

State of Maharashtra

Vs

Manohar

(G. T. Nanavati, M. Jagannadha Rao JJ)

20.10.1997

JUDGMENT

M.JAGANNADHA RAO, J.

1.This is an appeal preferred by the State of Maharashtra against the judgment of the High Court of Bombay in Criminal appeal No.731 of 1981 dated 13.1.1985 reversing the judgment of the Sessions Court and acquitting the respondent, accused for an offence under Section 302 I.P.C.The result was that the sentence of life imprisonment awarded by the Sessions Court was not set aside by the High Court.

2.The Prosecution case was as follows:

The deceased Udhav Golekar alias Patil belongs to village Kharda and went on 27.4.1980 alongwith his friend Tamij Mapadi (PW5) for attending the marriage of a relation at village Jejala.They stayed at Jejala overnight and on the next day i.e.28.4.1980 Udhav Golekar and PW5 went to another village Ambi beyond Jejala.Udhav told PW5 that they would be going to the house of the accused Manohar at Ambi for consuming liquor.Accordingly they reached the house of the accused around 10 or 10.30 A.m.on 28.4.1980.Udhav Golekar purchased liquor worth Rs.4/- from the accused.Thereafter both Udhav Golekar and PW5 consumed a cup of liquor.Subsequently udhav Golekar gave Rs.2/- to PW5 and told him to go out and bring eggs.Accordingly PW5 went out of the house of the accused and returned after purchasing eggs.When he was at the door frame of the house of the accused, PW5 saw that a scuffle was going on between the accused Udhav Golekar and he also saw accused picking up an axe and hitting Udhav Golekar on the back side of head.PW5 was not in a position to state whether the axe blow was given by the sharp end or by the butt end. There was bleeding injury on Uhdav's head.PW5 rushed ahead and when he was holding Udhav's head in his hand, he asked the accused as to why he had assaulted Udhav Golekar and whether he wanted to kill him.Immediately the accused gave a blow by axe to PW5 on his head.PW5 was not in a position to state whether the blow was given by the sharp end or by the butt end of the axe.There was a bleeding injury on PW5's head and his shirt was also stained with blood.When he got up, he was kicked by the accused on his buttocks and therefore PW5 ran away.

3.The prosecution case further was that PW5 then went to village Jejala and proceeded to the house of Balu Patil, who was a relation of the deceased Udhav Golekar.At that time Dattu Patil alias Bhosale (PW2) was with Balu Patil.PW5 told them that the accused had assaulted Udhav Golekar

by an axe at his house in Ambi village. He further told them that he was also assaulted by the accused and that he would be going to Kharda to inform the incident to Anna Golekar (PW4) who was the brother of the deceased Udhav Golekar. Accordingly PW5 went to Kharda and told PW4 about the incident. PW4 then took PW5 to a dispensary at Kharda. In the meantime PW4 went to the Primary Health Centre at Kharda and obtained a Jeep of the Medical Officer and he along with Rambhau Surve, Pandurang Golekar, Dattu Bhosale and Bhagatsing proceeded to Ambi. On the way Bhagatsing went to the police station, Ambi and submitted an application. After they came to the house of the accused they saw that the accused was in the house and Udhav Golekar was lying in an injured condition in the courtyard of that house and there was a bleeding injury on Udhav's head. He was alive but unconscious. At that time PW4 and PW2 asked the accused as to why he had assaulted Udhav Golekar and the accused kept mum. Thereafter they took Udhav Golekar in a jeep to the Primary Health Centre at Kharda where the Medical Health Centre at Kharda where the Medical Officer declared Udhav dead. Thereafter PW4 again proceeded to Ambi and lodged the FIR (Ex.23 at 22.10 hours).

4. Coming back to what happened after Tamij Mapadi, PW5 met PW4 at Kharda and was taken to a dispensary, it is the prosecution case that PW5 was taken to the Primary Health Centre at Kharda and the Medical Officer sutured his head injury and he was being treated there. Murlidhar Gavane, (PW6) Head Constable attached to police constable at Kharda. As there was a disturbance in the telephone call, he could not listen to it properly. On the next day the constable went to Kharda and came to know that the Medical Officer at Kharda had already sent intimation (Ex.18) about Udhav's death. This information was received by one police constable Gangarde. He went to the Primary Health Centre and saw Udhav's dead body and prepared inquests report (Ex.9). He recorded the statement of PW5 who was admitted as an inpatient at the Primary Health Centre, Kharda. He attached the blood stained shirt of PW5 under panchnama (Ex.11). By that time police constable from Ambi came to Kharda and told him that FIR was already lodged in the police station at Ambi and therefore the papers of investigation were handed over to him. Bhimsen Jadhav, (PW7) police head constable had earlier received the application of Bhagatsing (Ex.31) at 20.20 hours and made an entry in the station diary as serial No.24. but he did not take any steps thereafter. Anna Golekar lodged the complaint (Ex.23 at 22.10 hours) and offence under section 302 I.P.C. was registered against the accused. The accused was arrested and brought to the police station at 23.00 hours. The police visited the house of the accused on 29.4.1980 and prepared panchnama (Ex.8) and recovered the blood stained cloth (articles 8 & 9) from the person of the accused under panchnama (Ex.13). The accused was produced before the judicial Magistrate on 29.4.1980 and police remand was taken till 6.5.1980. After investigation the charge sheet was filed. Later the case was committed to the Court of Sessions on 1.9.1980.

5. The accused in his statement under Section 313 Cr.P.C. initially denied that the deceased and PW5 came to his house and that they purchased liquor worth Rs.4/- from him. He further denied that he assaulted Udhav Golekar and PW5 as lodged by the prosecution. But later he came forward with the following story in the said statement under Section 313 Cr.P.C.:

"When I was giving treatment to my ailing wife, a woman by name Yamunabai was sitting near me. At that time deceased Udhav and Tamij Mapadi came to my house all of a sudden. I again state that they both came to the door frame of my house and they called Yamunabai, they entered into my house and sat on the ota of my house. There was a conversation between Udhav and Tamij Madai. I only heard that they uttered the words Bayadi. Bayadi. I immediately got up and rushed towards them. I heard a sound of a person who had fallen down. I saw that Udhav had fallen on the ground of

my house. I asked Tamij to see if Udhav was injured. Tamij told me that he was helpless because since yesterday Udhav was constantly under the influence of liquor. Tamij also became unconscious because of his head injury. I also took both of them on the ota inside my house and gave water to them. When I carried Tamij or one ota of my house, the blood of his injury twinkled on my clothes. After Tamij regained consciousness he started wiping off the blood of his injury and because of the same there was a blood on the stone of ota. Tamij told me that he would arrange for vehicle for taking injured Udhav to Walwand or to Kharda.

He further stated:

"I told Tamij to police station Ambi and informed the incident to police Head Constable Jadhav, Writer Head Constable. I informed the incident which took place in my house between Udhav and Tamij Mapadi to writer Head constable Jadhav and P.H.C. Jadhav. One Osman Chandkhan Pathan of Ambi was with me at that time. They told me that I should not bother about them because many persons consume liquor and fell on the ground. They further told me that after some time the relations of those persons would come and they would take them, they further assured that in case anything happened they would see something. Till evening, I was in my house. In the mean time many persons in the vicinity came to my house and saw the injured Udhav. Before I returned from Police Station, Ambi, Tamij Mapadi escaped."

Thereafter he stated that he came to know that the name of the person who came along with Udhav was Tamij Mapadi and that in the evening Anna Golekar (PW4) and others came and took and injured in a jeep. Accused denied that they had asked him as to why he assaulted Udhav and he denied that he kept mum.

6. The Sessions Court's analysis of the evidence of PW5, PW2 and PW4 and PW3 (the doctor) and his reasons for conviction of the accused can be summarised as follows:

(i) Tamij Mapadi, PW5 had given details of the actual scuffle and of the accused beating Udhav by an axe and later hitting PW5 with the same axe. His evidence as to subsequent events and as to what happened after he left Ambi was amply corroborated by the evidence of Dattu, PW2, of Jejala and Anna Golekar. PW4 of the Kharda and also the evidence of Dr. Padmakar, PW3 of Kharda. No doubt PW5 could not give any police report at Ambi. This was because he was new to Ambi and also because when he was kicked by the accused after being injured by axe-blow, he must have felt like running away to Jejala and did so accordingly. In fact, this was explained by PW5 himself when stated that he was new to Ambi, he was not awarded if there was a police station there. It is true that PW5 stated that he went to the house of one Bharat at Ambi but he did not find him in his house. That by itself did not mean that PW5 was familiar with Ambi village. PW5 had no motive against accused because he stated in his cross-examination that he was not acquainted with the accused at all and he stated that even Udhav Golekar was not acquainted with the accused. It was only the accused who gave his name to PW5 after PW5 had taken liquor from his house. It was the first time for him to go to the house of accused at Ambi. PW5 had no occasion to see the woman by name Yamunabai at Ambi earlier. For the first time he saw her in the house of the accused on that day. He denied the suggestion that he and Udhav Golekar went to accused's house to see

Yamunabai. According to PW5, Yamunabai purchased liquor and she took away the liquor along with her and did not consume the same in the house of the accused in their presence. PW5 stated that after Yamunabai left the house of the accused she did not come there again. PW5 denied the suggestion that before entering the house of the accused at the place where one enters into the house of the accused there was a big stone used as a foot-step. He stated in cross-examination that when the accused hit Udhav and hit PW5, they had not raised any shouts and thereafter he did not go to the house of one Bharat but could not find him. PW5 denied that any scuffle took place between himself and deceased Udhav on the issue as to whether both should go to the house of one Bayadabai. He also denied the suggestion that during the said scuffle (PW5) had pushed the deceased Udhav as a result of which Udhav fell on the ground and sustained injury on his head. He also denied the suggestion that because he was under influence of liquor he could not control himself and dashed against a wall by losing his balance and sustained injury on his head, evidence of PW5 could be safely relied upon.

(ii) PW2 narrated how PW5 had come to him at Jejala and now thereafter PW2 proceeded to Ambi and reached there around 3.30 or 3.45 p.m. PW5 had gone to the house of accused and there were 20 persons there. He saw Udhav lying in an injured condition inside the house and inside the western door frame on the house. It is true that Dattu, PW2 admitted that PW5 met him at Jejala and that PW2 had not asked PW5 as to now he (PW5) was injured. PW2 admitted that he (PW2) did not make enquiries from the vicinity of one house of the accused. It is also true that PW2 did not go to the police station at Ambi after 3.45 p.m. and that in his earlier statement to the police, he had not stated that when he questioned the accused the latter had kept mum. The above aspects pointed out by the defence counsel were not sufficient to discard the evidence of Dattu (PW2).

(iii) Anna Golekar, PW4 stated that whatever incident was mentioned by PW5 to Anna Golekar (PW4) was informed through one Bhagatsing to the police at Ambi at 20.20 hours by way of an application (Ex.31) filed by Bhagatsing. Of course, PW4 was not aware as to what details were mentioned by Bhagatsing in his application. The diary entry in the police No.24/80 proved that Bhagatsing had in fact given an application by 20.20 hours. But the police constable did not take any action and it was only much later when a regular FIR was registered at 22.10 hours at the instance of PW4 at Ambi, that action was initiated. The defence counsel pointed out that in the earlier statement made by PW4 to the police. He had not stated that when he asked the accused as to why he had assaulted Udhav Golekar, the accused kept mum. Even so, the evidence at the trial by PW5 to the effect that when questioned the accused kept mum could not be treated as an improvement. Initially Anna Golekar, PW4, was interested in going to the house of the accused to see if the injured Udhav Golekar's life could be saved and therefore the fact that Anna Golekar did not straightway go to the police station at Ambi was not a circumstance which could be relied upon by the defence for rejecting PW4's evidence. Nor was the fact that he did not make any enquiries from the person residing in the vicinity a ground for rejecting his evidence.

(iv) PW3 the doctor referring to his examination of Tamij Mapadi, PW5, on 28.4.1980 at 11.15 P.M. and no said that he found that there was a contused lacerated

wound of 2 cm.x 1/4 on the middle of the skull, slightly on the right side. PW5's shirt was stained with blood. It might have been caused within 12 hours by a hard and blunt substance. According to him, this injury on the skull or PW5 could have been caused by the butt end of the axe. He had sutured the said head injury, in cross-examination he stated that he could not accept the suggestion that in case two persons were under influence of liquor and one of them had a fall on a stone on the back side. In that case, injury such as one caused on the head of the Udhav Golekar was possible. He did not also agree with the suggestion that in case a person was under influence of liquor and while taking care of another person who was also under influence of liquor and if he had dashed against a wall then the injury which was found on PW5 was possible. -though if PW5 was under the influence of liquor had merely dashed against a wall after losing his balance, the injury found on his head was possible. He also conducted the post mortem on the body of the deceased Udhav.

(v) The distance between Kharda and Jejala was 7 kilometers and the distance between Jejala and Ambi was 3 kilometers and that PW5 had to go by walk from Ambi to Jejala and then from Jejala to Kharda and PW4 initially took PW5 to the dispensary and then had to use his good office to secure a jeep from the Primary Health Centre for proceeding to Ambi. This explained the delay in PW4 informing the police at Ambi only at 22.10 hours. But before that Bhagatsing a petition reached Ambi police station by 20.10 hours.

(vi) It may be that in the report (Ex.31) submitted by onagatting the name of the accused was not mentioned. But this did not matter because the name of the accused was mentioned in Ex.20 given at 22.10 hours at the instance of PW4. In fact, it was stated in Ext.23 that PW5 had told PW4, the name of the accused even at Jejala earlier. The fact the blood was found on the ota of the house corroborated the evidence of PW5.

(vii) The explanation offered by the accused in his Section 313 Cr.P.C. statement as to fall by the accused cannot be accepted. The evidence of the doctor PW3 showed that once the injury was found on the skull of the deceased, that ruled out any possibility of an injury being sustained by the deceased by falling on the ground and hitting a stone. If there was a fall because of the effect of liquor, there would have at least been some scratches on his body. Statement of the accused that he went to the police station at Ambi and they refused to take cognizance of his complaint saying that several persons who drink liquor in his shop may fall down and he should not bother, could not be accepted. In that event the accused would have at least informed his neighbours in the locality. The incident had taken place in the house of the accused and not on the road and his explanation was unsatisfactory. Even assuming that the evidence of PW2 and PW4 can be said to be interested, the evidence of PW5 could not be rejected.

7. The above reflects broadly the analysis and reasons given by the learned Sessions Judge for coming to the conclusion that the prosecution had proved beyond reasonable doubt that the accused was guilty of murder of the deceased and the assault on PW5.

8. Learned counsel for the appellant contended that, in contrast, the High Court had given very flimsy reasons for not accepting the evidence of PW5, PW2 and PW4 and that, therefore, the

Judgment of the High Court was liable to be set aside.

9. On these aspects, we have heard the learned counsel Mr. Uma Dutta, who represents the accused before us. He relied strongly on the findings of the High Court and also referred us to the evidence of PW5.

10. We shall now proceed to examine the reasons given by the High Court. The High Court said that the entire case of the prosecution depended upon the solitary testimony of PW5 whose presence in his house at the relevant time was, of course not disputed by the accused. The High Court said there was no good reason why PW5 did not go to the police station at Ambi immediately to lodge a complaint and as to why he thought of proceeding towards Jejala and Kharda. No explanation was offered by him in this behalf. Prosecution ought to have examined Yamunabai who had also come to purchase liquor from the accused. The cause for the alleged scuffle between the accused and the deceased has not been established. Usha, the daughter of the accused and one vittal, were not even examined by the police and there was no corroboration of the story of scuffle as given out by PW5. The presence of eggs said to have been purchased by PW5 was not reflected in the panchnama. PW5 did not also say what he did with the eggs. These circumstances according to the High Court showed that PW5 was not giving out the whole truth and therefore it would be risky to go only by his solitary evidence. Further the motive for the crime had not been established. Since the evidence of PW5, the so-called eye witness, was to be rejected, there was no need to consider the evidence of PW2 or PW4. The only other thing was that some blood was found on the shirt seized from the accused. This circumstance alone was however not sufficient when the evidence of PW5 was otherwise being rejected. These are the reasons given by the High Court.

11. In our view, the High Court was clearly wrong in regard to all the reasons given by it except the one relating to the lack of evidence as to motive. We shall deal with each of these reasons in detail. Firstly we may point out that so far as the observation of the High Court that PW5 did not explain as to why he did not complain to the police at Ambi, the witness had categorically explained why he could not give a complaint at Ambi. He stated in his cross-examination as follows:

"I do not know if there is a police station at Ambi. I felt I should go to the house of Ambi to inform the incident but I was new in village Ambi and I was frightened. I did not do so".

This part of the cross-examination was not noticed by the High Court. Then the observation of the High Court that Yamunabai ought to have been examined by the prosecution to speak to the scuffle is not correct. There is no evidence that she was present at the time when the scuffle took place. The evidence of PW5 was only to the effect that Yamunabai purchased the liquor and left and that she did not consume the liquor at the shop in the presence of the deceased and PW5. PW5 also stated that "after Yamunabai left the house of the accused, she did not come there-Therefore, I had no occasion to see Yamuna bai in the house of the accused or any other place". Later, no doubt in cross-examination he stated that he could not say whether Yamunabai remained in another apartment of the house of the accused or whether she had left the house. But this by no means can be treated as any admission by PW5 of the presence of Yamunabai at the time of scuffle as presumed by the High Court. Again it may be that the police did not think it fit to examine Usha, the daughter of the accused or one vittal but that cannot be a reason for disbelieving the evidence of PW5. Nor is it of any relevance to say that the eggs were not referred to in the panchnama or that PW5 failed to say what he or anybody did with the eggs. The Panchnama regarding the scene of offence may not have referred to all and sundry items in the house of the accused or as to what happened to the eggs. W5

was not cross-examined at all as to what he did with the eggs. If asked, he would have stated what happened to them. It was then said that there was no corroboration as to what PW5 had stated in his evidence about the accused hitting the deceased and PW5 with an axe. In this connection the trial Court relied upon the blood stains at the ota and also on the shirt of the accused. In fact, the accused himself admitted the existence of these blood stains in his Section 313 statement. It is true the motive has not been established or as to why the accused and the deceased had a scuffle soon after PW5 went out to fetch eggs. But PW5 having gone out, cannot be expected to say what happened during the time when he went out to get eggs and returned. The High Court was not prepared to say that PW5 did not at all go out to fetch eggs. There is no such finding given by the High Court.

12. Therefore, the appraisal of the evidence of PW5 by the High Court is, in our opinion, based upon wrong assumptions and omission to consider material which was part of the evidence. The view of the High Court that PW5 had not told the whole truth and his evidence was not reliable or safe, cannot, in our opinion be sustained. Further PW5's evidence is corroborated by the other, evidence as set out in the judgment of the Sessions Court and as summarised by us hereinbefore.

13. For the aforesaid reasons, we are clearly of the view that the case calls for interference by this Court we, accordingly, set aside the judgment of the High Court and restore the judgment of the trial Court. The appellant will surrender for undergoing the remaining part of his sentence as directed by the Sessions Court, failing which, the State shall take steps to detain him for completing the remaining part of his sentence.