
(2016) 10 BOM CK 0023
In the Bombay High Court
Case No : Criminal Appeal No. 192 of 2013

Dnyandeo s/o Gopinath Pawar

APPELLANT

Vs

State of Maharashtra

RESPONDENT

Date of Decision : 27-10-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 300, Section 32

Citation : (2016) 3 AIRBomRCri 925

Hon'ble Judges : S.S. Shinde and Sangitrao S. Patil, JJ.

Bench : Division Bench

Advocate : Mr. N.R. Shaikh, Advocate, for the Appellant; Mr. S.W. Munde, A.P.P, for the Respondent/State

Final Decision : Dismissed

Judgement

Sangitrao S. Patil, J. - By this appeal, the original accused No. 2 in Sessions Case No. 95 of 2008 has challenged his conviction and sentence for the offence punishable under section 302 of the Indian Penal Code ("the I.P.C.", for short), recorded by the Adhoc Additional Sessions Judge- 2, Latur on 17th April, 2010.

2. Briefly stated, the case of the respondent (hereinafter referred to as "the prosecution") is that the deceased Bhaskar Dhansing Pawar was residing at Nandurga Tanda, Taluka Ausa, District Latur. On 2nd June, 2008, there had been quarrel between one Raju Ganu Pawar, who was the nephew of the deceased Bhaskar, on one hand and the appellant and one Manoj Budha Chavan (hereinafter referred to as "accused No. 1") on the other. The deceased Bhaskar intervened and questioned the appellant and accused No. 2 as to why they were quarrelling on account of a trifle ground. Therefore, both of them had got annoyed. It is further the case of the prosecution that on 3rd June, 2008 at about 6.30 p.m., the deceased Bhaskar came back to his house from his field. At that time, accused No. 1 went to the house of the deceased Bhaskar and asked to accompany him to go to the house of the appellant on the say that he had

some work with the deceased Bhaskar. Accordingly, the deceased Bhaskar went to the house of the appellant with accused No. 1. The appellant was present there. After reaching the open space in front of the house of the appellant, accused No. 1 questioned the deceased Bhaskar as to why he had intervened in the quarrel that had taken place on 2nd June, 2008 with Raju Pawar and further caught hold of the deceased Bhaskar. At that time, the appellant took out a dagger (i.e. Sura) and pierced it in the abdomen of the deceased Bhaskar. The deceased Bhaskar tried to resist the appellant and in that attempt, he sustained injuries to his left middle finger and wrist due to the dagger. The intestine of the deceased Bhaskar protruded from his abdomen. He placed his hand on his abdomen and tried to run away. At that time, the appellant gave one more blow of dagger on the left knee of the deceased Bhaskar and caused him a bleeding injury. The deceased Bhaskar fell down and become unconscious. He was initially taken to the Rural Hospital at Khillari from where he was referred to the Civil Hospital at Latur. He was operated there. However, ultimately, he succumbed to the abdominal injury during the treatment in the hospital on 8th July, 2008 at 4:40 a.m.

3. The statement of the deceased Bhaskar was recorded by A.S.I. Bansode (PW13) (Exh-71) on 4th April, 2008, wherein he stated the above-referred incident implicating the appellant and accused No. 1. The said statement was treated as the First Information Report (for short, "the FIR"). On the basis of that FIR, Crime No. 77 of 2008 came to be registered in Police Station, Killari, for the offence punishable under section 307 read with section 34 of the I.P.C.

4. The investigation followed. The appellant and accused No. 1 came to be arrested on 4th June, 2008. Their clothes came to be seized. The blood stained clothes of the deceased Bhaskar also came to be seized. The statements of the witnesses were recorded. One more statement of the deceased Bhaskar came to be recorded by the Special Executive Officer namely Vikrant Gaikwad on 6th June, 2008. The deceased Bhaskar is stated to have disclosed the cause of injuries sustained by him on the day of the incident to some of the witnesses as well. Their statements also came to be recorded. The blood stained dagger came to be seized at the instance of the appellant on 4th June, 2008. The blood samples of the deceased Bhaskar as well as that of the appellant and accused No. 1 came to be collected. The seized articles and blood samples were sent to the Chemical Analyst for analysis and report. After the demise of Bhaskar on 8th July, 2008, inquest panchanama of his dead-body was prepared. The dead-body was referred to the Civil Hospital, Latur for postmortem. The Autopsy Surgeon found external as well as the internal injuries on and inside the body of the deceased Bhaskar. They opined that the clinical and postmortem findings are consistent with the death due to stab injuries.

5. After the demise of Bhaskar, the offence punishable under section 307 of the I.P.C. came to be converted under section 302 of the I.P.C. After completion of the investigation the appellant and accused No. 1 came to be prosecuted for the

offence punishable under section 302 of the I.P.C. read with section 34 of the I.P.C.

6. The prosecution examined sixteen witnesses in support of its case. Accused No. 1 and the appellant examined Dr. Rajni Halgarkar in their defence. After evaluation of the evidence produced on record, the learned trial Judge found accused No. 1 and the appellant guilty of the offence punishable under section 302 read with section 34 of the I.P.C. and sentenced each of them to suffer imprisonment for life and to pay a fine of Rs. 1000/-, in default to suffer rigorous imprisonment for two months.

7. Accused No. 1 filed Criminal Appeal No. 252 of 2010, challenging his conviction and sentence for the offence punishable under section 302 read with section 34 of the I.P.C. before this Court. The said appeal came to be decided on merits on 10th January, 2012 and he came to be acquitted. It was specifically observed in paragraph No. 34 of the judgment dated 10th January, 2012 that there are no factors which would indicate, by the requisite standard and beyond reasonable doubt, that the appellant had shared any common intention with the said Dnyandeo (the present appellant) to kill Bhaskar. In paragraph No. 37 of the said judgment, it is mentioned as under :-

"We may only say that we have not expressed any opinion with respect to the merits of the case in respect of the case of the co-accused Dnyandeo (the present appellant), though some discussion regarding reliability of the dying declarations became inevitable from the point of view of the involvement of the appellant in the alleged offence. We have also not considered whether the conviction of the co-accused Dnyandeo is proper and legal. We have proceeded on the basis that "even assuming Dnyandeo had indeed assaulted Bhaskar, whether the appellant could be said to have shared the common intention with him on the basis of the evidence adduced before the trial court". We have examined the dying declarations only in the limited context of judging the role attributed to the appellant and from the point of view as to whether the role which may be safely attributed to him on the basis of the evidence, was sufficient for recording the finding that he shared the common intention with the co-accused."

8. The appellant preferred the above numbered appeal against his conviction and sentence on 10th April, 2013 i.e. after about one year and three months of the disposal of Criminal Appeal No. 252 of 2010, filed by accused No. 1. We are considering the merits of the impugned judgment and order passed by the learned trial Judge to the extent of the role attributed to the present appellant alone.

9. The case of the prosecution is depending on the following evidence :-

(i) The first dying declaration (Exh-73) of the deceased Bhaskar, recorded on 4th April, 2008 by API Bansode (PW13).

(ii) The second dying declaration (Exh-57) of the deceased Bhaskar, recorded by the Special Executive Officer Gaikwad (PW11) on 6th June, 2008.

(iii) The oral dying declarations of the deceased Bhaskar made before Ganpati (PW1) (Exh-22), Rajendra (PW5) (Exh-36), Ushabai (PW6) (Exh- 37) and Shalubai (PW8) (Exh-44).

(iv) The evidence of Ganpati (PW1) and Madhukar (PW4) (Exh-35), who claim themselves to be the eye witnesses to the part of the incident.

(v) The discovery of a blood stained dagger at the instance of the appellant.

(vi) The seizure of the blood stained clothes of the appellant.

10. It has come in the evidence of Ganpati (PW1) (the brother of the deceased Bhaskar), Madhukar (PW4), Ushabai (PW6) (the widow of the deceased Bhaskar) and Shalubai (PW8) (the sister of the deceased Bhaskar) that due to protruding of intestine from the abdomen of the deceased Bhaskar, he became unconscious on the spot itself and in that condition, he was taken initially to the Rural Hospital at Killari and then to the Civil Hospital at Latur, for treatment. Ushabai (PW6) and Shalubai (PW8), who were with the deceased Bhaskar in the Civil Hospital at Latur, state that the deceased Bhaskar regained consciousness on the next day morning of the incident i.e. on 4th April, 2008. This evidence has not been challenged in the cross-examination of these witnesses. It is, thus, clear that the deceased Bhaskar was not in a position to talk till the morning of 4th April, 2008.

11. Ushabai (PW6) deposes that after regaining consciousness, the deceased Bhaskar started speaking. She enquired with him about the incident, whereon he stated that accused No. 1 came to his house and on his call, he went with accused No. 1 to the house of the appellant. Accused No. 1 caught hold of him while Dnyanoba (present appellant) thrust a dagger (suri). Due to that, there had been injuries to the left middle finger, left knee joint and abdomen of the deceased Bhaskar.

12. Shalubai (PW8) states that after the deceased Bhaskar regained consciousness on the next day morning of the incident, she enquired with him, whereon he told that he went with accused No. 1 to the house of the appellant, where accused No. 1 caught hold of him and the appellant gave the blows of dagger (suri) in his abdomen. He further told that he was trying to rescue himself from the clutches of accused No. 1, when the appellant gave a blow of dagger on his left knee joint. She states that the deceased Bhaskar was conscious and was speaking correctly when the said statement was given by him.

13. The presence of Ushabai (PW6) and Shalubai (PW8) in the Civil Hospital at Latur for taking care of the deceased Bhaskar was quite natural. It has come in the cross-examination of Ushabai (PW6) that the deceased Bhaskar regained consciousness on the next day of the incident at about 6:00 a.m. to 7:00 a.m. As seen from the evidence of Dr. Rathod (PW16) (Exh-100), the deceased Bhaskar

was operated by him on 3rd June, 2008. It has come in the evidence of Dr. B.G. Patil (PW14) (Exh-97) and Dr. Rathod (PW16) that the deceased Bhaskar was admitted in the Civil Hospital at Latur on 3rd June, 2008 at about 8:45 p.m. There was stab injury to his left lower abdomen and the intestine had protruded out of the abdomen. Immediately after his admission, he was shifted for operation and accordingly operated at 9:15 p.m. Dr. Patil (PW14) states that the general condition of the deceased Bhaskar, as seen from the case papers, was poor upto 6th June, 2008. However, he specifically states that on 4th June, 2008, at 9:00 a.m. the deceased Bhaskar responded to verbal commands. Dr. Rathod (PW16) states that on 4th June, 2008, the deceased Bhaskar was irritable with abnormal talks. The physician's reference was taken and the deceased was stabilised. From the evidence of these medical witnesses, it is clear that on 4th June, 2008, the condition of the deceased Bhaskar was stabilised and he was responding to verbal commands. In the circumstances, the evidence of Ushabai (PW6) and Shalubai (PW8) that on being asked by them, the deceased informed them about the circumstances under which he sustained injuries, as referred above, cannot be doubted.

14. Ganpati (PW1) states that he met the deceased Bhaskar in the Civil Hospital at Latur. The deceased Bhaskar was in a fit mental condition to speak. When he enquired with the deceased Bhaskar as to how the incident took place, the deceased Bhaskar disclosed that accused no. 1 Manoj caught hold of him and the appellant gave blows. The facts that this witness met the deceased Bhaskar in the Civil Hospital at Latur and at that time, the deceased Bhaskar informed him about the cause of his injuries to this witness, have not been challenged in his cross-examination. We do not find any reason to disbelieve the version of this witness on the point of oral dying declaration given by the deceased Bhaskar.

15. Rajendra (PW5) (Exh-36) is the nephew of the deceased Bhaskar. He states that prior to the day of the incident, there had been a quarrel between accused no. 1 Manoj and the appellant on one hand and himself on the other at about 7:00 p.m. The deceased Bhaskar pacified that quarrel and on the next day, he came to know about stabbing of the deceased Bhaskar by accused no. 1 and the appellant. He met the deceased Bhaskar on the next day of the incident in Civil Hospital at Latur. He found the deceased Bhaskar as conscious. On being enquired by him, the deceased Bhaskar told him that accused no. 1 Manoj had caught hold of him and the appellant stabbed him by means of a dagger (Sura). He further states that the deceased Bhaskar informed him that the incident of stabbing was the outcome of his intervention in the quarrel that had taken place on the previous day. This witness being the nephew of the deceased Bhaskar, it was quite natural for him to go to the Civil Hospital at Latur to see the deceased Bhaskar. After seeing Rajendra (PW5), it was further quite natural for the deceased Bhaskar to tell Rajendra (PW5) about the cause of the injuries sustained by him. The version of this witness about the oral dying declaration given by the deceased Bhaskar, thus, cannot be doubted.

16. From the evidence of Ganpati (PW1), Rajendra (PW5), Ushabai (PW6) and Shalubai (PW8), it is clear that the deceased Bhaskar had regained consciousness on the next day of the incident. From the evidence of Dr. Patil (PW14), it is clear that the deceased Bhaskar was responding to the verbal commands. It was quite natural on the part of the deceased Bhaskar to disclose the cause of injuries sustained by him when the above witnesses met him in the hospital. The role attributed by the deceased Bhaskar against the appellant in his oral dying declaration is quite consistent.

17. Ganpati (PW1) deposes that at the time of the incident, at about 6.40 p.m., he was inside his house. After hearing the commotion from the backside of his house (where there was the house of the appellant), he rushed to the house of the appellant. He saw the deceased Bhaskar running with his hands covering his abdomen. Thereafter, the deceased Bhaskar fell down on the ground. He saw the appellant holding a knife. The blood was sprinkled on the clothes of the appellant.

18. Madhukar (PW4) deposes that on the day of incident, at about 6.40 p.m., he was standing in front of his house. He heard commotion from the side of the house of the appellant. He rushed towards that side and reached near the house of the appellant. He saw the deceased Bhaskar running by holding both of his hands on his abdomen and then falling down on the ground. He states that the appellant was following the deceased Bhaskar. He further states that the appellant gave a blow of dagger (Suri) on the knee joint of the deceased Bhaskar. He then went to the house of the deceased Bhaskar and informed his wife and sister about the injuries sustained by the deceased Bhaskar. He immediately went back to the house of the appellant.

19. It has come in the cross-examination of Madhukar (PW4) that the distance between his house and that of the appellant is 150 feet. Likewise, in the cross-examination of Ganpati (PW1), it has come that there is hardly any distance between his house and that of the appellant. They are just behind each other. Considering the nearness between the houses of Ganpati (PW1) and Madhukar (PW4) on one hand and that of the appellant on the other, it was quite natural and probable on their part to hear the commotion from the side of the house of the appellant and to go to the spot of the incident immediately. Thus, their presence near or at the spot of the incident, as claimed by them, cannot be doubted.

20. An attempt has been made to suggest that the appellant sold out his land to a third person which Madhukar (PW4) wanted to purchase and therefore, Madhukar (PW4) had grudge against the appellant. This fact has been denied by Madhukar (PW4). We do not find any substance in this contention raised on behalf of the appellant. Madhukar (PW4) is not the only witness to state about the incident. There is other evidence which supports the evidence of Madhukar (PW4).

21. Considering the evidence of Ganpati (PW1) and Madhukar (PW4), it would be

clear that they have stated before the Court in respect of the incident to the extent that they had witnessed it. Had they been of the tendency to state false, they could have stated the incident right from the beginning. Their versions that they saw the deceased Bhaskar running with holding his hands over his abdomen and running of the appellant behind the deceased Bhaskar armed with a dagger, shows that they did not add anything at their own with a view to falsely implicate the appellant. We do not find any reason to disbelieve the evidence of these witnesses on this point. Thus, from their evidence, it will be clear that the appellant was running behind the deceased Bhaskar armed with a dagger (Sura) at the time of the incident.

22. Madhukar (PW4) specifically states that the appellant gave a blow of dagger on the knee joint of the deceased Bhaskar. Dr. Bargale (PW7) (Exh-40), who conducted postmortem of the body of the deceased Bhaskar, states that he noticed one healed contused abrasion below popliteal fossa of left leg of the deceased Bhaskar. There is nothing in the cross-examination of Madhukar (PW4) to show that he deposed before the Court about causing of injury by the appellant over the knee joint of the deceased Bhaskar by means of a dagger, as an improvement, addition or exaggeration. His statement has been supported by the medical evidence.

23. The evidence of Ganpati(PW1) and Madhukar (PW4) sufficiently proves presence of the appellant at the spot of the incident running with a dagger behind the deceased Bhaskar. The evidence of Madhukar (PW4) further sufficiently shows that the appellant gave a blow of dagger on the left knee joint of the deceased Bhaskar.

24. API Bansode (PW13) states that on receiving the letter (Exh-72), on 4th June, 2008 from the Medical Officer from Rural Hospital, Killari, informing that the deceased Bhaskar resident of Nandurga Tanda had been referred to the Civil Hospital at Latur, he went there to record the statement of the deceased Bhaskar. The letter (Exh-72) contains that the deceased Bhaskar, who had sustained serious injury on his abdomen that was caused by means of a knife, had been referred to the Civil Hospital at Latur for treatment. API Bansode (PW13) states that he approached the Medical Officer in the Civil Hospital at Latur and after getting an opinion from the said Medical Officer that the deceased Bhaskar was in a condition to give statement, recorded the statement (Exh-73) of the deceased Bhaskar as per his say. He further states that he read over the contents thereof to the deceased Bhaskar whereon the deceased Bhaskar admitted that they were as per his say. Then he obtained the thumb impression of the deceased Bhaskar on the statement (Exh-73).

25. Dr. Jaishri (PW10) (Exh-53), who was attached as a Medical Officer to the Civil Hospital at Latur, states that a Police Inspector from Police Station, Killari, called her to state whether the deceased Bhaskar, who was admitted in that hospital, was conscious and oriented to give a statement. She went to the ward where deceased Bhaskar was admitted. She enquired about the name and

address of the deceased Bhaskar, which he disclosed correctly. Then she informed the Police Inspector that the deceased Bhaskar was conscious and oriented to give statement. Accordingly, she made an endorsement (Exh-54) that after examining the patient clinically he was found to be conscious and in a condition to give a statement. She further states that thereafter the Police Inspector started recording the statement of the deceased Bhaskar in her presence through a police constable. The Police Inspector was enquiring with the patient and was dictating the version of the patient to the police constable who was scribing it. She states that the recording of the statement was over in her presence. Thereafter, the thumb impression of the patient was obtained in the presence of the Police Inspector. She again examined the patient and found him to be conscious. According to her, 45 minutes were required to complete the recording of the statement of the said patient i.e. the deceased Bhaskar. It has come in her cross-examination that none of the relatives of the deceased Bhaskar was present at the time of recording of his statement. As such, the possibility of tutoring of the deceased Bhaskar is ruled out. She denies that the deceased Bhaskar was not in a condition to give a statement and that she mechanically endorsed that he was in a condition to give a statement. From the evidence of Dr. Jaishri (PW10), it is clear that the deceased Bhaskar was in a condition to give a statement during the period the statement (Exh-73) came to be recorded.

26. In the statement (Exh-73) of the deceased Bhaskar, which has been treated as the FIR, he narrated that on 3rd June, 2008, at about 6:30 p.m., he brought his bullocks at his home from his agricultural land. When he was at his house, accused no. 1 Manoj came there and asked him to accompany him to go to the house of the appellant. According, he went to the house of the appellant. The appellant was present in the open space in front of his house. Accused no. 1 Manoj asked him as to why he had intervened in the quarrel that had taken place with Rajendra (PW5) on 2nd June, 2008 and caught hold of him. At that time, the appellant pierced the dagger in the abdomen of the deceased Bhaskar. When the deceased Bhaskar tried to resist him, the dagger struck to his left little finger due to which it got cut. He sustained injury on his wrist also. As the intestine had protruded from his abdomen, he started running by holding one of his hand with his abdomen. At that time, the appellant again gave a blow of dagger on his left knee due to which he sustained injury. He stated that the incident took place at about 6:45 p.m., in front of the house of the appellant. He further stated that he became unconscious and fell down. He then found himself in the hospital when he regained consciousness and he was informed that he was operated.

27. The learned counsel of the appellant submits that from the evidence of Dr. Jaishri (PW10), who was treating the deceased Bhaskar, it is clear that she had advised tramadol injection and accordingly, it was administered to the deceased Bhaskar at about 12:00 noon on 4th June, 2008. Dr. Rajni (DW1) (Exh-93), who has been examined by the appellant in his defence, states that the injection Tramadol is sedative and causes nausea, vomiting, dry mouth, ventilator

depression, hallucinations, dizziness, drowsiness, anxiety, insomnia. She then states that the serious side effects of Tramadol drug are break down of nerves system, hallucinations which means false thinking of mind, confusion in the mind, etc. However, she herself states that the adverse effects of Tramadol depend on the patient's sensitivity. She admits that the Medical Officers certify whether a patient is conscious and oriented to give a statement only after examination and getting satisfied about his condition.

28. If the evidence of this witness Dr. Rajni (DW1) is considered, it can be said that whatever the adverse effects are attached to injection Tramadol, cannot ipso facto be attributed the patient. Depending on the sensitivity of the patient concerned, the said adverse effects would exhibit their presence. Therefore, ultimately, the side effects would differ from patient to patient and it would be for the Medical Officer concerned only, who actually examines the patient, to depose about his mental condition and to certify whether he is conscious, oriented and fit to give statement.

29. As stated above, Dr. Rathod (PW16) states that on 4th June, 2008, the deceased Bhaskar was irritable with abnormal talks, but was stabilised after Physician's reference was taken. If this evidence is considered, the evidence of Dr. Jaishri (PW10), who actually examined the deceased Bhaskar and opined about his fitness to give statement, cannot be doubted.

30. From the evidence of Dr. Jaishri (PW10), and that of API Bansode (PW13), it is clear that the deceased Bhaskar was in a fit state of mind to give statement when the dying declaration / FIR (Exh-73) came to be recorded. API Bansode (PW13) specifically states that after recording the said statement, it was read over to the deceased Bhaskar who had admitted that it was recorded as per his say. There is specific mention at the bottom of the said statement that it was read over to the deceased Bhaskar and that he admitted it to be true and correct. It is, thus, clear that the dying declaration and FIR (Exh-73) was given by the deceased Bhaskar voluntarily when he was in a fit condition to give statement.

31. There is one more dying declaration of the deceased Bhaskar recorded by Special Executive Officer Gaikwad (PW11) (Exh-55) on 6th June, 2008, he states that after receiving the letter (Exh-56) dated 5th June, 2008 from Police Station, Gandhi Chowk, Latur, he visited the Civil Hospital at Latur to record the statement of the deceased Bhaskar. He contacted Dr. Manisha (PW9) (Exh-50), Resident Doctor attached to that hospital and requested her to opine whether the deceased Bhaskar was in a fit condition to give statement. Dr. Manisha (PW9) states that on the request of Gaikwad (PW11), she went to the deceased Bhaskar where he was admitted and asked him his full name, address and the time. From the answers given by the deceased Bhaskar, she found him in a condition to speak. Accordingly, she certified that the deceased Bhaskar was conscious and oriented, by making an endorsement to that effect in writing under her signature on the top of the form of the dying declaration. Gaikwad (PW10) then states that

he recorded dying declaration (Exh-57) as per the say of the deceased Bhaskar. Thereafter, he obtained thumb impression of the deceased Bhaskar on that dying declaration. He states that after recording the dying declaration (Exh-57) he again requested Dr. Manisha (PW9) to certify whether the deceased Bhaskar was in a condition to give statement. Dr. Manisha (PW9) states that the dying declaration (Exh-57) was recorded by Gaikwad (10) in her presence and after it was recorded, she again certified that the deceased Bhaskar was conscious and oriented to give statement. Accordingly, she endorsed in writing (Exh-52) at the bottom of the dying declaration (Exh-57).

32. Nothing has been elicited in the cross-examination of Dr. Manisha (PW9), so that her version can be seen with suspicion. There is a specific statement of the deceased Bhaskar that the contents of the dying declaration (Exh-57) were read over to him and they were true and correct as per his say. The evidence of Gaikwad (PW11) about recording of dying declaration (Exh-57) as per the version of deceased Bhaskar, also has not been shattered in his cross-examination.

33. In the dying declaration (Exh-57), there is variance on two counts i.e. the place from where the deceased Bhaskar went with accused No. 1 Manoj to the house of the appellant and the time of his coming from his field. In the said dying declaration, it is mentioned that on 3rd June, 2008 at about 5:00 p.m. to 5:30 p.m., on his way to the village from his field, when he was sitting under a Umri tree, accused no. 1 Manoj came there and asked to accompany him for going to the house of the appellant. However, so far as the role attributed by the deceased Bhaskar against the present appellant in the said dying declaration is concerned, there cannot be said to be any inconsistency with the dying declaration (Exh-73) as well as the oral dying declarations. In the dying declaration (Exh-73), the deceased Bhaskar stated that accused no. 1 Manoj had come to his house for calling him to the house of the appellant at about 6:30 p.m. Accordingly, he went to the house of the appellant and then the incident took place. Thus, prima facie there is inconsistency in respect of these points in the dying declarations (Exh-57) and (Exh-73). Therefore, it would be necessary to seek independent corroboration to the version of the deceased Bhaskar in order to see which of the dying declarations would be reliable. We, now propose to discuss the evidence of the prosecution, which has been produced to lend corroboration to the dying declaration of the deceased Bhaskar.

34. Ushabai (PW6) specifically states that on the day of the incident, the deceased Bhaskar and herself returned to their house from the field in the evening. The deceased Bhaskar served fodder to the bullocks and at that time, accused no. 1 Manoj came there. She further states that on being asked by accused no. 1 Manoj, the deceased Bhaskar left the house and went with accused no. 1 Manoj. This evidence has not been challenged in the cross-examination of Ushabai (PW6). Therefore, it will have to be treated as accepted by the defence side. From this evidence, it is clear that the deceased Bhaskar

went to the spot of incident from his house only and not from any other place on his way to his house from his field. This evidence corroborates the version of the deceased Bhaskar that has been recorded in dying declaration (Exh-73).

35. The appellant has filed his written statement under Section 313 of the Code of Criminal Procedure. In paragraph no. 5 thereof, he states that he was arrested by the police on 4th June, 2008 at about 8:30 p.m. At that time, there were blood stains on his clothes. However, he explained that on that day, he had fallen down from a bund due to which he had sustained injuries on his head and knee and his own blood had fallen on his clothes. He states that the said clothes were seized by the police.

36. Dilip (PW2) (Exh-26) is a panch to seizure panchanama (Exh-29), under which a cream coloured full shirt and a Dhoti with red border, stained with blood, were seized from the house of the appellant in his presence on 6th June, 2008 by API Bansode (PW13). It has come in paragraph no. 9 of the cross-examination of Dilip (PW2) that the said clothes of the appellant had been seized at his house. API Bansode (PW13) also states so. In the circumstances, it is clearly established by the prosecution that a blood stained full shirt and blood stained Dhoti belonging to the appellant came to be seized from his house vide panchanama (Exh-29). As stated above, the appellant has admitted the seizure of his blood stained clothes, in his written statement. In paragraph no. 7 of his deposition, API Bansode (PW13) states that the blood samples of accused Manoj and the appellant were collected with the assistance of the Medical Officer and were sent to the Chemical Analyst. This fact has not been denied in his cross-examination.

37. It has come in the evidence of Dilip (PW2) and API Bansode (PW13) that a T-Shirt and a pant of the deceased Bhaskar were seized under panchanama (Exh-28). The said clothes were blood stained. API Bansode (PW13) states that the blood sample of the deceased Bhaskar was also sent for chemical analysis. The Chemical Analyst's Report (Exh-82) is in respect of the blood sample of the appellant wherein it is shown to be of group "B". The Chemical Analyst's Report (Exh-84) shows that the blood of the deceased Bhaskar also was of group "B". API Bansode (PW13) states that he sent the seized clothes of the appellant as well as that of the deceased Bhaskar for chemical analysis vide a letter (Exh-77) on 16th June, 2008. The report thereof is at Exh-81. The full shirt and Dhoti of the appellant are Exh-2 and Exh-3, respectively, while the T-shirt and full pant of the deceased Bhaskar are Exh-4 and Exh-5 respectively. Dhoti (Exh-2) and full shirt (Exh-3) were having moderate number of blood stains ranging from 0.5 c.m. to 5.0 c.m. in diameter spread at places while T-shirt (Exh-4) and full pant (Exh-5) were having considerable number of blood stain ranging from about 0.1 c.m. in diameter to big size spread at places. It was found that the blood on those exhibits was of human having group "B".

38. It seems that in order to take disadvantage of the fact that the blood group of the appellant was the same as that of the deceased Bhaskar, the appellant, in his written statement put forth a theory that on 4th June, 2008, he fell down

from a bund and sustained injuries to his head and knee which had fallen on his clothes, which were seized by the police. However, there is absolutely no evidence to support this theory.

39. API Bansode (PW13) states that he arrested the appellant on 4th June, 2008 vide panachanama (Exh-74). The fact that the appellant was arrested on 4th June, 2008, has not been challenged in the cross-examination of API Bansode (PW13). None of the witnesses states that the appellant had sustained bleeding injuries on the day of the incident. It is not even suggested to the witness including API Bansode (PW13) that there were any bleeding injuries on the head and knee of the appellant at the time of his arrest. The appellant has not produced any medical evidence to show that he had sustained the bleeding injuries on 4th June, 2008. Had the appellant sustained bleeding injuries, he certainly would have visited the Doctor for medical treatment. He could have examined the said Doctor to show that he had sustained bleeding injuries on 4th June, 2008 itself. There is nothing on record to show that the appellant had sustained any injuries on 4th June, 2008 and they were bleeding. In the circumstances, the defence set up by the appellant that there was his own blood on his clothes when the same were seized, cannot be accepted. Finding of the blood stains on the clothes of the appellant of group "B", which is that of the deceased Bhaskar, shows presence of the appellant at the time when the deceased Bhaskar was inflicted blows with dagger.

40. It has come in the evidence of Wahed (PW3) (Exh-31) and API Bansode (PW13) that on 5th June, 2008, when the appellant was in the police custody, he made a statement (Exh-32) and offered to produce the dagger concealed under a Babool tree. Accordingly, the appellant took Wahed (PW3), another panch and API Bansode (PW13) to his house and took out the dagger (Art.3) from under a Babool tree by removing the soil. There were blood stains on that dagger. It came to be seized vide panchanama (Exh-33). Wahed (PW3) has been cross-examined on behalf of the appellant. It was suggested to him that he being acquainted with Madhukar (PW4), Ganpati (PW1) and Dhansing as well as the police, deposed false against the appellant. It was further suggested to him that the seized dagger was brought from the shop of his own brother that was being used for cutting animals. He denied both of these suggestions. There is nothing in his cross-examination to show that he had any animus against the appellant. We do not find any reason to disbelieve his version. It is, thus, clear that the blood stained dagger came to be seized at the instance of the appellant from under a Babool tree which was near the house of the appellant. The said dagger was sent by API Bansode (PW13) for chemical analysis with letter (Exh-77) on 16th June, 2008. The Chemical Analyst's Report (Exh-81) shows that the dagger was stained with the blood of group "B", which was that of the deceased Bhaskar. The discovery of the dagger (Art.3), stained with the blood of the group of the deceased Bhaskar, at the instance of the appellant, would be a strong evidence to connect him with the incident in question vide Section 27 of the Indian Evidence Act.

41. As stated above, there are two written dying declarations and four oral dying declarations of the deceased Bhaskar. There is some variance with dying declarations (Exh-57 and Exh-73) in respect of the place from where the deceased Bhaskar went to the spot of the incident as well as the time of his going there. However, there is direct evidence of Ganpati (PW1) and Madhukar (PW4) showing that the appellant was running behind the deceased Bhaskar with a blood stained dagger and the said incident took place at about 6.30 to 6.40 p.m. Madhukar (PW4) further states that the appellant actually gave a blow of dagger on the left knee of the deceased Bhaskar. Besides, this oral evidence, there is circumstantial evidence in the form of recovery of blood stained clothes of the appellant from his house as well as recovery of the dagger at the instance of the appellant whereon there was blood of blood group of the deceased Bhaskar. Ushabai (PW6) states that accused Manoj had come to call the deceased Bhaskar when the deceased Bhaskar was at his house. Considering this positive and dependable evidence on record, we are not inclined to attach any importance to the variance in respect of the time and the place where the deceased Bhaskar was sitting prior to going to the spot of the incident as mentioned in the dying declaration (Exh-55). The dying declaration (Exh-71) is corroborated in all material particulars by the above referred direct as well as circumstantial evidence. Moreover, there is no inconsistency in the dying declarations (Exh-57) and (Exh-73) in respect of role attributed by the deceased Bhaskar against the appellant. Consequently, the dying declaration (Exh-71), which has been recorded first in point of time and which has been corroborated by the above mentioned direct and circumstantial evidence, being most natural and probable, inspires great confidence. It will have to be relied on and accordingly relied on.

42. The learned counsel for the appellant cited the judgments in the cases of Kashi Vishwanath v. State of Karnataka, AIR 2013 SC (Supp.) 415, Munnabee w/o. Shoukat Tadavi v. State of Maharashtra, 2015 (11) LJSOFT 123 and Milind Ramchandra Gharat v. State of Maharashtra and another 2015 (5) LJSOFT 112 (BOM.), wherein it is held that the dying declaration should be read over and explained to the deceased in the language in which he understands. As stated above, the dying declaration (Exh-73) was read over by API Bansode (PW13) and the deceased Bhaskar had admitted that it was recorded as per his say. In the circumstances, the aforementioned rulings would not be helpful to the appellant to seek any benefit.

43. The learned counsel for the appellant further relied on the judgment in the case of Laxman v. State of Maharashtra AIR 2002 SC 2973, wherein it is mentioned as under :

"It is indeed a hyper technical view that the certificate of the doctor was to the effect that the patient was in a fit state of mind specially when the magistrate categorically stated in his evidence indicating the questions he had to put to the patient and from the answers elicited was satisfied that the patient was in a fit

state of mind whether he responded the dying declaration. What is essentially required is that the person who records dying declaration must be satisfied that the deceased was in a fit state of mind."

44. As stated above, Dr. Jaishri (PW10) specifically states that after asking certain questions to the deceased Bhaskar, she was satisfied that he was conscious and oriented to give a statement. She had got herself satisfied about the fitness of the deceased Bhaskar to give a statement. Accordingly, she endorsed on the dying declaration (Exh-73). Therefore, this ruling would be of no help to the appellant.

45. The learned counsel for the appellant then cited the judgment in the case of *Gajnan s/o. Hanmantu Jiddewar v. State of Maharashtra* 2016 (7) LJSOFT 73 (Bom). In that case, there were many infirmities in the written dying declarations. The accused was convicted merely on the basis of oral dying declarations. It was held that the oral dying declaration is a weak piece of evidence and it would be unsafe to convict the accused on the basis of oral dying declaration. In the case at hand, there is a written dying declaration (Exh-73), which is corroborated by the above referred direct as well as circumstantial evidence. Consequently, this ruling would not be helpful to the appellant.

46. In the case of *Ganpat @ Bajirao Gulab Jadhav v. State of Maharashtra* 2007 (4), LJSOFT 66 (BOM.), the Medical Officer's endorsement about the fitness of the deceased was held to be suspicious. This is not the position in the present case. Hence, the ratio in the said case would not be applicable in the fact of the present case.

47. The learned counsel for the appellant further relied on the judgment in the case of *Shahid Khan v. State of Rajasthan* AIR 2016 SC 1178, wherein it is held that the delay in recording the statements of the witnesses casts a serious doubt about their being eye witnesses of the occurrence. In the present case, the statements of the witnesses have been recorded after registration of the crime on the basis of the dying declaration (Exh-73) given by the deceased Bhaskar. There is no objectionable delay in recording the statements of the witnesses. Moreover, none of the witnesses can be said to have improved or exaggerated the facts. Whatever they have actually seen, has been deposed to by them. As such, the possibility of false implication is ruled out considering the nature of the evidence of these witnesses. Hence, their evidence cannot be seen with suspicion.

48. Dr. Bargale (PW7) conducted the postmortem of the body of the deceased Bhaskar in the Civil Hospital at Latur on 8th July, 2008 between 1:00 p.m. and 2:00 p.m. On external examination, he noticed the following injuries:

- (i) Healed contused abrasion below popliteal fossa of left leg.
- (ii) Healed star mark below umbilicus over linea alba of size 18 c.m. long and 5 c.m. wide.
- (iii) a stitched hole having size of 2 c.m. X 2 c.m. over left lumbar region middle

aspect.

49. On internal examination, Dr. Bargale (PW7) found healed scar mark on abdominal wall. He further noticed adhesion and necrosis over peritoneum. He states that the injuries were ante-mortem. He opined that the clinical and postmortem findings were consistent with the death due to stab injury. Accordingly, he prepared memorandum of the postmortem (Exh-41). His attention was brought to clause 6 of the memorandum Exh-41 of post-mortem, wherein he mentioned that the cause of death was septicemia due to fecal fistula in an operated case of stabbing injury with small bowel and mesenteric injury. It has come in his cross-examination that septicemia is an infection which arises because of surgical complications. He states that if stitches are not properly given, it may happen. He expressed inability to state about any surgical complications. According to him, the injuries mentioned in column 17 i.e. external injuries found on the body of the deceased Bhaskar were not possible by fall on the cutter of animal fodder. He states that he cannot tell firmly the cause of death was because of surgical complications but expressed the possibility that it may be a cause of death.

50. In view of the statement of Dr. Bargale (PW7) and the judgment in the case of Laxman Hashya Gondhali and others v. State of Maharashtra 2015(6) LJSOFT 223 (BOM.), the learned counsel for the appellant submits that the deceased Bhaskar cannot be said to have died because of the injury sustained by him in the incident. He submits that since the deceased Bhaskar has died of septicemia on account of surgical complications, he cannot be said to have met with homicidal death and cannot be connected with the offence of murder of the deceased Bhaskar.

51. Here, a reference may be made to the evidence of Dr. Rathod (PW16), who operated the deceased Bhaskar. He states that the septicemia can occur with contaminated weapon and hemorrhage. He specifically states that the injuries sustained by the deceased Bhaskar were sufficient in the ordinary course to cause death. He denies that because of improper stitches and improper follow-up treatment, there was septicemia because of which the deceased Bhaskar died. Dr. Patil (PW14), who also was with Dr. Rathod (PW16) while operating the deceased Bhaskar, denies that the deceased Bhaskar died because of surgical complications.

52. Dr. Bargale (PW7) states that the injuries on the body of the deceased Bhaskar were possible by dagger (Sura) (Art.3) shown to him. Considering the evidence of Dr. Bargale (PW7), Dr. Rathod (PW16) and that of Dr. Patil (PW14), the contention of the learned counsel for the appellant that the death of Bhaskar was not homicidal, cannot be accepted. From the evidence of these medical witnesses, it is clear that the death of Bhaskar was the direct result of the injuries sustained by him at the time of the incident referred to above, which led to septicemia. In the circumstances, the judgment in the case of Laxman Hashya Gondhali and others (supra) would not be applicable to the facts of the case.

53. Considering the above facts and circumstances of the case, we are of the view that the prosecution has established beyond reasonable doubt that the appellant inflicted blows of dagger on the person of the deceased Bhaskar, causing him serious abdominal injuries which resulted into his death. The said incident occurred because on the earlier day, the deceased Bhaskar had intervened in the quarrel between his nephew Rajendra (PW5) on one hand and the appellant on the other. The appellant had got called the deceased Bhaskar to his house. The appellant was having dagger with him. This shows that he had prepared himself to commit deadly assault on the deceased Bhaskar. The attack on the deceased Bhaskar was predetermined so far as the appellant is concerned. Using a dangerous weapon like dagger (Art. 3) causing injuries on the vital part of the body of the deceased Bhaskar are the facts which clearly indicates the intention of the appellant to kill the deceased Bhaskar. The offence proved against the appellant fully comes under definition of murder as given in Section 300 of the IPC, which is made punishable under Section 302 of the IPC.

54. The roles played by accused no. 1 Manoj and the present appellant differ to a great extent. The evidence against the appellant is sufficiently strong to connect him with the murder of the deceased Bhaskar. The circumstantial evidence, which has been produced against the appellant was not available against accused no. 1 Manoj. In the circumstances, the acquittal of accused no. 1 Manoj by this Court vide judgment dated 10th January, 2012, passed in Criminal Appeal No. 252 of 2010, would have no adverse effect on case of the prosecution as against the present appellant.

55. The learned Trial Judge has rightly considered the facts of the case and rightly appreciated the evidence on record. He has rightly held the appellant guilty of the offence punishable under Section 302 of the IPC. We do not find any reason to interfere in the judgment and order passed by the Trial Judge. The appeal is devoid of any substance. It deserves to be dismissed.

56. As regards the grant of benefit of set off, in view of the judgment in the case of Bhagirath v. Delhi Administration and Rakesh Kaushik v. Delhi Administration, AIR 1985 SC 1050, even if the accused is convicted and sentenced with imprisonment for life set off is required to be given vide Section 428 of the Code of Criminal Procedure, subject to the provision contained in Section 433-A and provided that orders have been passed by the appropriate authority under Section 432 or Section 433 of the Code of Criminal Procedure. The learned Trial Judge, in the present case, should have extended the benefit of set off to the appellant. Since the appellant is entitled to the said benefit, while dismissing the appeal, direction to extend set off to the appellant vide Section 428 of the Code of Criminal Procedure from 4th June, 2008 (i.e. the date of arrest), deserves to be given. In the result, we pass the following order :-

ORDER

(i) The appeal is dismissed.

(ii) The appellant be given set off from 4th June, 2008, vide Section 428 of the Code of Criminal Procedure subject to the provision contained in Section 433-A and provided that orders have been passed by the Appropriate Authority under Section 432 or 433 of the Code of Criminal Procedure.

(iii) Since the learned counsel Mr. N.R. Shaikh was appointed to represent the appellant, we quantify his fees at Rs. 7500/-, which shall be paid by the High Court Legal Services Sub Committee at Aurangabad.