

(2019) 07 BOM CK 0099
In the Bombay High Court
Case No : Criminal Appeal No. 443 Of 2010

Dattatraya Vitthal Dhamal And Ors

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 04-07-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 313, 374(2)
Indian Penal Code, 1860 — Section 143, 147, 148, 149, 201, 302, 304(2), 324
Scheduled Caste And Scheduled Tribe (Prevention Of Atrocities) Act, 1989 — Section 3(2)(vi)
Evidence Act, 1872 — Section 27

Citation : (2019) 07 BOM CK 0099

Hon'ble Judges : B.P. Dharmadhikari, J; Swapna S. Joshi, J

Bench : Division Bench

Advocate : Chaitanya Pendse, Sujit Jagtap, Siddhi Bhosale, Kuldeep Patil, M.H. Mhatre

Judgement

B.P. Dharmadhikari, J

1. By this appeal filed under section 374(2) of Cr.P.C. the original accused nos. 1 to 5 question their conviction under section 302 read with section

149 IPC and under sections 143, 147 and 148 as also under section 324 read with section 149 IPC by Sessions Judge, Satara on 17/5/2010 in Sessions

Case No. 38 of 2009.

2. The case of the prosecution in brief was that deceased Prakash had worked as driver on the truck owned by accused no. 3 Dnyaneshwar.

Dnyaneshwar did not pay his salary and Prakash therefore had left the employment five days prior to the incident, i.e. prior to 17/9/2008. The arrears of his salary were Rs.5000/- and request made by him to pay it went in vain.

3. On 17/09/2008 at about 10.00 pm accused nos. 1 to 5 came to the house of

Prakash, called him out and took him near their house. At that place there was a quarrel for the said amount. Accused no.1 Dattatraya who was also the driver in the employment of accused no. 3 thrust a gupti into the chest of deceased Prakash. His father accused no. 2, his mother accused no. 4 and his wife accused no.5 also assaulted Prakash causing his death.

The prosecution case is that the accused persons form an unlawful assembly with a common object to eliminate the deceased and then tried to conceal/destroy the weapons used in commission of the offence. Accused no. 1 had thrown chili powder in the eyes of one Sunil Kamble (PW 1) and accused no. 3 assaulted Sunil using handle of the spade. The prosecution contends that accused persons belong to particular community while the deceased and the prosecution witnesses belong to scheduled caste. Therefore, the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 were also invoked.

4. Needless to mention that the accused persons have been acquitted of the offence charged under section 201 read with section 149 IPC and under section 201 read with section 3(2)(vi) of the Prevention of Atrocities Act.

5. We have heard Advocate Pendse for the appellants and learned APP Mrs. Mhatre for the State.

6. The appellants urge that they have been fabricated in a false case and after the alleged offence, PW 1 and other witnesses were given ample time to deliberate and prepare a false version. It is clear that the FIR in the matter is ante timed. It is also submitted that the true and correct genesis of the crime has not been brought on record and the learned trial court has ignored the material inconsistencies in the evidence of the eye witnesses and the lacunae in the investigation.

7. They argue that all so called eye witnesses are close relatives of deceased and they came together to force accused no. 3 Dnyaneshwar to pay amount to the deceased. The fact that the amount was due has not been established or then the fact that the accused no.1 Dattatraya worked as driver with Dnyaneshwar has also not been established. The offence has taken place in the courtyard of house of accused no. 1 and the entire family of the accused no. 1 has been roped in.

8. Shri Pendse submits that the deceased happened to be friend of accused no. 1 and similarly accused no. 3 is friend of accused no. 1. It was

therefore, never possible and there was no intention to eliminate deceased Prakash. The family members of accused no. 1 reside together and were present in the house when accused no. 3 arrived there. It cannot be said that the family members with or without accused no. 3 formed any unlawful assembly.

9. After accused no. 3 arrived there, deceased Prakash also came perhaps with an intention to persuade accused no. 3 to pay him with the help of

accused no. 1. Some quarrel took place between them and then the other prosecution witnesses belonging to the group of deceased participated in it.

The accused persons were also injured in the process. None of the accused persons were aggressors and the prosecution has not explained how the

weapon like gupti or handle of spade has suddenly surfaced. Shri Pendse claims that the other side had come prepared with the weapons. Our

attention is also invited to the suggestion given to the prosecution witnesses that the deceased Prakash tried to attack accused no. 1 with gupti.

Accused no. 1 therefore, twisted the hands of Prakash and in the process the gupti accidentally got inserted in the body of Prakash and that none of

the witnesses state of more than one blow of gupti on the deceased. The prosecution has not explained other two injuries on the backside of left arm

of the deceased.

10. The time taken for recording of FIR, time of inquest panchanama are relied upon to show that it brings on record the situation in which PW 1 is

shown to be present simultaneously at police station and also for inquest panchanama. The appellants argue that all prosecution witnesses were in

police station after 12.30 am on 18/09/2008 till 6.00 am and they got time to ponder and to fabricate the false story.

11. It is pointed out that the nephew of PW 1 and 2 namely Nitin examined as PW 7 gives entirely different version and contradicts PW No. 1. As per

PW 3 Sonam and PW 7 Nitin, more than 10 persons were present on the spot. But then prosecution has not examined any of these persons.

12. The recovery from accused no. 2 is questioned by pointing out that PW 5 Ramdas has deposed that he was in the office during office hours.

Similarly the alleged recovery from accused no. 1 is also seriously assailed by showing that the so called blood stained cloths were lying on sewing

machine openly and the gupti was also found nearby. These recoveries are

managed only to implicate accused persons. Attention is also invited to the deposition of PW 1 to show that after the incident, sticks and gupti were seen lying on the spot.

13. The deposition of PW 6 Doctor is relied upon to show that the injury to deceased was not caused by gupti. The fact that there is no arrest

panchanama of accused no. 1, 3 and 4 is also relied upon to show that the prosecution has managed the records to suit their purpose. Accused nos. 2

and 5 are arrested at 2.30 am on 18/09/2008 while accused nos. 1 and 3 have been arrested at 15.00 hrs on 19/09/2008 and accused no. 4 was

arrested on 21/09/2008 at 14.00 hrs. The appellants submit that the prosecution nowhere states that the accused persons were absconding at any point

of time.

14. Without prejudice, he submits that as the accused persons were aggressors, a single blow given by accused no. 1 Dattatraya cannot be seen as

indicative of intention to kill deceased Prakash. Without prejudice it is submitted that at the most, it may constitute exceeding little during self defence.

He contends that in such a situation, when the group of persons suddenly come in night hours and quarrel began, the exercise of right of self defence

cannot be measured with the mathematical precision. Some excess force employed in it without premeditation needs to be overlooked and he

therefore, prays for acquittal of the accused persons.

15. Learned APP submitted that there are 4 eye witnesses and their evidence about the incident is consistent and convincing. He submits that

deceased was called by accused persons and thereafter he was killed in preplanned manner. Use of gupti and handle of spade itself shows previous

planning.

16. He pointed out that after death of victim in hospital at night at about 11.30 p.m., FIR was lodged immediately and it is not ante-dated. Distance

between police station and rural hospital in which inquest/post mortem was performed is hardly 6 k.m. and in night hours police and pancha could have

reached within short time. He therefore states that argument of fabrication of false story by prosecution witnesses is unsustainable.

17. Recoveries under section 27 of the Evidence Act are strongly relied upon. It is submitted that human blood is detected on clothes of accused No.1

and the said clothes also had DNA of deceased. Our attention is drawn to report

of Chemical Analyzer to show that chilly powder was seen in nail clippings of accused Nos.1, 2 and 5.

18. Learned APP submits that when prosecution witness No.1 states that he saw gupti at spot and has identified the same, argument of learned counsel for appellant that gupti as shown to be seized under section 27 of the Evidence Act is by way of farce or then it is a different gupti is misconceived. The said witness has supported prosecution fully.

19. Our attention is invited to deposition of PW⁶ Dr. Shedge. It is pointed out that this Doctor has examined PW¹ in less than 5 hours after the incident. Mentioning of date 19/9/2009 in Exhibit 79 by him is inadvertent error because certificate is issued on that date.

20. Learned APP lastly submitted that accused did not examine any witness in defence and also did not come forward with any FIR. Their arguments are therefore by way of an afterthought and unsustainable.

21. The description of spot shows that it is courtyard of accused Nos.1, 2, 4 and 5. The boundaries also reveal that the deceased and his group were present in courtyard of accused persons.

22. Accused No.1 is son of accused No.2 and accused No.5 is wife of accused No.1. Accused No.4 is mother of accused No.1. These two couples

i.e. father, mother, son and daughterⁱⁿlaw were in their private property. Accused No.3 Dyaneshwar is an outsider but then he happens to be

friend of accused No.1[?] Dattatraya. It therefore cannot be said that accused persons assembled in courtyard.

23. Perusal of evidence of PW³ Sonam shows that her husband deceased Prakash was called outside by accused No.1 Dattatraya. She claims that

her husband then went out and she heard loud sound of argument between her husband and accused. Therefore she and her mother in law came out.

They saw accused persons assaulting Prakash. Sunil and Anand tried to separate fight. Accused No.1 threw chilly powder in the eyes of Sunil. She

states that accused assaulted Sunil with stick and accused No.2 assaulted him with handle of spade. Accused No.1 assaulted her husband on his chest

with gupti and also on his left arm. Accused Nos.4 and 5 assaulted her husband with fist and kick blows. Her husband Prakash fell down in injured

condition and accused persons ran away. She has identified stick handle of spade and gupti.

24. The deposition of PWÂ2 Ananda shows that after hearing loud arguments he, Sunil and others went out. Physical quarrel was going on between 5

accused and deceased. Accused persons assaulted Prakash. They tried to separate the quarrel. Accused No.1 threw chilly powder in the eyes of

Sunil. Accused No.3 gave blow of stick on back of Sunil. Accused No.1 assaulted Prakash with gupti. Accused No.2 and accused No.3 had danda

and stick. They also assaulted Sunil. They assaulted deceased Prakash with kick blows. Accused Nos.4 and 5 also assaulted Prakash with kicks.

Prakash fell down and accused persons ran away. In cross examination he has stated that deceased Prakash was called out by accused Nos.1 and 3

from outside.

25. During cross examination he is also given a suggestion that Prakash was having gupti and other persons with Prakash had stick. Suggestion is

given to him that accused No.3 told deceased Prakash that he would look into accounts and pay after two days and that he did not owe any amount.

He denied that Prakash told accused No.3 that Prakash wanted amount immediately and Prakash rushed towards accused No.3 and in the scuffle

gupti in the hands of Prakash accidentally injured his own hand. Suggestion was given that accused No.1 Dattatraya and his father Vitthal tried to stop

accused No.3 and Prakash. He denied suggestion that chilly powder was thrown in the eyes of Sunil by some other persons. He also denied that Sunil

went to wash his eyes. He also denied that when Prakash attempted to assault accused No.1 Dattatraya with gupti, Dattatraya caught hold of his

hands and pushed Prakash backwards. At that time gupti accidentally pieced into the chest of Prakash.

26. PWÂ1ÂSunil had lodged a police report and has stated therein that after hearing loud sound he came out. All the accused persons were abusing

and scuffling with deceased. Accused No.1 came charging towards him. Sunil felt that accused No.1 was about to throw something in his eyes and he

therefore ducked and closed eyes. Chilly powder thrown by accused therefore could not enter his eyes. Gupti was in the hands of accused No.1.

After PWÂ1 ha closed his eyes. Accused No.1 pierced gupti in chest of deceased Prakash. Accused No.3 assaulted with stick on back of PWÂ1.

He went home washed his eyes and returned to spot. He has identified gupti which was used to attack deceased Prakash.

27. In his cross examination, he accepted that there was no dispute between Prakash and Dnyaneshwar. Further he has stated that after arrival at spot, he noticed quarrel between deceased and accused No.3 He also stated that two sticks were lying near Prakash and gupti was lying at about 25 ft. from the house. He accepted that as deceased was lying in front of house of accused No.1 they discussed about lodging of police complaint and lodged complaint accordingly. Various suggestion given to him to prove that witnesses and Prakash were aggressors, are denied by him. He also denied that gupti was with Prakash and accused No.1 twisted Prakash's hand due to which gupti accidentally got inserted in his chest.

28. Accused No.1 as part of his statement under section 313 of Cr.P.C., filed written statement in detail. Therein he has mentioned that when after

dinner he and his family members were sitting in front courtyard chitchatting, his friend Dnyaneshwar arrived. When they were talking, from northern

side all of a sudden, deceased Prakash, his maternal uncle Ananda, his maternal brother Sachin and his wife Sonam came near them loudly abusing

Dnyaneshwar. Prakash was having a gupti Sunil and Ananda had a handle and stick. They were demanding money from Dnyaneshwar and

threatened him with dire consequences. When Dnyaneshwar refused to give money, Prakash, Sunil and Ananda proceeded to assault Dnyaneshwar.

Hence accused No.1 and his father intervened. Prakash, Sunil and Ananda threatened them also. Prakash was beating Dnyaneshwar and hence he

again intervened. His father Vithal was trying to push Sunil and Ananda away. 15-20 neighbours also gathered. One out of those persons who had

gathered, threw chilly powder in eyes of Sunil and Sunil ran towards his house to wash eyes. Prakash came to assault Dattatraya with gupti and

scuffle ensued. To save himself, accused No.1 claims that he caught hold of both hands of Prakash and twisted them inside and pushed Prakash

backwards. Accidentally the gupti pierced chest and injured Prakash. Sunil, Ananda left the handle of spade and stick there. Gupti with Prakash was

also lying at the Spot.

29. This statement in defence and suggestions (supra) therefore show that it is accused No.1 who gets connected with injury of deceased. PW-6?

Dr. Raju Shedge has conducted autopsy and he found three injuries. One on chest second injury was on left arm posterior aspect while third wounds

again on left arm posterior aspect. He has stated that the death must have occurred immediately. As left ventricle itself was having injury, patient could not have survived at all. Death was due to injury on vital organ.

30. PWÂ6ÂDr. Shedge has in examinationÂinÂchief, deposed that injury Nos.2 and 3 were not possible with sharp object or weapon. Gupti was then shown to him and he has stated that injury Nos.2 and 3 are possible due to scratching of that gupti. This evidence therefore shows that there was single injury on deceased Prakash which resulted in his death.

31. We need not in the light of this material and discussion, dwell more upon the evidence of PWÂ4ÂDilip who witnessed disclosure under section 27 by accused No.1, seizure of clothes from sewing machine table and gupti kept by side of that sewing machine table from house of accused No.1.

32. Investigating Officer has also seized plastic tin containing chilly powder from residence of accused No.1. Human blood has been found by Chemical Analyzer on clothes of accused No.1 and DNA on it match with DNA of deceased.

33. The finding of chilly powder in nail clippings of accused Nos.1, 2 and 5 cannot in itself be taken as incriminating circumstance. The mode and manner in which offence took place is not correctly brought on record. PWÂ3 specifically states that deceased Prakash was inside the house and went out after he was given call. According to her call was given by accused No.1. She could not explain why this fact did not appear in hear police statement. PWÂ2 states that accused Nos.1 and 3 gave a call from outside to Prakash. Thus there is some inconsistency in their evidence about it.

34. There was no reason for accused Nos.1, 2,4 and 5 to quarrel with deceased. Accused persons were present in their courtyard and deceased and his supporters had entered their courtyard. Eye witness PWÂ7 does not point out any call given by accused persons to deceased Prakash. He deposed that accused No.1 threw chilly powder in the eyes of Sunil but Ananda was washing his eyes.

35. PWÂ5ÂRamdas Anpat is on recovery from Vithal of handle of spade. This witness is told by Thasildar to help police. He states that panchanama Exhibit 71 was recorded between 4.00 to 4.15 p.m. In cross, he accepted that he was in office and his office hours are from 10.00 a.m. to 5.45 p.m.

Thus, he accepted that he was not present when memorandum under section 27

was recorded or recovery was effected. Hence recovery of handle of spade at the instance of accused No.2 could not be established by the prosecution.

36. Injury certificate Exhibit 79 of PW¹ shows that Doctor has put date 19/9/2008 upon it. Below it he has also mentioned time 3.35 a.m. He has further stated that injuries on Sunil are within 24 hours. In chief he has deposed that he examined PW¹ at 3.35 a.m. on 18/9/2008. This examination was at Rural Hospital, Khandala.

37. It is nobody's case that on 19/9/2008 at 3.35 in the morning any incident occurred. It appears that date 19/9/2008 in Exhibit 79 has been put erroneously. Moreover witness has specifically deposed about this date and time and he has not been cross examined about date. But then injuries on him were not serious.

38. Inquest panchanama Exhibit 47 shows that it is recorded at Rural Hospital, Khandala between 00.30 hours to 01.30 hours on 18/9/2008. FIR

Exhibit 45 shows that statement of Sunil is recorded and FIR was registered on 18/9/2008 at 00.15 hours. PW¹ in cross states that he reached police

station at about 12.30 hours in the night. His evidence also shows that there was discussion about lodging of police complaint. PW² Ananda has

stated that all of them reached police station at about 11.30 p.m. and they were in police station upto 6.00 a.m. next morning. This evidence however

does not show that PW¹ could not have attended the inquest in the meanwhile. We cannot therefore accept the contention that FIR has been

recorded after deliberations in the morning i.e. after 6.00 a.m. on 18/9/2008. The fact that section 161 statement of PW³, wife of deceased was

recorded in the morning is not sufficient for this purpose.

39. Evidence shows that there were 10¹² neighbours also present on spot. Investigating Officer has not produced any independent witness. All

relatives of deceased Prakash are deposing against appellants. Money transaction was between the deceased and accused No.3, accused No.1 was

not party to it. We therefore find substance in contention that genesis of crime has not been correctly brought on record. Injuries on left arm of

deceased have not been explained by any witness. The prosecution witnesses also do not point out how during quarrel suddenly the accused persons

without going back to their home produced and used handle of spade or gupti or

chilly powder.

40. Involvement of accused No.1 in the matter cannot be ruled out though he claims that deceased had tried to assault him, he has not lodged any police report to that effect. He, for the first time in Court has come up with defence that to save himself he twisted arms of deceased and pushed him backwards which resulted in deceased piercing the gupti in his own chest.

41. PW 6 Dr. Raju Shedge has stated that this injury in chest was measuring 1 x 2 x 12.5 c.m. Thus, gupti had pierced deep into the body puncturing left ventricle. We find that such an injury could not have been possible in situation being explained by accused No.1. Though, it is apparent that accused No.1 was not having an intention to kill deceased Prakash fact that he delivered the single blow is clear. Developments leading to it and genesis of crime has not been correctly explained. Accused No.1 definitely had knowledge of consequences of his act. Though arguments have been advanced about date and time of arrest of accused persons, absence of arrest panchanama of accused Nos.1,3 and 4 and absence of medical report on injuries on accused persons, we find that this situation helps other accused persons but not accused No.1. It is also clear that prosecution has not approached the Court with case that accused persons were absconding. The blood stained clothes were not hidden by accused No.1 but were seen on sewing machine table.

42 We therefore find that the conviction of other accused persons under section 302 read with 149 of IPC and under sections 143, 147, 148 as also under section 324 read with 149 of IPC is unsustainable. Accordingly, we proceed to pass following order:

i) We alter conviction and sentence of appellant No.1/accused No.1 Dattatraya for the offence under Section 302 of IPC to one under section 304(2) of IPC sentencing him to suffer R.I. for 10 years. If he has already put in 10 years of imprisonment, he shall be released immediately if his custody is not required by State in any other matter;

ii) The conviction of other appellants under Section 302 r/w Section 149 of IPC and under Sections 143, 147 and 148 as also under Section 324 read with Section 149 of IPC is quashed and set aside;

iii) The other appellants/accused Nos.2, 3, 4 and 5 are acquitted of the offences as charged and they be set free if their custody is not required by

State Government in any other matter;

iv) Muddemal property be dealt with as directed by the Trial Court after appeal period is over.