was having the letters showing where exactly Ashok was. Still there is delay of 64 days in recording the statement of PW-5 Ashok. This delay speaks for itself. Though he has denied that in collusion with informant and under the pretext to discharge Ashok from the crime he has recorded false statement of Ashok, it appears to be a fact. The investigation was absolutely not fair. Therefore, though PW-5 Ashok has given his own version of the story, it will have to be discarded. How the Police had helped PW-5 Ashok since the time of his admission in Ashti Hospital has come on record in his cross-examination. He has admitted that Police was with him in Ashti Hospital till his treatment. Police had brought him to Civil Hospital, Beed. One Sachin Pawal from Police Department was accompanying him and after he was discharged from Civil Hospital, Beed, the same Police took Ashok to Ashti.

13. It is interesting to note that PW-5 Ashok has stated in his examination-in-chief that when he asked appellant – accused as to why he has been assaulted, accused told him that it was by mistake. Then he saw the accused assaulting the deceased and then the appellant himself had taken this witness i.e. PW-5 Ashok on his motorcycle to Ashti, threatened to kill him if he discloses the incident to anybody. Thereafter PW-5 Ashok corrected himself and said that when they came to Ashti, he jumped down from the motorcycle of accused. Police came there and took him to Hospital. He was then taken to Civil Hospital, Beed where he had taken treatment for four days. There is absolutely no explanation from him as to why he had not informed the incident to the Police immediately, why he had not tried to lodge the report with the Police when he was in the safe custody of Police. In the answer to the Court question, PW-5 Ashok discloses that deceased Raosaheb was his relative, which is totally absent in the testimony of PW-2 Vijay. Thus, it can be seen from the entire episode that every act done by the Police as well as this witness PW-5 Ashok was of suspicious nature.

14. The prosecution was relying on the oral dying declaration given by Raosaheb to PW-2 Vijay and it was tried to be said that even PW-4 Deepak was present at that time. PW-4 Deepak has stated in his examination-in-chief that on a way to hospital Raosaheb was talking to him and therefore, he made inquiry with Raosaheb and then Raosaheb disclosed that, " I was sleeping here. I received one stroke near my ear. Therefore, I woke up. At that time I saw that Vishnu Gund was assaulting me by wooden log. I inquired with Vishnu about assault to which he replied that as you have not paid money to me, hence you have to suffer for it." As regards the oral dying declaration is concerned, it is well settled principle of law that it is a weak piece of evidence. It can be relied only when the attending circumstances are proved beyond reasonable doubt and when the alleged oral dying declaration is heard by more than one person, then all of them should be consistent enough in saying that they had heard the same. Of course, this would be applicable when there is only one oral dying declaration. Herein this case, police have not come with the case nor PW-2 Vijay, PW-4 Deepak and PW-6 Ramesh have come with the case that each one of them had made inquiry with Raosaheb separately at different times and in absence of another. They were consistent enough in saying that whatever oral dying declaration was given,

it was during journey from the spot to Hospital. However, PW-4 Deepak and PW-6 Ramesh are silent on the point that Raosaheb had disclosed name of PW-5 Ashok as assailant, along with the appellant and other 2-3 unknown persons. Thus, there is absolutely no consistency in the alleged oral dying declaration.

15. PW-6 Ramesh claims that on the day of incident around 4.00 to 5.00 a.m. he was proceeding from Gangewadi road for answering nature's call, at that time he saw appellant proceeding on motorcycle along with one person, from a distance of 20 feet near the hotel. Then he says that he heard noise of crying of Raosaheb, he went there and saw that Raosaheb was lying in the pool of blood and thereafter he called PW-2 Vijay. He has not stated that when he went near Raosaheb, he asked him as to what had happened. The alleged dying declaration by Raosaheb which was heard by PW-6 Ramesh, was after the arrival of PW-2 Vijay and PW-4 Deepak and during the journey to the hospital. The fact that his statement that he had seen Vishnu going on motorcycle with one another person from a distance of 20 feet from the hotel, is an improvement, for which he could not assign any reason.

16. Thus the prosecution had utterly failed to connect the accused with the crime and whatever evidence has been adduced in the form of oral dying declaration as well as the testimony of so-called eye witness will have to be discarded as untrustworthy.

17. Taking into consideration the medical evidence i.e. testimony of PW-7 Dr. Balaji Gutte, it can be certainly said that death of Raosaheb was homicidal in nature. Raosaheb had received 11 external injuries and 3 fractures. However, it has not been connected to the appellant beyond reasonable doubt.

18. So far as charge under Section 326 of the Indian Penal Code, for causing grievous hurt to PW-5 Ashok with stick, is concerned; since the testimony of PW-5 Ashok is required to be discarded in toto, the said charge also does not survive. At the cost of repetition we would say that there is absolutely no explanation by PW-5 Ashok and also by PW-9 Gawli and the prosecution, as to why the Police who was accompanying PW-5 Ashok had not recorded his complaint / FIR or as to why there

was no attempt to record statement of PW-5 Ashok prior to 64 days.

19. There is total perversity in appreciation of evidence by the learned trial Judge. The learned trial Judge had failed to consider the different versions of oral dying declaration. The learned trial Judge was not justified in considering only the role attributed to the present appellant. The oral dying declaration would have to be considered as a whole or would have to be discarded as a whole. Therefore, such Judgment cannot be allowed to stand and the Appeal deserves to be allowed. Hence we proceed to pass following order:-

ORDER

(I) Criminal Appeal stands allowed.

(II) The conviction awarded to the appellant – Vishnu Jagganath Gund, by the learned Additional Sessions Judge, Beed in Sessions Case No.11 of 2017 for the offence punishable under Sections 302 and 326 of the Indian Penal Code on 25-02-2019 stands quashed and set aside.

(III) We clarify that the award of granting compensation under Section 357(1) of the Code of Criminal Procedure to PW5 Ashok Vishwanath Dhawan also stands set aside.

(IV) Appellant stands acquitted of the offence punishable under Sections 302 and 326 of the Indian Penal Code.

(V) The appellant be set at liberty, if not required in any other case.

(VI) Fine amount deposited, if any, be refunded to the appellant after the statutory period.

(VII) It is clarified that there is no change as regards the order regarding disposal of Muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE