

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

CRIMINAL APPEAL NO.131 OF 2017

Babasaheb Deoram Arane,
Age-25 years, Occu:Nil,
R/o-At Post-Pohegaon Road,
Dorhale, Taluka-Rahata,
District-Ahmednagar.

...APPELLANT

VERSUS

The State of Maharashtra,
Through Police Inspector,
Shirdi Police Station,
Taluka-Rahata, District-Ahmednagar.

...RESPONDENT

...
Mr. Shailesh S. Chapalgaonkar Advocate for Appellant.
Mr. S.J. Salgare, A.P.P. for Respondent - State.
...

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

DATE : 19th OCTOBER, 2023

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

1. Present appellant is the original accused, who challenges his conviction in Sessions Case No.22 of 2011 by the learned Additional Sessions Judge, Kopargaon, District-Ahmednagar on

10th February 2017, wherein he has been held guilty of committing offence punishable under Section 302, 201 of the Indian Penal Code.

2. Informant Farjana Rafiq Maniyar, is the widow of deceased Rafiq. She has lodged the First Information Report (for short "FIR") on 6th May 2011 with Shirdi Police Station in respect of an incident which has allegedly taken place around 9.45 p.m. of 5th May 2011. It is informed that around 9.30 p.m. of 5th May 2011 deceased Rafiq and his entire family members were taking dinner. While the dinner was going on, Rafiq received telephonic call. He finished of the dinner and left the house. Prior to that, on inquiry by PW-2 Farjana, deceased Rafiq told that the call was from the accused and he has been called by the accused to fetch him as accused was not having the vehicle and was standing near Vruddhashram on Kankuri road. Rafiq left the house by taking his motorcycle. When the family members were about to sleep, PW-2 Farjana received phone call from Rafiq informing that he has been assaulted by a sharp edged weapon by accused and his associates. Thereafter, PW-2 Farjana, PW-3 Peer Mohammad @ Baba, brother of the deceased, went to the spot. It is also the prosecution story that another brother of Rafiq i.e.

PW-4 Munnabhai resides at Shirdi and he was also informed about the incident by deceased Rafiq on phone and therefore, he also reached at the said place and they could find Rafiq lying by the side of the road in injured condition. Blood was oozing from his injuries. Thereafter all of them made arrangements to take injured to Saibaba Hospital at Shirdi. Primary treatment was given but the condition of Rafiq was serious and therefore, the doctor advised that the injured should be taken to either Loni or at Nashik. The family members then shifted Rafiq to the hospital at Nashik. When the FIR was lodged vide Crime No. 74 of 2011, it came to be registered under Section 326, 323 read with Section 34 of the Indian Penal Code.

3. After registration of the offence, investigation was taken up. On the next day i.e. 6th May 2011 itself Rafiq succumbed to the injuries at Nashik. The local Police had got the inquest panchnama prepared and then dead body was sent for postmortem. PW-11 Dr. Bandopadhyay carried out the postmortem and gave report. Panchnama of the spot came to be executed and certain articles were seized. Statements of the witnesses were recorded and it was then revealed that only accused was involved in the crime and not any other person. The

accused has led the discovery and thereby discovered the murder weapon i.e. knife and also his clothes, which came to be seized by executing the panchnama. After completion of the investigation, charge-sheet came to be filed only against one person i.e. present appellant.

4. After committal of the case, prosecution has examined in all fourteen witnesses to bring home the guilt of the accused. After considering the evidence on record and hearing both sides, the learned trial Judge has held that the offence has been proved under Section 302, 201 of the Indian Penal Code. The appellant – accused has been sentenced to suffer imprisonment for life and to pay fine of Rs.10,000/-, in default of payment of fine, to suffer rigorous imprisonment for one year, for the offence punishable under Section 302 of the Indian Penal Code. He has been further sentenced to suffer rigorous imprisonment for the period of seven years and to pay fine of Rs.2,000/-, in default of payment of fine, to suffer rigorous imprisonment for three months, for the offence punishable under Section 201 of the Indian Penal Code. Both the substantive sentences were directed to be run concurrently. This is the Judgment and order challenged in the present Appeal.

5. Heard learned Advocate Mr. Chapalgaonkar appearing for the appellant and learned APP Mr. Salgare appearing for the respondent – State.

6. It has been vehemently submitted on behalf of the appellant that the learned trial Judge has not appreciated the evidence properly. Though the prosecution tried to seek corroboration from the testimony of PW-2 Farjana, PW-3 Peer Mohammad @ Baba and PW-4 Munnabhai, yet it can be seen that they were highly interested witnesses i.e. wife and two brothers of the deceased. Testimony of PW-2 Farjana and her FIR does not speak about the presence of PW-4 Munnabhai and PW-5 Bhausahab Choudhari, yet they have been believed by the learned trial Judge. The investigating officer has not collected the call details between the deceased and PW-2 Farjana as well as deceased and PW-4 Munnabhai. All of them have tried to contend that deceased had given oral dying declaration in their presence. Oral dying declaration is a weak kind of evidence. Unless the presence of the appellant at the spot would have been proved beyond reasonable doubt, the reliance by the prosecution on the oral dying declaration was unjustified. The

prosecution has also stressed on the evidence of discovery of weapon and clothes. In isolation no reliance can be placed on the same. The delay in sending the seized articles to the Chemical Analyzer has not been explained. Therefore, there was no material before the learned trial Judge which can be said to be sufficient to hold that the offence has been proved beyond reasonable doubt. Another glaring fact is that the prosecution has not proved the motive for the accused to commit the crime. A scanty statement to say something about the motive will not be sufficient. The learned Advocate for the appellant, therefore, prayed for setting aside the Judgment and conviction and prayed for holding the appellant not guilty.

7. Learned APP strongly supported the reasons given by the learned trial Judge. It is submitted that oral dying declaration can also be the basis for convicting a person when it inspires confidence. PW-2 Farjana, PW-3 Peer Mohammad, PW-4 Munnabhai and PW-5 Bhausahab Choudhari have consistently said that when they went to the spot at that time deceased was alive and was in a position to speak. Deceased has specifically told that the accused has assaulted him. Prior to that the deceased had given phone call to his wife as well as to his

brother PW-4 Munnabhai who resides at a different place. The doctors have declared Rafiq as dead on the next day thought it is stated that till he reached the hospital from the spot he was unconscious. It appears that thereafter he has not regained his consciousness. The discovery was proved under Section 27 of the Indian Evidence Act when there was voluntary disclosure on the part of the appellant. The weapon and the clothes have been discovered by the appellant and after those articles were sent for chemical analysis, it contained blood stains from the blood group of the deceased. Therefore, taking into consideration these two vital pieces of evidence, the learned trial Judge has rightly concluded that the appellant is the perpetrator of the crime.

8. There is no much dispute by the accused regarding death of Rafiq being homicidal in nature. Prosecution has examined PW-11 Dr. Bandopadhyay, the treating doctor from Suvichar Hospital, Nashik and PW-13 Dr. Rajendra Dusani, medical officer from Civil Hospital, Nashik who conducted autopsy. The postmortem report Exhibit-77 proved through PW-3 Dr. Dusani shows that the cause of death was "due to shock due to intra-abdominal and intra-thoracic hemorrhage due to multiple stab injuries." Therefore, we straightway conclude that death of Rafiq

has been proved to be homicidal in nature. The accused is disputing the charge that he is the author of the crime.

9. Perusal of the record would show that PW-2 Farjana, widow of deceased Rafiq and PW-3 Peer Mohammad @ Baba – brother of the deceased Rafiq were residing in the same house with their families. Around 9.30 p.m. on 5th May 2011 PW-3 Baba and Rafiq took dinner and at that time Rafiq had received phone call. Rafiq, while leaving the house thereafter, told that the said phone call was given by the accused and accused was standing at Kankuri road in front of Vruddhashram. At this stage itself, we would like to say further that the said statement of both these witnesses i.e. PW-2 Farjana and PW-3 Baba, is not supported by the call records. PW-3 Baba has given the mobile number of Rafiq as well as that of accused in his examination-in-chief. However, there is no record collected by the investigating officer PW-14 PI Tambe to support the statement that accused was using the said particular phone number. Further, there is absolutely no evidence to show the tower location of the said mobile number as well as that of Rafiq's mobile tower location after 9.30 p.m. on 5th May 2011. The prosecution has come with the case that when the witnesses had gone to the spot, they had found two pairs of

chappals and two mobile phones. It has been certainly said that one phone was that of Rafiq and another was of the accused. But again, at the cost of repetition, we would like to say that there is absolutely no technical support to the said statement, which could have been sought or achieved by taking out the mobile numbers of those two mobile phones / handsets, which were allegedly found at the spot. Here itself we would like to further say that testimony of PW-1 Sunil Sandanshiv, who is the panch to the panchnama dated 7th May 2011 wherein two mobile phones were seized, would show that those two mobile phones were presented in the Police Station by PW-4 Munnabhai. Munnabhai made a statement before the panchas and the Police Officer that one mobile phone belongs to his brother Rafiq and another belongs to the accused. Though the phone number has also been given with IMEI number, as aforesaid, there is no technical support that the said mobile number / SIM card stood in the name of the accused. Merely because PW-4 Munnabhai is saying that the said mobile handset / number belongs to the accused, we cannot accept the same. PW-4 Munnabhai has not stated as to how he was knowing that the said mobile handset and the mobile number i.e. SIM card number belongs to the

accused. On this count itself, the testimony of PW-2 Farjana and PW-3 Baba cannot be accepted when they say that around 9.30 p.m. of 5th May 2011 deceased Rafiq had received phone call from the accused.

10. Both these witnesses i.e. PW-2 Farjana and PW-3 Baba have thereafter stated that around 10.00 p.m. of 5th May 2011, Rafiq gave phone call on the mobile of PW-2 Farjana intimating that he has been assaulted by accused and his associates with some sharp weapon. Again, at the cost of repetition, it can be seen that except the bare words of PW-2 Farjana, there is nothing on record. The call details have not been fetched and proved.

11. At this stage itself, we would also like to take note of the testimony of PW-4 Munnabhai, who says that he was also informed by deceased Rafiq, on phone around 10.00 p.m. of 5th May 2011 that he has been stabbed by knife and he was lying at Nandurkhi road near Vruddhashram. Before proceeding further, we would like to caution the trial Courts that they are required to be alert, sensitive while recording the evidence. Though the trial Courts are supposed to take down the deposition in the words of

the witnesses, if for some reason rustic witnesses are using wrong terminology, then that should be corrected. Such witnesses should be made understandable and then the answer should be taken down. Here, while recording the testimony of PW-4 Munnabhai, it has been recorded that " *I was told by my brother Rafiq that accused Babasaheb Aarne (Mama) have stabbed him by knife and committed his murder* ". We have checked the vernacular deposition also and it is the same. If the murder has already been committed, then the person murdered cannot speak. Therefore, the words "committed his murder" ought not to have been recorded. To support this statement of PW-4 Munnabhai also there is nothing, that means the call details between the mobile phone of Rafiq and PW-4 Munnabhai have not been produced and proved.

12. PW-2 Farjana and PW-3 Baba have stated that after the information was received, they proceeded on motorcycle to the spot. Examination-in-chief of PW-2 Farjana is totally silent on the point that they met PW-4 Munnabhai at the spot. But PW-3 Baba says that Munnabhai met him and then all of them went to the spot where Rafiq was lying. PW-3 Baba and PW-4 Munnabhai are giving an impression that they could not get the exact location of

Rafiq and therefore, Munnabhai gave phone call to Rafiq and then Rafiq told the exact location. But there is nothing to support this version also. Further PW-3 Baba has admitted in his cross-examination that giving phone call to Rafiq by Munnabhai to get his location, is an improvement as compared to his statement under Section 161 of the Code of Criminal Procedure.

13. Though PW-2 Farjana says that she had gone to the spot and after it was seen that Rafiq had sustained injury which was profusely bleeding, arrangement for ambulance was made and Rafiq was taken to Shirdi Hospital and from there he was shifted to hospital at Nashik, yet her examination-in-chief is silent that after her arrival at the spot till death of Rafiq, he had given any statement to her or in her presence to anybody. That means she has stick up to the statement that whatever was disclosed by Rafiq to her in respect of alleged incident, was on phone call only. Her FIR is also on the same line. However, PW-3 Baba, PW-4 Munnabhai have told that after they went to the spot, Rafiq told them that accused has inflicted the injury and Rafiq should be saved.

14. Here, in the FIR PW-2 Farjana has said that when she

received phone call from husband, he had told that he has been assaulted by the accused and his associates. Even while registering the offence, therefore, Section 34 of the Indian Penal Code has been invoked. There is no evidence in that respect, as to whether any other person was accompanying the accused. This also shows that there is contradiction between the alleged oral dying declarations given in presence of different witnesses.

15. Another fact to be noted is that PW-3 Baba and PW-4 Munnabhai are not disclosing presence of any third person in whose presence Rafiq had given oral dying declaration. But prosecution has examined PW-5 Bhausahab Choudhari, PW-7 Navnath Gadakh and PW-8 Jalindar Choudhari as the persons in whose presence also Rafiq had given oral dying declaration. It is the case of PW-3 Baba and PW-4 Munnabhai that PW-3 Baba made arrangements for the ambulance from Saibaba Sansthan. PW-7 Navnath is said to be the driver of that ambulance. In the examination-in-chief PW-7 Navnath says that he, accompanied by two brothers of the patient and ladies at the back side of the ambulance, went to the hospital. When he was supposed to drive the vehicle, how he can be at the back side of the ambulance, is a question and he has stated that at that time the patient was

telling his relatives that one Arane has beaten him. It is unbelievable that only one sentence would be repeated again and again by the patient because as per the testimony of PW-3 Baba and PW-4 Munnabhai that oral dying declaration was given by Rafiq at the spot of offence. PW-5 Bhausahab states that PW-3 Baba had asked him to show the way to ambulance. PW-7 Navnath appears to be not the same driver though from Saibaba Sansthan, who had picked Rafiq from the spot and brought to Shirdi Hospital. According to PW-5 Bhausahab and PW-8 Jalindar when they were shifting Rafiq in ambulance from the place where he was lying, to Shirdi Hospital, brother of Baba i.e. deceased made a statement that Arane has beaten him. Therefore, at the cost of repetition we would say that it is hard to believe that at each and every place deceased Rafiq had made the said statement. It appears that PW-5 Bhausahab PW-7 Navnath and PW-8 Jalindar are the got up witnesses. Their presence was not at all stated by PW-2 Farjana, PW-3 Baba and PW-4 Munnabhai. The learned trial Judge erred in considering their testimony without going into the fact that their presence itself was doubtful and not told by other witnesses. Even if for the sake of arguments it is accepted that these witnesses i.e.

PW-5 Bhausahab, PW-7 Navnath and PW-8 Jalindar were the independent witnesses and therefore their testimony should be looked into, what they have said is that the brother of Baba / patient said that he has been beaten by Arane. Merely stating the surname will not be sufficient. Here again we would say that the trial Judge has not recorded the deposition properly, especially English translated version. Word 'beaten' has been taken which is not appropriate when prosecution intends to convey that deceased was 'stabbed'. Further, PW-5 Bhausahab, PW-7 Navnath and PW-8 Jalindar have not told that deceased disclosed by which weapon he was assaulted. Under the said circumstance, the testimony of these three witnesses is absolutely untrustworthy and should not have been relied by the learned trial Judge.

16. The question remains, as to whether, when two brothers of Rafiq and wife had gone to the spot, Rafiq was in a state of making oral dying declaration because the wife is totally silent on this point. Therefore, it creates doubt on the veracity of the brothers that such statement was made by Rafiq.

17. Learned Advocate has rightly raised doubt, as to when the

FIR would have been lodged. The thing has been tried to be patched up by PW-4 Munnabhai by saying that after Rafiq was admitted in the Hospital at Nashik, he as well as Farjana came to Shirdi Police Station and lodged the report, because when it was lodged, offence was under Section 326, 323 read with Section 34 of the Indian Penal Code. In fact the FIR could have been lodged at Nashik also and that could have been then transferred to Shirdi Police Station. PW-2 Farjana has stated that after Rafiq was admitted in the Hospital at Nashik, she came to Shirdi, lodged the report and went back to Nashik. Why the brothers did not accompany PW-2 Farjana at the time of lodging the report, is a question. But then, thereafter it appears that the brothers have taken active participation in other proceedings. For the above said reasons, the alleged oral dying declarations cannot be believed. It is a very weak kind of evidence and unless strong circumstances are shown, no reliance can be placed on it.

18. The next piece of evidence that has been relied by the prosecution is the discovery panchnama. Prosecution has examined PW-9 Rafiq Nasir Maniyar, who says that in his presence the accused gave memorandum and discovered the knife and clothes. In his examination-in-chief he has stated that

accused took them to the place and took out the knife and clothes but this witness is not giving the details of the same. Panchnama Exhibit-64 says that the place was in a ditch about 700 to 800 meters away from village Korhale. It is then stated that those articles were kept there after digging the ditch. By which means the ditch was dug, has not been stated. In his cross-examination PW-9 Rafiq has admitted that though the photographs of the place and event were taken, he is not seen in those photographs. There is no explanation of the same by the investigating officer. PW-9 Rafiq also says that at the time of the procedure, the Police had caught hold the collar of the shirt of the accused. He also says that accused was handcuffed at that time. Thus, this cannot be said to be a voluntary disclosure. Another fact to be noted is that PW-9 Rafiq is the relative of the deceased. Therefore, it will have to be held that the said discovery cannot be said to be under Section 27 of the Indian Evidence Act. The learned trial Judge erred in considering the same.

19. There is no direct evidence in this case and therefore taking into consideration the above said reasons we hold that the learned trial Judge totally erred in appreciating the evidence. The

prosecution has not adduced evidence to prove, as to what was the motive for the accused to commit the crime. Both the brothers as well as wife of the deceased are silent on this aspect, though a scanty line has been stated in the FIR that deceased had some financial transaction with accused. Therefore, in absence of motive also, when there was time to extract but still it has not been extracted, the single lines of alleged oral dying declarations cannot prove the offence beyond reasonable doubt. The impugned Judgment and conviction, therefore, deserves to be set aside by allowing the Appeal. Hence, the following order:-

ORDER

- (i) The Appeal stands allowed.
- (ii) The conviction awarded to the appellant – **Babasaheb Deoram Arane** by learned Additional Sessions Judge, Kopargaon, District-Ahmednagar in Sessions Case No.22 of 2011 on 10.02.2017 for the offence punishable under Sections 302, 201 of Indian Penal Code stands quashed and set aside.
- (iii) The appellant stands acquitted of the offence punishable

under Sections 302, 201 of Indian Penal Code.

(iv) He be set at liberty, if not required in any other case.

(v) The fine amount deposited, if any, be refunded to the appellant after the statutory period is over.

(vi) We clarify that there is no change as regards the order in respect of disposal of muddemal.

[ABHAY S. WAGHWASE]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

asb/NOV23