

(2017) 12 BOM CK 0113
In the Bombay High Court
Case No : 58 of 2017

Babarao s/o Chandrabhan Wankhede

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 22-12-2017

Acts Referred:

[Indian Penal Code, 302](#), Section 302, Section 323

Citation : (2017) 12 BOM CK 0113

Hon'ble Judges : R. K. Deshpande, M. G. Giratkar

Bench : DIVISION BENCH

Advocate : R. P. Thote, M. H. Deshmukh

Judgement

1. Appellant assailed the judgment of conviction dated 30/7/2016 passed by learned Additional Sessions Judge, Khamgaon in Sessions Trial No. 62 of 2012 by which he is convicted for the offence punishable under Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 2,000/in default to undergo rigorous imprisonment for six months. He is also convicted for the offence punishable under Section 323 of the Indian Penal Code and sentenced to suffer simple imprisonment for one month and to pay fine of Rs. 500/in default to undergo simple imprisonment for one month.

2. The case of the prosecution against the appellant in short is as under. (i) There was a dispute between the deceased and brother of appellant Dadarao Wankhede before 5 to 6 years of incident on account of land. Three years prior to the incident, appellant threatened deceased asking him to leave space for the construction of house for his nephew Dhwarkesh failing which he would kill somebody of his family. On the day of incident i.e. on 25/2/2012, complainant Vandana, daughter of deceased came to the house of deceased. Quarrel was going on in the house of appellant. Appellant was quarreling with his wife. At about 5.00 to 6.00 p.m., deceased was sleeping on platform (oata) of Samaj Mandir. Wife of deceased was cooking food in the house. Complainant was washing clothes. Appellant/accused come with axe near the deceased and gave

blow of axe on his head. Appellant gave three blows of axe on the head of deceased. Complainant heard the noise and she rushed to the spot. She caught hold the appellant. Appellant slapped on her cheek. She also slapped on appellant's cheek. Appellant raised axe on her. She tried to snatch axe from his hand. The appellant gave jerk to her hand and ran towards Akola Road with axe. Deceased sustained severe bleeding injuries. Dhamma Ingle, son of deceased and Ramesh Wagh took deceased to General Hospital, Khamgaon. He was referred to Government Hospital, Akola. Thereafter he was referred to Government Hospital, Nagpur. Deceased died in Government Hospital at Nagpur on 652012.

(ii) After the incident, complainant Vandana w/o Panjabrao Khandare lodged report in Police Station, Khamgaon on 252012. Investigating Officer Shri Kalkotwar, on the oral report of the complainant, Exhibit 26 registered the crime as per printed F.I.R., Exhibit 27. He went to spot of incident and prepared spot panchanama. He searched the accused and arrested him. He seized blood stained quilt and blood mixed soil from the spot of incident. He has recorded the statements of witnesses. On 552012, accused gave confessional statement to show axe. His confessional statement was recorded in presence of panchas as per Exhibit 46. Accused taken them to his house and produced the axe. It was seized as per seizure panchanama, Exhibit 47. Investigating Officer Shri Kalkotwar sent all the seized property to the Chemical Analyser and after complete investigation, filed the chargesheet before the Judicial Magistrate First Class. The same was committed to the Court of Sessions.

(iii) Charge was framed against the accused at Exhibit 6. Same was readover and explained to the accused. Accused/appellant pleaded not guilty and claimed to be tried. His defence appears to be of total denial.

(iv) The trial Court recorded the evidence of following witnesses.

- (1) P.W. 1 Manoj Rupchand Sirsath (Exhibit 16)
- (2) P.W. 2 Vandana Panjabrao Khandare (Exhibit 25)
- (3) P.W. 3 Mustafa Hussain Sabdar Hussain (Exhibit 28)
- (4) P.W. 4 Jyotibai Anil Tidke (Exhibit 31)
- (5) P.W. 5 Ramesh Ninaji Wagh (Exhibit 32)
- (6) P.W. 6 Punjab Yadaorao Khandare (Exhibit 35)
- (7) P.W. 7 Anand Kisan Dhunde (Exhibit 37)
- (8) P.W. 8 Mangala Sanjay More (Exhibit 38)
- (9) P.W. 9 Dr. Zuber Ahmed Khan S/o Riyaz Khan (Exhibit 39)
- (10) P.W. 10 Dr. Jaideo Laxman Borkar (Exhibit 41) and

(11) P.W. 11 Shri Prashant Madhukar Kalkotwar (Exhibit 44)

(v) Statement of appellant was recorded under Section 313 of Code of Criminal Procedure. He has denied material incriminating evidence against him and stated that he is falsely involved in the crime. After hearing the prosecution and defence, learned trial Court convicted the appellant as stated above.

3. Heard learned counsel Shri Thote for the appellant. He has pointed out evidence of P.W. 2 and submitted that her evidence is not reliable. She has stated in her examination in chief that she tried to snatch axe but in her report, she has stated that she snatched axe from the hands of accused. She has stated that she along with her husband caught hold the accused and snatched axe from his hand thereafter he slapped on her cheek and ran away. Material contradiction is brought on record in her evidence. In her police statement, she has stated that she was washing clothes on the backside of the house. But she denied this portion. Portion marked "A" in the report and her statement are proved by the Investigating Officer.

4. Learned counsel Shri Thote submitted that P.W. 4 Jyotibai Tidke has stated about the incident but her presence is doubtful. P.W. 2 not stated about the presence of P.W. 4 at the time of incident.

5. Learned counsel for the appellant pointed out evidence of P.W. 6. He has not stated anything about the incident. P.W. 6 Punjab Khandare is the husband of P.W. 2. She has stated that she along with P.W. 6 caught the accused on the spot of incident and snatched axe. But this witness not stated anything about the incident. Learned counsel has submitted that evidence of P.W. 4 recorded after 10 to 12 days from the date of incident. Learned counsel has pointed out evidence of P.W. 8 Mangala More and submitted that there is material omissions and contradictions. She has denied her statement i.e. portion marked "A" which is proved by the Investigating Officer that after sometime appellant returned back to the spot of incident. There is also omission in respect of her presence.

6. Learned counsel has pointed out Chemical Analyser Reports and submitted that blood of deceased was not examined by the Chemical Analyser. There is no Chemical Analyser report in respect of examination of blood of deceased. Therefore, the axe having the blood which is of Group "A" is not an incriminating circumstance against the appellant. Blood group of appellant was determined as Blood Group "A". There is no evidence to show that axe was having blood group of deceased.

7. Learned counsel has pointed out evidence of panch witnesses P. W. 3 Mustafa Hussain and P.W. 7 Anand Dhunde. Both these witnesses have stated that they were standing on road. Police came to them and obtained their signatures on the papers. Therefore, recovery of weapon is not proved as stated by the Investigating Officer. Learned counsel has submitted that prosecution has failed to prove the guilt of accused beyond reasonable doubt. Learned trial Court wrongly recorded its findings, hence, prayed to allow the appeal and acquit the

appellant. In support of his submissions, he pointed out decision of Hon'ble Supreme Court in the case of Jagdish Prasad and ors. Vs. State of M.P. reported in 1994 Cri.L.J. 1106 and the decision of this Court in the case of Mohd. Hanif s/o Mohd. Habib and anr. Vs. The State of Maharashtra reported in 2017 ALL MR (Cri) 2980.

8. Heard learned Additional Public Prosecutor Mrs. Deshmukh for the respondent. She has submitted that P.W. 2, P.W. 4 and P.W. 8 are the eye witnesses of the incident. There is nothing to discard their testimony. She has submitted that weapon was seized from the accused. As per Chemical Analyser Report, the blood was found on the weapon and clothes of accused and also on the quilt. Learned Additional Public Prosecutor submitted that witnesses are from rural area. They could not have stated every details in precision and on this count, prosecution version cannot be held to be unbelievable. In support of her submission, she pointed out decision in the case of Manjit Singh and anr. Vs. State of Punjab and anr. reported in (2013) 12 SCC 746. Learned Additional Public Prosecutor has submitted that learned trial Court rightly convicted the appellant, hence, the appeal is liable to be dismissed.

9. Perused the evidence of material witnesses. As per the case of prosecution, P.W. 2, P.W. 4 and P.W. 8 are the eye witnesses of the incident. P.W. 2 has stated in her evidence that at the time of incident, she was washing clothes. She heard noise. Accused beat her father by axe. She rushed there. She caught hold the accused. Accused slapped her. She also slapped him. She tried to snatch axe. Accused ran away from the spot of incident.

10. In her crossexamination, material contradictions are brought on record. In her report, she has stated that she snatched axe from the hands of accused whereas she has stated before the Court that she tried to snatch the axe. In her statement, she has stated that she was washing clothes at the backside of house whereas she has denied this portion. In the crossexamination, she has specifically admitted that she along with her husband caught hold the accused and snatched axe from his hand. Thereafter accused slapped on her cheek and ran away.

11. P.W. 4 Jyotibai Tidke has stated in her evidence that at the time of incident, deceased was sleeping on quilt on the platform (oata) of Samaj Mandir. She was doing household work. Appellant Babarao Wankhede came there armed with axe, gave blow of axe on the head of Sukhdeo Ingle, again, he gave two blows on his head. Due to which Sukhdeo sustained bleeding injuries on his head. P.W. 2 caught hold the accused. Accused/appellant gave slaps on her cheek. Vandana, P.W. 2 also gave slaps to the accused. Thereafter accused ran away with axe.

12. P.W. 4 has admitted in her crossexamination that her statement was recorded after 10 to 12 days of the incident. It is pertinent to note that this witness is the neighbour of deceased, then why her statement was not recorded at earlier not explained. P.W. 2 has stated the presence of other witnesses but

not stated the name of P.W. 4. Therefore, the evidence of P.W. 4 appears to be doubtful. She has stated in the tune of P.W. 2.

13. P.W. 8 also stated as per the evidence of P.W. 2. Testimony of witnesses clouded with suspicion and discrepancy in material particulars. The material omissions and contradictions are brought on record in the evidence of P.W. 2, P.W. 4 and P.W. 8. In the case of Jagdish Prasad Vs. State of M.P. (cited supra), Hon"ble Supreme Court has held that "testimony of witness clouded with grave suspicion and discrepancy in material particulars. Recording conviction on his testimony, unsafe."

14. Evidence of P.W. 2 who is the star witness of the incident appears to be doubtful because as per her evidence, she herself and her husband caught hold the accused and snatched axe from him. Accused slapped her and ran away. She did not state further in her crossexamination that accused taken axe with him.

15. P.W. 2 has stated that accused beat her father by axe. That time, her husband was present and she with the help of her husband P.W. 6 caught hold the accused but P.W. 6 not stated anything about the incident. P.W. 6 has only stated that inquest panchanama was only prepared in his presence at Government Medical College, Nagpur. Had it been a fact as stated by P.W. 2, then it was natural for P.W. 6/her husband to depose before the Court about the incident but he has not stated a single word about the incident. Therefore, evidence of P.W. 2 is not reliable.

16. Recovery of axe from the accused as per his confessional statement appears to be doubtful. The material contradiction is brought on record in the evidence of P.W. 2. She has stated in her report specifically that she snatched the axe. In her crossexamination, she has specifically stated that she caught hold the accused along with her husband and snatched axe. Accused slapped her and ran away. She did not stated whether accused taken axe with him.

17. Both the panchas on recovery, P.W. 3 and P.W. 7 have stated that police only obtained their signatures on road. Therefore, recovery panchanama of axe is not proved. Possibility cannot be ruled out that axe was handed over by the P.W. 2 to the Investigating Officer. Hence, recovery of weapon from the accused is doubtful.

18. Evidence of P.W. 2, P.W. 4 and P.W. 8 appears to be doubtful. P.W. 4 and P.W. 8 are neighbours of deceased. Their statements were recorded after the lapse of 1012 days from the time of incident. Admittedly, they are neighbours of deceased. As per evidence of Investigating Officer, he went to the spot of incident immediately on the next day morning and prepared spot panchanama etc. Why the statements of P.W. 4 and P.W. 8 were not recorded at the same time is not explained. Therefore, evidence of P.W. 4 and P.W. 8 are not reliable.

19. In respect of Chemical Analyser report, learned trial Court recorded its findings in judgment in paragraph 18 as under : "18. As regards the forensic evidence, it may be noted here that the blood of accused as well as deceased

was of same group "A". Blood of group "A" was found on the seized quilt, jean pant of accused and the axe seized in the offence. However, as noted above, the Investigating Officer did not seal the clothes of accused as well as the axe and therefore, it is very difficult to hold....."

20. Learned trial Court wrongly recorded its finding that blood of deceased was of group "A" and it was found on the axe and clothes of accused. Chemical Analyser Reports, Exhibit Nos. 14, 15 and 67 are on record. Exhibit 14 shows that article nos. 1, 4 and 6 i.e. axe, full shirt and full pant stained with blood group "A". Blood group on other articles not determined. Therefore, it is clear that only axe and clothes of accused were stained with blood group "A". Exhibit 15 shows that blood group of accused Babarao Wankhede is determined as "A". Exhibit 67 shows that blood group of Babarao determined as group "A". There is no Chemical Analyser report in respect of examination and detection of blood group of deceased. Therefore, it cannot be said that blood group of deceased was found on the weapon/axe and clothes of accused. Therefore, Chemical Analyser Reports are also not useful to the prosecution.

21. Learned Additional Public Prosecutor has pointed out decision in the case of Manjit Singh and anr. Vs. State of Punjab and anr. (cited supra). In this case, Their Lordships have held that "discrepancies are bound to occur when an occurrence of present nature takes place. One cannot expect witnesses to state every detail with precision. On these counts prosecution version cannot be held to be unbelievable." The facts in the cited decision is very much different.

22. In the present case, P.W. 2, P.W. 4 and P.W. 8 claimed to be eye witnesses. P.W. 2 is the star witness of the incident. Her evidence is not reliable because she has stated in her evidence that she snatched the axe with the help of her husband from the hands of accused. Accused ran away whereas her husband has not stated anything about the incident. Material omissions and contradictions are brought on record in her evidence.

23. P.W. 4 and P.W. 8 are the interested witnesses who are neighbours of deceased. Presence of P.W. 4 not stated by P.W. 2. Statements of P.W. 4 and P.W. 8 were belatedly recorded after 1012 days of the incident. In fact they are the neighbours of deceased. As per the evidence of Investigating Officer, he went to the spot near the house of deceased and prepared spot panchanama. P.W. 4 and P.W. 8 not stated the incident to Investigating Officer at the time of spot panchanama. Hence, evidence of P.W. 2, P.W. 4 and P.W. 8 are not reliable. Recovery of weapon is doubtful. Both the panch witnesses not supported. As per P.W. 2 herself, she snatched axe. Therefore, possibility cannot be ruled out that axe was handed over by P.W. 2.

24. Prosecution has to prove the case against accused beyond all reasonable doubt. The material discrepancies brought on record in the evidence of eye witnesses and investigation. It creates doubt. Hence, benefit of doubt should be given to the appellant. Therefore, we are inclined to allow the appeal. Therefore,

we proceed to pass the following order. ORDER (i) The appeal is allowed.

(ii) Appellant is acquitted of the offences punishable under Sections 302 and 323 of the Indian Penal Code. He is in jail. He be set at liberty, if not required in any other crime or case.

(iii) R & P be sent back to the trial Court.

(iv) Fees of the learned counsel appointed for the appellant are quantified at Rs. 5,000/(Rupees Five Thousand Only).