

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

CRIMINAL APPEAL NO. 402 OF 2016

Ganesh Kika Gavit ... **Appellant**
Age: 35 years, Occu: Agril.
R/o Dongifali Raigan, Tq. Nawapur,
District Nandurbar

VERSUS

The State of Maharashtra ... **Respondent**

Mr. Joydeep Chatterji, Advocate for the appellant(Appointed),
Mr. R. V. Dasalkar, APP for respondent-State

CORAM : **SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : **20.03.2023**

JUDGMENT (Per Y. G. Khobragade, J.):

1. By the present appeal under section 374(2) of the Criminal Procedure Code, the appellant/accused takes exception to judgment and order of his conviction passed by the learned Additional Sessions Judge, Nandurbar on 31.05.2016 in Sessions Case No. 21 of 2014 for the offence punishable under section 302 of the Indian Penal Code and directing him to suffer rigorous imprisonment for life with fine of Rs.2000/- and in default of payment of fine, to suffer simple imprisonment for two months.

2. In short, it is the case of prosecution that the deceased Majutabai Gavit was resident of village Dongifali (Raigan) and on

30.04.2014 at around 12.00 noon, she had gone to village Mavchifali to purchase food grains from the fair price shop. After purchasing food grains, when she was returning to her village via Dongifali- Mavchifali road and had reached near the field of one Suresh Jadu Vasave but at that time, the accused/appellant, who is her distant relative, came from her back side and stabbed her on her stomach by knife. As a result, she sustained severe injuries. She was admitted in Sub District Hospital, Navapur. The Hospital authority issued an intimation to Navapur Police Station about admission of the victim Majutabai due to injury. Accordingly, Head Constable- Mahendra Nagrale (PW13) had visited the Hospital and recorded statement of the victim; wherein, she disclosed about assault with knife by the accused. Said statement has been treated as First Information Report. On the basis of said statement/report, Crime No.60 of 2014 was registered against the accused for the offence punishable under sections 326 and 323 of Indian Penal Code.

3. Investigation was entrusted with PW-14 Devidas Kadam-ASI who visited the spot of incident and executed spot panchanama. He had collected blood mixed soil and simple soil from the spot of incident. On 30.05.2014, PW14 -IO arrested the accused and seized his clothes which were on his person at the time of arrest. The injured patient died on 30.05.2014, at about 20.50 Hours, while undergoing treatment,

therefore, the offence punishable under section 302 of IPC was added to the Crime/FIR.

4. PW-16 Ramesh Varade, PSI conducted further investigation and executed inquest panchanama of dead body of the victim and referred the dead body for postmortem. The investigating officer (PW-16) recorded statement of witnesses under section 161 of Cr.PC. and collected postmortem report. All the sized articles, blood samples of accused were sent to chemical analyzer. On completion of investigation, charge sheet came to be filed against the accused before the learned Judicial Magistrate, First Class, Navapur. After compliance of section 207 of Cr.PC., the learned Judicial Magistrate, passed order under section 209 of Cr.PC. and committed the trial to the Court of Sessions.

5. Learned trial court framed charge at Exh. 8 against the accused for the offence punishable under section 302 of IPC on 11.11.2014 and recorded the plea of the accused at Exh.9. The accused pleaded not guilty and claimed for trial.

6. In order to prove the charge, the prosecution has examined following witnesses:

Name of Witnesses		Exh. No.
PW-1	Ishu Magan Gavit	17
PW-2	Dharma Atya Gavit	19
PW-3	Vasant Kantya Gavit	20
PW-4	Dipak Arjun Gavit	23

PW-5	Rajubai Jahagu Gavit	25
PW-6	Reva Honga Gavit	26
PW-7	Anil Ravindra Gavit	27
PW-8	Arvind Vijay Gavit	30
PW-9	Dr. Ajit Raghunath Patil	33
PW-10	Dilip Pundlik Kulkarni	37
PW-11	Harish Daju Gavit	42
PW-12	Mohan Shankar Savle	48
PW-13	Mahendra Namdeo Nagrale	50
PW-14	Devidas Gangaram Kadam	52
PW-15	Dr. Dattaram Gopinath Shinde	57
PW-16	Ramesh Dnyandeo Varhade, PSI	61

7. Besides oral evidence, the prosecution has proved documentary evidence i.e. Spot Panchanama Exh. 18, Memorandum Panchanama Exh. 28, Memorandum Exh. 31, Sketch Map of spot of incident Exh.38, Inquest Panchanama on corpse Exh. 43, cloth seizure Panchanama in respect of deceased Exh. 44, letter dated 26.06.2014 issued by Investigating Officer to Chemical Analyzer Exh. 49, dying declaration dated 30.05.2014 recorded by Head Constable Exh.15, Endorsement of Medical Officer Exh. 58, Arrest Panchanama Est.53, Seizure Panchanama in respect of gown of deceased Exh. 62, letter dated 16.06.2014 issued to the Tahsildar for drawing sketch map of spot of Incident Exh. 63 and letter dated 17.06.2016 issued to the medical officer Exh. 64.

8. After conclusion of trial, the learned trial court recorded statement of accused under section 313 of Cr.PC. The defence of the accused is that he is innocent and has been falsely implicated in crime. After hearing, the learned trial court passed the judgment and order on 31.05.2016 and convicted the accused as afore-said.

9. Initially the appellant/accused presented this appeal through Advocate Mr. R.C. Patil but after his demise, accused had engaged Advocate Mr. S.V. Bhosale. However, he remained absent on certain dates when the matter was taken up for final hearing. Therefore, this court passed order on 01.02.2021 and appointed Advocate Mr. Joydeep Chatterji to conduct the appeal on behalf of the appellant.

10. Mr. Chatterji, the learned counsel appearing for the appellant submitted that the evidence of alleged eye witnesses who have been examined by the prosecution does not prove that the appellant is the author of crime. All the witnesses are interested and the prosecution has failed to prove the guilt of accused beyond reasonable doubt. As per testimony of the eye witnesses the deceased was carrying food grains and she fell down at the spot of incident after alleged assault, however, the spot Panchanama Exh. 18 does not reflect about finding food grains at the spot of incident. Therefore, the spot panchanama Exh. 18 creates doubt.

11. The learned counsel further canvassed that PW-15 Dr. Dattaraya Shinde, who examined the deceased after she was admitted in Sub District Hospital Navapur, had found one stab wound on right side abdomen below chest, however, PW-9 Dr. Ajit Patil who conducted postmortem found three injuries on the person of the deceased. As per the prosecution witnesses, the deceased was assaulted only once but PW-9 Dr. Ajit found two injuries and the prosecution failed to explain how those two injuries were caused to the victim. This circumstance also creates doubt over the story. However, the learned trial court recorded perverse finding that though two injuries are not explained, it is not sufficient to raise doubt about entire prosecution's case.

12. The learned counsel appearing for the appellant further canvassed that though the prosecution allegedly recovered the knife Article-9 at the instance of appellant under section 27 of the Evidence Act, however, evidence of PW-5 Anil Gavit i.e. Pancha and evidence of investigating officer in respect of recovery of weapon is not in corroboration. Therefore, the learned trial court ought to have given benefit of doubt and the appellant/accused could have been acquitted. However, the learned trial court recorded perverse findings which is not sustainable in law. It is further canvassed that even though the case of the prosecution is accepted, however, the prosecution fails to prove the motive and intention of the appellant/ accused to cause death of the

deceased. Therefore, the appellant is entitled to receive benefit of doubt. However, the learned trial court recorded perverse finding, hence, prayed to quash and set aside the same.

13. The learned counsel for the appellant further canvassed that as per evidence of prosecution witness, at the time of incident, work of construction of road was in progress and driver of the roller rescued the deceased from further assaults at the hands of the appellant- accused. Therefore, driver of the roller would be the best witness to prove the assault at the hands of appellant accused, however, the prosecution failed to examine driver of the roller. Therefore, non-examination of the driver of roller was fatal to the case of prosecution and therefore, the appellant is entitled for acquittal.

14. Per contra, Mr. R. V. Dasalkar, the learned APP supported the findings and reasons recorded by the trial court. He submitted that soon after the assault with knife, the injured Majutabai Gavit was admitted in Sub District Hospital, Navapur and PW13 Mahendra Nagrale, Head Constable of Navapur Police Station recorded Exh. 51 statement/dying declaration of the deceased after obtaining certificate about mental status and physical health of the victim from medical officer. Deceased told PW-13 that, accused/appellant had stabbed her below right-side rib while she was returning to her house after

purchasing food grains. PW-5 Rajubai Gavit and PW-6 Reva Gavit are eye witnesses to the incident. It is further canvassed that deceased, in her dying declaration Exh.51 as well as eye witnesses PW5 and PW6, categorically deposed that accused/appellant assaulted the deceased by knife. The PW-15 Dr. Shinde who firstly examined the injured /deceased in Sub District Hospital Navapur found only one stab wound on the right-side of abdomen below the chest of size 3.5 cms x 1 cm x 2.5 cm and issued injury certificate Exh. 36. As per the evidence of PW-15, the injury described in Exh. 36 is possible by knife Article No.9. Therefore, evidence of the prosecution witness about giving stab injury to the victim with knife Article-9 by the accused is in corroboration. Therefore, the learned trial court, well appreciated the evidence available on record and passed the impugned judgment and order is justifiable, which does not require any interference.

15. Here in this case, PW-9 Dr. Ajit has conducted postmortem and found injuries -(i) Sutured wound over chest and mid line of at the level of 8th rib, horizontal 2.5 cm in length. After opening sutures margin clean cut elliptical for tempering was present on right side, depth: cavity deep; (ii) Sutured wound over chest right side at the level of 10th rib 7.5 cm below right nipple. Horizontal 3 cm in length. After opening suture margin, clean cut elliptical with tempering present laterally, death: Cavity deep with stab wound over liver and (iii) incised

wound over axillary region 2.5 cm x 02 cm x muscle deep. There was stab wound corresponding to injury no.2 described in postmortem report. He has also stated that said injury was possible due to knife Art. 9. Testimony of PW 15 Dr. Shinde corroborates the testimony of PW 9. He has also stated that the injury noted by him was possible by knife Art. 9. It cannot be said that other two injuries were not noted by the doctor who had examined deceased at Sub-dist. Hospital. In fact, the said two injuries were noted by PW-9 after he had opened the sutured wound. Describing them separately will not make the prosecution story unbelievable. Further, accused had every opportunity to ask specific question about the same to both the medical experts. We have not found any pin pointed question in the cross-examination of both the doctors. Therefore, the prosecution has proved beyond reasonable doubt that due to stab with knife Article 9, the deceased had sustained injuries and other internal injuries are corresponding to the injury no.2 described in the column no. 17 over the liver. There is proximity between the injury and the death. Therefore, medical evidence is corroborating to the prosecution case of homicidal death of Majutabai.

16. It has come on record that, deceased Majutabai had gone to fair price shop at village Mavchifali to purchase food grain at about 12.00 p.m. on 30.05.2014. After purchasing food grains, she was on her way to village by Dongifali-Mavchifali road. When she reached near the

spot of incident, at that time, the accused, who is her distant relative, came there from her back side and stabbed her on stomach by knife. Thereafter the victim was taken to Sub District Hospital, Navapur. PW13 Mahendra has thereafter, recorded statement/dying declaration of victim. From the testimony of PW-13 Mahendra, it appears that prior to recording statement of deceased, he obtained opinion of PW-15 Dr. Dattatraya Shinde at Exh. 58. It was opined that she was in a fit state to give statement. Nothing has been brought in the cross examination to discard testimony of the PW-13 and PW-15 on the said point. As the dying declaration has been given by Majutabai explaining the circumstances of injuries caused to her and then she expired due to those injuries, the said dying declaration was admissible under Sec.32 (1) of Indian Evidence Act. The said dying declaration Ex.51 has been duly proved by the prosecution.

17. On perusal of dying declaration Exh. 51, the deceased had stated that, when she was returning to her village after purchasing food grains, one Raju Jahagu Gavit (PW5) was proceeding ahead to her and construction work of Mavchifali- Dongifali road was going on and at that time, the accused /appellant came from her backside and stabbed her with knife on the right-side of her stomach. Therefore, she shouted but the accused again assaulted her with fist blows. Therefore, the roller driver and other labourers came to rescue her from the clutches of the

accused. She was then brought to Sub District Hospital, Navapur and hospitalized.

18. Prosecution has examined PW4 Deepak Gavit at Exh. 25 who deposed that, on the day of incident, at about 12.00 noon, he along with other labourers were carrying road construction work and at that time, he heard shout of a woman and saw that one woman was stabbed on her stomach by knife with somebody. PW-5 Rajubai Gavit (Exh.25) deposed that, on the day of incident, she and Majutabai/victim had gone to fair price shop for purchasing food grains and they were returning to their house after purchasing grains. When they were returning, she was ahead of Majutabai and at that time, all of a sudden, she heard shouts of Majutabai. Therefore, she looked back and saw that accused was assaulting Majutabai with knife on her stomach, after which injured fell down. Thereafter, the roller driver and other workers who were executing road work came there and took the accused away from the victim. Though the defence counsel tried to bring on record that the injured would have fallen down on her stomach on open cement concrete drainage and sustained injury, however PW-5 has denied said suggestion. The evidence of PW-6 is in corroboration with PW-5, who are the eye witnesses to the incident. PW5 and PW6 were knowing the accused as they are also resident of same village. They both have categorically stated that accused had

assaulted deceased with knife. Nothing has been brought on record to show that these two witnesses had any enmity with accused or reason to implicate him. Hence, their evidence cannot be discarded.

19. Evidence of Medical officers, eye witnesses are further corroborated by discovery of the weapon under section 27 of the Evidence Act. Evidence of PW-5 Anil Gavit i.e. Pancha and investigating officer in respect of recovery of weapon is in corroboration. Both have stated that accused had given the voluntary statement and then discovered the knife. There is nothing in the cross-examination of PW-5 Anil to show that he had any reason to implicate accused. The other seizure panchnamas have also been duly proved by the prosecution. The PW 16, Investigating Officer had sent Articles i.e. Article-9 Knife, Clothes of accused- Shirt Article 6, Pant Article 7 as well as clothes of deceased, Article 3 pink sari and petticoat Article 4, Blood of the deceased to the Chemical Analyzer and on examination of the same C.A report Exh.65 (collectively), blood of the blood group of deceased appears on T-Shirt of the accused. Accused has not given any explanation about the same in his statement under section 313 of Code of Criminal Procedure.

20. On perusal of postmortem report Exh. 34, death of the deceased is homicidal. PW-5 and PW-6 who are the eye witnesses to the incident deposed that the accused stabbed the victim Majutabai by knife

on her stomach. It has been further proved that, the accused was caught hold at the spot of incident by the driver of Roller and other workmen. Non-examination of road-roller driver and workmen present there is not fatal to prosecution, as there is ample evidence otherwise to prove the said fact. Therefore, it proves that except accused/appellant, none other is author of the crime, who committed murder of the deceased by stabbing with knife Article-9. The prosecution proved the spot panchanama Exh. 18 in evidence of PW-1 and as per the spot panchanama incident was occurred on the Mavchifali- Dongifali road and merely the investigating officer did not mention about finding of grain at the spot of incident, it cannot be said that the spot panchanama is unbelievable. Further, on 30.05.2014, at about 22.00 hours, the appellant/ accused arrested under arrest panchanama Exh. 53 and thereafter on his interrogation, knife Article 9 seized under section 27 of the Evidence Act under seizure panchanama which is in corroboration with evidence of Exh. PW-7 Anil Gavit. The dying declaration of victim at Exh. 51 has been duly proved and it is trustworthy and reliable.

21. In the case of **State Vs. Dharkole, 2005 SCC (Cri.) 225**, the Hon'ble Supreme Court held that non-examination of a particular witness would not affect the prosecution case when the witnesses so examined withstood the cross- examination. So also, in the cases of **Mahindra Singh Vs. State, (2007) 9 SCC 796, Ramaji Vs. State (1983)**

3 SCC 629, **Anil Phukun Vs. State (1993) 3 SCC 282 and Sewaka Vs. State (2001) 10 SCC 1**, it has been held that conviction can be based on the testimony of sole eye witness, if it appears trustworthy and reliable.

22. The learned counsel appearing for the appellant canvassed that the prosecution has not brought substantial evidence to prove the motive and intention of the appellant accused to cause homicidal death of deceased by stabbing with knife. However, it can be said that when there is direct evidence to prove the said fact of causing injuries leading to homicidal death, then, motive is immaterial. In the case of **Mulakh Raj etc. Vs. Satish Kumar & Ors.**, reported in **AIR 1992 SC 1175**, the Hon'ble Apex Court held that:

"Undoubtedly in cases of circumstantial evidence motive bears important significance. Motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case."

23. Therefore, considering the corroborative pieces of evidence available on record, the learned trial Court passed the impugned judgment and order on 31.05.2016, holding that, the accused has

committed homicidal death of Majutabai, amounting to murder under section 300 of IPC and convicted the accused. The said conviction is justifiable and no substantial ground set out to interfere with the findings of the trial court. In view of the above, the present appeal is dismissed.

24. Record and proceedings be remitted back to the trial court with Muddemal property.

25. Since Advocate Mr. Joydeep Chatterji was appointed by this court to represent appellant, his fees is quantified to Rs.10,000/- (Rs.Ten thousand) to be paid by High Court Legal Services Authority, Sub-Committee, Bench at Aurangabad.

(Y. G. KHOBRAGADE, J.)

(SMT. VIBHA KANKANWADI, J.)

JPChavan