

(2020) 01 BOM CK 0039
In the Bombay High Court
Case No : Criminal Appeal No. 610 Of 1999

State Of Maharashtra

APPELLANT

Vs

Sanjay Dinkar Magar And Ors

RESPONDENT

Date of Decision : 08-01-2020

Acts Referred:

Indian Penal Code, 1860 — Section 143, 147, 148, 149, 302
Maharashtra Police Act, 1951 — Section 135

Citation : (2020) 01 BOM CK 0039

Hon'ble Judges : S.S. Shinde, J;N.B. Suryawanshi, J

Bench : Division Bench

Advocate : M.M. Deshmukh, Satyavrat Joshi, Sunil S. Kamble, Nitesh J. Mohite, Jaydeep Mane, Rahul S. Kate

Final Decision : Dismissed

Judgement

S.S. Shinde, J

1. This Appeal is directed against the Judgment and order dated 05th August, 1999 passed by the Additional Sessions Judge, Pandhapur in Sessions Case No. 108 of 1997 acquitting all the Accused - Respondents herein for the offences punishable under Sections 147, 302 read with 149 of the Indian Penal Code.

2. The prosecution case, in brief, is as under.

The Complainant Purushottam Balasaheb Magar (PW 1) has lodged a complaint at Police Station Akulj on 24th August, 1997. The deceased Laxman Ramchandra Magar was his cousin brother and was also his neighbour. According to complainant there was dispute regarding agricultural land between the accused Sanjay Magar and deceased Laxman and in the said dispute deceased Laxman along with complainant beat accused Sanjay, since that time accused Sanjay threatened Laxman that he will kill him. The incident of beating to accused Sanjay had taken place one month prior to the incident.

3. It is the case of the prosecution that, according to Purushottam (PW 1) on

24th August 1997 he went to the shop of the deceased Laxman at Nimgaon. Purushottam (PW 1) was receiving anonymous calls on his telephone threatening him that, he and Laxman would be killed. Complainant Purushottam Magar (PW 1) told the said fact to deceased Laxman. Laxman also told complainant Purushottam (PW 1) that, he also received such calls on telephone. Complainant - Purushottam (PW 1) and deceased Laxman, therefore decided to lodge complaint at police station.

4. According to complainant - Purushottam (PW 1), he along with his father Balsaheb Magar and deceased Laxman started going towards Velapur. Complainant - Purushottam (PW 1) and his father were on Hero Honda Motorcycle and the complainant (PW 1), was driving said motorcycle whereas deceased Laxman was on another motorcycle. As soon as deceased Laxman reached the field of accused Haridas, accused persons came out of the field of Haridas and suddenly assaulted deceased Laxman with sword, iron rods and axe etc. In the meantime, complainant Purushottam (PW 1) and his father also reached at the spot and found accused persons assaulting deceased Laxman. Accused Sukhadev was holding an axe, Suresh was holding an iron rod and other's were holding swords and they all assaulted deceased Laxman, and deceased Laxman succumbed to injuries. Accused persons ran away as soon as they saw complainant - Purushottam (PW 1) and his father reaching at the spot. Complainant - Purushottam (PW 1) gave message to one Shri K.K. Patil on telephone and called his jeep. Deceased Laxman was taken to Government Hospital at Akluj in the said jeep. Deceased Laxman succumbed to the injuries at about 11.00 a.m. to 12.00 p.m. Complainant - Purushottam (PW 1) thereafter lodged the complaint at police station, Akluj.

5. On the basis of the complaint lodged by the Complainant - Purushottam Balasaheb Magar (PW 1), PSI Akluj registered Crime No. 0/1997 under Sections 302, 143, 147, 148, 149 of the Indian Penal Code and under Section 135 of the Bombay Police Act. Crime was registered at zero number since alleged offence was committed within the jurisdiction of Velapur Police Station. The said Crime No. 0/1997 was then transferred to Velapur Police Station where Crime No. 52/1997 was registered.

6. PSI Suresh Babhale (PW 9) investigated into Crime No. 52 of 1997. He went to the place of incident and found blood stains on the spot. He seized simple mud and mud mixed with blood from the place of incident under panchanama Exh. 26 in presence of panchas. On the same day, he also seized the clothes of the deceased with one Lungi under Panchanama Exh. 33 in presence of panchas. All these clothes were kept in sealed packet. Further investigation was carried out by PSI Subhash Shinde (PW 8). PSI Subhash Shinde (PW 8) arrested the accused persons on 25th August, 1997 and then on 27th August, 1997 under panchanama and also seized the clothes of accused Sanjay, Arun @ Arvind. On 01st September, 1997 he seized sword and axe in pursuance of information given by accused Sanjay and sword and iron rod in consequence of information given

by accused Arun. On 02nd September 1997 he seized two swords produced by accused Hanmant in consequence of his information. On 09th September, 1997 he sent the seized articles to Chemical Analyzer, Pune for analysis.

7. After due investigation PSI Subhash Shinde (PW 8) filed charge sheet in the Court of Judicial Magistrate F.C., Malshiras. Since the offences were triable by the Court of Sessions exclusively, The JMFC, committed the case for trial to the Court of Sessions vide its order dated 24th November, 1997.

8. Learned Additional Sessions Judge, Pandharpur had framed the charge against accused persons under Sections Sections 147, 302 read with 149 of the Indian Penal Code, its contents were read over and explained to the accused in vernacular, for which they pleaded not guilty and claimed to be tried. After recording evidence and full fledged Trial, the learned Additional Sessions Judge, Pandharpur acquitted the accused - Respondents herein under Sections 147, 302 read with 149 of the Indian Penal Code. Hence, this Criminal Appeal filed by the State against the order of acquittal.

9. Learned APP appearing for the Appellant - State relying upon the evidence of eye witness Purushottam Magar (PW 1) submits that, he has categorically deposed about the manner in which respondents - accused assaulted deceased Laxman. It is submitted that, the FIR has been lodged promptly. The other evidence collected by prosecution lends support to the version of eye witness Purushottam Magar (PW 1). There was recovery of weapons at the instance of Accused No. 1, 4 and 5. Blood stains found on those weapons are of blood group of deceased Laxman and therefore, the prosecution has proved the case beyond reasonable doubt. The Trial Court has not properly appreciated the evidence and reached to the wrong conclusion and therefore, Criminal Appeal deserves to be allowed.

10. On the other hand learned counsel Mr. Kate and Mr. Satyavrat Joshi appearing for the Respondents - Accused submits that, there is delay in sending FIR to the Magistrate, even though it was registered on 24th August, 1997. It was received by the Magistrate on 27th August, 1999. Learned counsel further submits that, the statements of all witnesses were recorded on 28th August, 1997 and 3rd September, 1997. The investigating officer has admitted the said fact. The prosecution has not examined the father of PW 1 i.e. Balasaheb Magar who was pillion rider whose statement was recorded on 28th August, 1997, Suresh Doshi from whose shop grocery was purchased by the complainant and his father, Praksh Mager who found deceased Laxman in injured condition and Gorakh who informed K.K. Patil on phone about the injured, are not examined by the prosecution. Learned counsel further submits that, even though it is the case of the prosecution that, he informed about the assault of Praksh, Suresh and Gorakh but the same is omitted. K.K. Patil is the person to whom complainant informed on phone is also not examined. Complainant carried injured Laxman, however his clothes were not seized even though they were blood stained. It has come in the evidence of Purushottam Magar (PW 1) that while going to Akluj

they passed through the Velapur Police Station even they have not informed the Velapur Police Station about alleged incident and informed to one K.K. Patil. Purushottam Magar (PW 1) admitted the in his deposition that, there is private as well as Government Hospital in village Velapur. Learned counsel further submitted that, weapons were recovered on 2nd September 1997 and the same are shown to have been deposited on 01st September, 1997, which is reflected in property Register (Exh. 44) and also there is overwriting in the entry of deposit of clothes.

11. It is also submitted that, weapons and other articles seized during the course of investigation were no properly sealed and therefore, alleged chemical analyzer's report cannot be believed. In support of the aforesaid contention learned counsel pressed into service exposition of law by the Supreme Court in the case of *Habeeb Mohammad Versus State of Hyderabad* AIR 1954 SC 51, and two reported judgment of the Bombay High Court in the case of *Ashraf Hussain Shah Versus State of Maharashtra* 1996 CRI. L.J. 3147 and *Kiran Ashok Jadhav Versus The Stae of Maharashtra* 2014 ALL MR (Cri) 3850. Learned counsel also submits that, there is a solitary witness i.e. Purushottam Magar (PW 1) and his evidence is full of contradictions, omissions and improvements and therefore, said cannot form basis for conviction. Therefore, relying upon the findings recorded by the Trial Court it is submitted that, Criminal Appeal deserves no consideration and may be dismissed.

12. In order to find out whether the death was homicidal, suicidal or accidental, the prosecution has examined Dr. Eknath Irappa Chandanshive (PW 3). He stated in his examination-in-chief that, On 24th August, 1997 he was serving as Medical officer in Rural Hospital at Akluj. One Laxman Ramchandra Magar was admitted in their Hospital at about 11.45 a.m. in injured condition. He was unconscious, he expired while the treatment was being given. He carried out post mortem on the body of deceased Laxman on 24th August, 1997 in between 8.45 p.m to 3.45 p.m. On examination he found following external injuries on his person.

1. Incised wound over parietal region, centrally 1 ½ X ½ X ½ clotted blood;
2. Incised wound over frontal region. 3 X ½ X ½ clotted blood.
3. Incised wound over both orbital region, from right orbit to left orbit, both eyes ruptured 9 X 2 into bone deep clotted blood, plus parts of brain matter seen, fracture of skull orbital region.
4. Incised wound just below above injury 8 X 2 bone deep.
5. Incised wound over nose at the base 2 X ½ into bone deep, fracture of Nasal bone.
6. Abrasion 3 in number on left shoulder, measuring 4 cm X 3 cm, bleeding.
7. Abrasion over left scalp muscle region 3 X 1.
8. Diffused contusion over both back,

9. Incised wound over dorsum of right hand, 1 X ½ X 1.
10. Incised wound over dorsum of right hand below above injury, 1 X ½ X 1/x clotted blood,
11. Incised wound over right hand at the basis of finger 2 X ½ X ½.
12. Amputation of little finger at the tip with sharp edges, clotted blood.
13. Incised wound over middle finger, and little finger measuring about 1 X ½ X ½.
14. Abrasion over left knee joint, 4 cm X 3 cm.
15. Abrasion over just below above injury, 1 X ½.

13. In internal examination he found laceration of frontal lobe and intracranial hemorrhage. All the injuries sustained by deceased were ante mortem. Death was caused due to extensive intracranial hemorrhage and laceration of brain. He accordingly prepared the post mortem notes shown to him.

14. The internal injury to brain is corresponding to external injury no. 3. Injury No. 1 to 4 were sufficient to cause death in ordinary course of nature. The injuries may be possible due to weapons shown to him. He also took the sample of blood of deceased for sending it to chemical analyzer.

15. During his cross-examination, he stated that, the injuries no. 6, 7, 14, 15 and all abrasions may be possible in a scuffle. Police had been to the hospital for recording dying declaration.

16. The star witness of the prosecution is complainant - Purushottam Balasaheb Magar (PW 1). The prosecution claims that he is eye witness to the incident. In his deposition he stated that, his cousin brother deceased Laxman Magar is his neighbour. There was dispute regarding agricultural land between Sanjay Magar and Laxman. In the said dispute he himself and Laxman beat accused Sanjay. Since that time Sanjay was threatening Laxman to kill. The incident had taken place one month prior to the incident.

17. On 24th August, 1997 Purushottam Magar (PW 1) and his father Balasaheb went to their field on motorcycle. They came back to village Nimgaon at about 9.30 a.m. They purchased some grocery in the shop. The shop of deceased Laxman is adjacent to the grocery shop. He told Laxman that he has received an anonymous telephone calls since last two days threatening him and deceased Laxman that both of them would be killed. Laxman told him that he had also received such calls. Laxman thereafter closed the shop and they decided to go to Velapur Police Station for lodging the complaint.

Thereafter Laxman took his motorcycle Hero Honda and complainant (PW 1) and his father started towards Velapur on his motorcycle. They were following deceased Laxman. There was a distance of about half kilometer between them and Laxman. However they were able to see Laxman's motorcycle.

18. As soon as deceased Laxman reached near the field of Haridas, some persons came out of the field of Haridas Magar. They assaulted deceased Laxman with sword, iron rods, axes etc. He accelerated the speed to reach near deceased Laxman when he reached there he found accused Sanjay Magar, Dinkar Magar, Harichandra Magar, Hanumant Magar, Arun Magar, Sukhdev Magar and Suresh Magar assaulting deceased Laxman. Accused Sukhdev was holding an axe, Suresh was holding an iron rod and others were holding swords. Deceased Laxman fell down during the assault and the accused were assaulting even thereafter. The accused persons then looked towards them, and they ran away along with their weapons through the field of Haridas. They went near deceased Laxman and found that Laxman received bleeding injuries on his head, face, hands, legs etc. and he became unconscious. He then informed Shri. K.K. Patil of their village. Thereafter Prakash Magar, Suresh Magar, Gorakh and other villagers came there. He narrated the incident to them. K.K. Patil came there along with jeep. They took Laxman to Government Hospital at Akluj in the said jeep. Laxman died at about 11.00 a.m. to 12.00 p.m. He lodged the complaint.

19. In his cross-examination suggestion was given to him that there are two political parties in their village. One group is lead by Shri. K.K. Patil and other by Raosaheb Magar and accused belong to group of Raosaheb Magar. However, he stated that he is not aware of such political groups. There was no civil suit between complainant and accused Sanjay. There is no civil dispute pending between himself and accused Sanjay Magar. He did not lodge any complaint at Police Station for threats received to himself and Laxman from accused Sanjay. There is a police patil in the village. His name is Angatrao Patil. They have to go to Akluj via Velapur. There is a police station at village Velapur. The residence of Waman Magar is about 1000 ft. from the place of incident. He stated that he did not hear shouts / cry when he saw the assault of Laxman. Laxman was on the motorcycle when he was assaulted. He cannot state the exact number of attacks on Laxman while he was on motorcycle. Deceased Laxman felled down after assault and his motorcycle also fell down on the other side. He specifically state that, "they did not chase the assailants and did not inform the incident to the police patil". He went to his house and informed to K.K. Patil on phone. He did not lodge the complaint at Police Station Velapur while going to Akluj. He admitted that there is a Government Hospital at Velapur so also private hospital is there. He himself and other kept deceased Laxman in the jeep. His clothes were stained with blood however, he did not produce the said clothes before the police. He stated that, he know one Babu Vasudev Magar from his village. Lungi article No. 7 belongs to the witness Prakash Bramhadev Magar. This lungi was encircled / tied on the head of deceased Laxman. It appears that a suggestion was given to this witness that deceased Laxman was having illicit relations with one lady on Velapur and there he was caught red handed and the family members of that lady were on inimical terms with deceased Laxman. He specifically stated that, his father accompanied him at Akluj. He was present at the time of funeral.

20. He was further cross-examined by counsel for accused no. 4 and 6. he admitted in his cross-examination that there is a telephone connection at his residence. It is true that, deceased Laxman was driving the motorcycle in excessive speed as compared to him. Deceased Laxman did not try to avoid assault after he felled down from motorcycle. He cannot remember whether he stated to the police that deceased Laxman was assaulted even after he felled down from the motorcycle. He did not remember whether he told the police that Prakash, Suresh and Gorakh came there after incident. He did not remember whether he told the police that he narrated incident to those persons.

21. It is clear from his cross-examination that when accused were assaulting deceased Laxman he did not raise shouts /cry neither he chased the accused persons. He has admitted in his cross-examination that his father was also accompanying him as pillion rider on motorcycle. Though he claims that he himself and other kept deceased Laxman in the jeep and his clothes stained with blood, he did not produce the said clothes to the investigating officer.

22. The prosecution has examined Dhanaji Shripat Magar (PW 2) who was panch to the alleged Memorandum statement given by the accused Sanjay Magar. Prosecution claims that sword and axe blood stained was recovered at the instance of accused no. 1 and sword and iron rod blood stained was recovered from accused no. 5 and sword was recovered from accused no. 4.

23. The prosecution also examined Agatrao Nigambar Magar (PW 4) to prove the place of occurrence so also Nandakumar Prabhakar Patil (PW 5) who was panch to the inquest Panchanama. The prosecution also examined Annasaheb Sukhdev Shinde (PW 7) who was panch to the seizure of clothes of deceased and Tanaji Mansing Rathod (PW 10) carrier to carry the seized articles to the office of chemical analyzer.

24. The prosecution also examined Suresh Manik Babhale (PW 9). He stated that, on 24th August, 1997 he was incharge of Malshiras Police Station. He investigated Crime No. 52 of 1997 of Velapur Police Station. The complaint at Zero number was received from Akluj Police Station. After registration of crime at Velapur Police Station he was entrusted with the investigation. On 24th August, 1997 he went to place of incident. The spot was shown to him by the complainant Purushottam Magar (PW 1). The place of incident was on Velapur Nimgaon Road, five kilometers away from Velapur Police Station. One Suzuki motorcycle was lying on the road. He also found blood stains. He seized the simple mud and mud mixed with blood under panchanama. He prepared the panchanama of the place of incident. The mud stained with blood was taken out and was sealed in a paper packet. On the same day the clothes of deceased and one lungi were produced by complainant's brother and he seized them under panchanama. The said clothes were stained with blood.

25. During his cross-examination he admitted that at Exh. 15 there is no signature by him to show that he received information about commission of the

offence and he verified the same on 24th August, 1997. He admitted in his cross-examination that he did not specifically mention in Exh. 26 that the packet was sealed and the same is also not mentioned in Exh. 33. Therefore, it appears from his evidence that he did not seize the blood stained clothes of complainant Purushottam (PW 1). It appears that, lungi (Article-17) which was encircled / tied on the head of Laxman, was produced before him. But it appears that said witness who gave his lungi, has not been examined by the prosecution.

26. We have considered the entire evidence brought on record by the prosecution. As already observed star witness is complainant Purushottam Magar (PW 1) and we find his evidence unreliable. Neither said Prakash Magar nor father of PW 1 i.e. Balasaheb Magar were examined by the prosecution. The said witnesses whose names are mentioned by complainant Purushottam Magar (PW 1) in police statement are not examined by the prosecution. The place of incident is within the jurisdiction of Velapur Police Station and Velapur is approximately 3 to 5 kilometers distance from village Nimgaon. There is private as well as Government Hospital at village Velapur. The prosecution failed to explain that, why the deceased Laxman was taken to the Akluj which is 15 kilometer away from village Nimgaon, when place of incident is within the jurisdiction of Velapur Police Station which is only 3 kilometer and also there is a Civil Hospital. The prosecution has not brought on record call record showing anonymous calls received by Purushottam Magar (PW 1) thereby giving threats to him and Laxman. Purushottam Magar (PW 1) has stated that, he has telephone connection in his house. If really he had received threats, it was possible for the investigating officer to collect such call record so as to establish, whether really threats were given by the accused to Purushottam Magar (PW 1) and deceased Laxman. It is surprising to note that though clothes of Purushottam Magar (PW 1) were blood stained, nevertheless those blood stained clothes were not produced before the investigating officer. Therefore, evidence of Purushottam Magar (PW 1) is totally unreliable and cannot be believed and deserves to be discarded.

27. It appears that, though the alleged incident had taken place on 24th August, 1997, the statement of witnesses were recorded by the investigating officer on 28th August, 1997 and 03rd September, 1997. There is no explanation for delay brought on record, in recording the said statements. The investigating officer admitted the said fact of delay in recording the statement. The investigating officer has not explained in his deposition, that how the inquest panchanama at Exh. 28 which was conducted on 24th August, 1997 in between 12.45 to 13.30 was prior to registration of offence at 14.15 hours on same date. Though it appears that statements of some witnesses are recorded however, other witnesses are not examined except Purushottam Magar (PW 1), who was driving motorcycle and his father i.e. Balasaheb Magar was pillion rider whose statement was recorded on 28th August, 1997 by the police but he has not been examined before the Court by the prosecution. During the course of hearing we have seen the original records and we find that, though recovery was made on 02nd

September, 1997, however, articles were shown to have been deposited on 01st September, 1997 as it is reflected in the property register at Exh. 44. There appears overwriting in the entry of deposit of clothes. We also find considerable substance in the submissions of learned counsel appearing for the Respondents - Accused that the alleged articles recovered were not properly sealed and therefore, said alleged recovery stands vitiated and consequently report received from the chemical analyzer cannot be relied upon. The other aspects have been dealt with by the Trial Court extensively. In our opinion, once the evidence of Purushottam Magar (PW 1) stands discarded, there is no substantive piece of evidence so as to rest the conviction of the accused on the basis of other corroborative material collected by the prosecution. As already observed even the other material i.e. C.A. report, collected during the course of investigation deserves no consideration, inasmuch as there was no proper sealing of the articles, and also there was overwriting in the original record mentioning the dates so also entries taken on 01st September, 1997.

28. Upon overall consideration of the evidence, we find that findings recorded by the Trial Court are in consonance with the evidence on record and there is no perversity as such. There is no substance in the Criminal Appeal filed by the State. Hence, Criminal Appeal stands dismissed. Bail bonds of the Respondents - Accused, if any, stands cancelled.