

ABC 2017 (I) 185 BOM
ACQUITTAL & BAIL CASES
HIGH COURT OF BOMBAY
(B. P. Dharmadhikari & Kum. Indira Jain, JJ.)
Criminal Appeal Nos. 649 & 563 of 2002
Decided on 9 January, 2017
Nagpur Bench

SHAMKUMAR RAMLAL SAKHARE - Appellant(s).
Versus
STATE OF MAHARASHTRA - Respondent(s).
With
Criminal Appeal No. 563 of 2002.
SMT. BHIMABAI RAMLAL SAKHARE & ANR. - Appellant(s).
Versus
STATE OF MAHARASHTRA - Respondent(s).

Law Covered:- (A) Indian Penal Code, 1860 – Section 302, 323, 325 & 34 – Assault on victims – failure to prove by prosecution – Conduct of complainant party – after the incident, deceased was very much active & proceeded to report the attack– Nobody then attempted to stop him as there was nothing to worry– Held, This militates with version of attack on his head and his falling down on spot or then relatives lifting him to carry to his home– Violence by accused on other victim – not proved– Acquittal – Indian Evidence Act, 1872 – Section 3 – Relevant fact. (Para 29)

(B) Indian Evidence Act, 1872 – Section 3 – Relevant fact – FIR – Name of accused – not mentioned in the FIR – No role ascribed to accused– deposition in Court– Prosecution version not believable– Code of Criminal Procedure, 1973 – Section 154. (Para 10 & 11)

(C) Code of Criminal Procedure, 1973 – Section 161 – Statement under – Omission in the police statement – non explanation by witness – Held, variance in her report immediately after incident, her statement & deposition in court is significant. (Para 12)

(D) Medical Jurisprudence – External injury – Deposition of Medical Officer & Postmortem Report – does not show that any external injury may have contributed to haematoma (a solid swelling of clotted blood within tissues) – Head injury– fatal to prosecution case. (Para 18)

(E) Indian Evidence Act, 1872 – Section 27 – Recovery in pursuance of discloser statement – Recovery article – Non seizure – fatal to prosecution case. (Para 21)

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(F) Indian Evidence Act, 1872 – Section 3 – Relevant fact – Chemical Analyzer's report – Absence of – Weapon of offence & blood stains on the clothes of deceased – of no help to prosecution. (Para 21)

Facts:- It was alleged that over a dispute of sharing of property the accused persons assaulted both the victims, by means of stick, kicks and fist blows, which resulted in to the death of one of them. Initially offence u/s 307 r/w 324 & 34 of IPC was filed. After the said death, it was altered to Section 302 r/w other provisions. The trial Court recorded the judgment of conviction.

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It was observed by the honourable Bombay High Court that the prosecution has failed to prove the assault on the deceased as well as on second victim. It was observed that after the incident, the deceased was very much active and did proceed in the direction of house of police patil to report the attack. Nobody then attempted to stop him as there was nothing to worry. It was held that this militates with version of attack on his head and his falling down on spot or then relatives lifting him to carry to his home. Both the appeals were allowed.

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Law of relief:- Non seizure of recovery article in case of recovery u/s 27, Evidence Act is fatal to prosecution case.

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Held:- Thus, in this report she does not name accused no.2 Bhimabai or accused no.3 Vasanta and does not ascribe any role to them. She also does not say that her brother-in-law Nepal was unconscious. (Para 11)

She is examined as P.W.8 by the prosecution. Before the court for the first time she deposes that Bhimabai and Vasantabai had caught hold of her hair or then caught hold of her brother-in-law Nepal. She states that both the ladies brought Nepal in courtyard of Moreshwar. Lobhan then inquired as to why they were beating Nepal, accused no.4 administered blow of stick on leg of Lobhan and accused no.1 Shamkumar gave blow on his scalp. She went to save her husband, but, accused no.2 and accused no.3 caught hold of her hair and pulled it. Her husband became unconscious and fell down. Bhimabai and Vasantabai then pulled down Nepal. Accused no.2 Bhimabai caught his testicles and accused Vasantabai gave him kick on stomach. She could not explain why there was omissions in her

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7. *Pulicherla Nagaraju .vrs. State of A.P.*; (2006) 11 SCC 444. (Para 6)
8. *Kikar Singh .vrs. State of Rajasthan*; (1993) 4 SCC 238. (Para 6)

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JUDGMENT

B.P. DHARMADHIKARI, J.: - Convicted accused persons in Sessions Trial No. 5/2002, challenge judgment and order dated 27.09.2002, delivered by the 2nd Additional Sessions Judge, Bhandara. There were total 4 accused. Accused no.1 Shamkumar is punished under Section 302 and sentenced to suffer life imprisonment and pay fine of Rs. 10,000/-, in default to suffer rigorous imprisonment for three years. Accused no.2 and accused no.3 (both ladies) are found guilty under Section 325 read with Section 34 of Indian Penal Code and sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 2000/-, in default to suffer rigorous imprisonment for 6 months. Accused no.4 Ramlal was punished under Section 323 of Indian Penal Code and has been let free after imposing upon him punishment for 10 months and to pay fine of Rs. 1000/- and in default to suffer further rigorous imprisonment for 2 months. Accused no.4 had already suffered his punishment in the meanwhile.

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2. Case of prosecution in brief is - Moreshwar and Ramchandra Walde, two brothers had some dispute about sharing of property. On 02.11.2001 at about 9 a.m., Moreshwar was digging a pit for drainage of latrine and Ramchandra obstructed in it. Deceased Lobhan Urkada Raut and victim Nepal Urkada Raut intervened in the quarrel and attempted to persuade the parties to get the property demarcated. Accused no.4 Ramlal and accused no.1 Shamkumar uttered that they also have share in open land, where pit was being dug. Lobhan stated that they had no share. Accused no.1 and accused no.4 assaulted Lobhan by means of stick, kicks and fist blows. Nepal, brother of Lobhan also received injuries. Initially offence under Section 307 read with Section 324 and Section 34 of Indian Penal Code was taken note of vide Crime No.115/2001. After death of Lobhan, it was altered to Section 302 read with other provisions.

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3. We have heard Shri R.M. Daga, learned counsel for the appellant - Shamkumar (accused no.1), Shri H.S. Chitale, learned counsel (appointed) for two lady accused in Criminal Appeal No. 563/2002. Learned A.P.P. Mrs. M.H. Deshmukh, has advanced arguments in both the appeals on behalf of the State Government.

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4. Effort of Shri Daga and Shri Chitaley, learned counsel is to demonstrate that injured witness Nepal as also other eye witnesses
a have twisted the facts and attempted to project incorrect story before the trial Court. Trial Court also did not peruse and appreciate the evidence of all witnesses. Accused no.1 Shamkumar did not inflict any injury on Lobhan, and Lobhan was well even after the alleged incident. He left his house to report the quarrel to police patil and had
b a fall on road. Medical evidence does not show any external injury on his head and hence, any assault on his head by Shamkumar is totally ruled out. The Trial Court has also accepted the alleged recovery of a stick under Section 27 of the Evidence Act from him, but, then that recovery is without any disclosure memorandum and seizure
c panchnama. There is no report of C.A. on it. It is pointed out that Nepal was also active after alleged attack on him and gave incorrect version to falsely implicate two ladies in the family of Shamkumar. Bhimabai is mother of Shamkumar, while Smt. Vasanta is also relative of Shamkumar. His contention is both the ladies attacked on his
d private parts, is not supported by any medical evidence. Respective counsel has taken us through relevant evidence to urge that effort was made by Bhimabai to lodge report first, but, she was given understanding that it was a non-cognizable offence. Bhimabai was also injured because of attack on her by Lobhan and Nepal. Shri Daga, learned counsel for the appellant has placed reliance upon a
e judgment reported at *2011 Cri.L.J. 2631 (SC) Swapan Kumar Senapati .vs. State of West Bengal*), to point out the impact of finding that Lobhan had not suffered any external injury on his head.

Judgment reported at *2015 All MR (Cri) 2628 (Padmakar Dadarao Thorat .vs. The State of Maharashtra)*, is also relied upon
f by him to show how delivery of single blow needs to be appreciated.

5. Shri Chitaley, learned Counsel for the appellants, has submitted that there is no evidence of any grievous injury suffered by victim Nepal. He relies upon the provisions of Section 320 [8] of
g Indian Penal Code and draws support from *1962 (1) Cri.L.J. 652 (Mathu Pally .vs. State of Kerala)*, *1969 Cri.L.J. 1498 (State of Gujarat .vs. Samaj)* and *2008 (4) AIR Bom. R. 265 (Syed Afzal Ahmed .vs. State of Maharashtra)*, to explain what grievous hurt means.

h 6. As against this Mrs. Deshmukh, learned A.P.P. relies upon the evidence as looked into by the trial Court and submits that

Lobhan who has lost his life and his younger brother Nepal were assaulted by accused persons. It is submitted that Nepal or any of the eye witnesses have no reason to lie. She states that medical evidence shows Haematoma and Hemorrhagic shock, as cause of death. Recovery of stick though not under Section 27, is a vital in this respect. She relies upon a judgment of Hon'ble Supreme Court reported at (1979) 3 SCC 90 (*Prakash Chand .vrs. State (Delhi Administration)*), to urge that said recovery shows knowledge of incriminating facts. Even if on technical grounds recovery may fail, cognizance of knowledge with accused or of his conduct could be taken. She points out that the report of Bhimabai is at about 1.30 in the afternoon, while hospital had given phone call to police station about injuries to Lobhan and Nepal and attack on them at 11 a.m. itself. She has cited judgments reported at (2006) 11 SCC 444 (*Pulicherla Nagaraju .vrs. State of A.P.*) and (1993) 4 SCC 238 (*Kikar Singh .vrs. State of Rajasthan*), to buttress her contentions.

7. Prosecution has contended that accused no.1 Shamkumar has committed murder of Lobhan by using stick as a weapon. Accused no.4 Ramlal is found guilty by the trial Court under Section 323 for attack on Lobhan with stick, but, Ramlal is not in appeal before us, as he has accepted the finding. He has accepted the finding because he was in jail for the period for which he has been asked to undergo imprisonment as he could not secure bail during trial. Accused no.2 Bhimabai and accused no.3 Smt. Vasanta are found guilty under Section 325 read with Section 34 of Indian Penal Code for attack on Nepal.

8. After hearing respective counsel and after going through the evidence on record, we find that the trial Court has not appreciated the evidence correctly.

9. FIR (Exh.58) is the first document which brings on record case of prosecution. It is taken down on oral report of Babinanda wife of deceased Lobhan on the date of incidence itself. Police Constable Sukhadeo Bhoyar has recorded it and then registered FIR at police station Duggipar. He received telephone from medical officer of Rural Hospital, Sadak Arjuni about assault on Lobhan and Nepal. He recorded Sana entry no.19/2001 and proceeded to Rural Hospital. Medical officer on duty told him that injured persons were not in a position to give statements. Babinanda w/o Lobhan gave oral report there, which he noted down. He brought that report to police station

and lodged complaint. It is supported by P.S.I. Ashok Sakharkar, examined as P.W.17 by prosecution.

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10. Report lodged by Babinanda speaks of quarrel over a septic tank. She submits that after her husband Lobhan and his younger brother Nepal denied right of accused no.1 and accused no.4, accused persons who were already armed with sticks, beat her husband with stick, kicks and fist blows. Her husband sustained injuries on his head and blood came out from it. He also sustained injuries on his legs and became unconscious. Nepal also sustained injuries.

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11. Thus, in this report she does not name accused no.2 Bhimabai or accused no.3 Vasanta and does not ascribe any role to them. She also does not say that her brother-in-law Nepal was unconscious.

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12. She is examined as P.W.8 by the prosecution. Before the court for the first time she deposes that Bhimabai and Vasantabai had caught hold of her hair or then caught hold of her brother-in-law Nepal. She states that both the ladies brought Nepal in courtyard of Moreshwar. Lobhan then inquired as to why they were beating Nepal, accused no.4 administered blow of stick on leg of Lobhan and accused no.1 Shamkumar gave blow on his scalp. She went to save her husband, but, accused no.2 and accused no.3 caught hold of her hair and pulled it. Her husband became unconscious and fell down. Bhimabai and Vasantabai then pulled down Nepal. Accused no.2 Bhimabai caught his testicles and accused Vasantabai gave him kick on stomach. She could not explain why there was omissions in her police statement. She further deposes in cross-examination that she never informed police about Nepal lifting and shifting her husband Lobhan. She could not explain why this fact appeared in her police statement. Thus, variance in her report immediately after incident, her statement and deposition in court is significant.

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13. It will be appropriate to see what P.W.16 Nepal Raut has to say. His deposition reveals that there was quarrel between Moreshwar and Ramchandra on account of digging of pit. He and Babinanda suggested to get the land measured from Patwari instead of quarreling. Bhimabai [accused no.2] and Vasantabai [accused no.3] questioned their authority to intervene. Thus, a story not deposed by Babinanda and not disclosed by her is coming on record through this witness. Nepal further deposes that his elder brother Lobhan

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[deceased], then arrived and again made similar suggestion. Accused no.1 and accused no.4 then assaulted Lobhan with sticks in their hand on Lobhan's head, back and leg. There was serious injury on his head and he fell down unconscious. His head was broken open. He rushed to his brother and lifted him and at that time accused no.2 Bhimabai pulled his testicles and Vasantabai gave kick blows on his private part. He therefore, fall unconscious. He regained conscious to some extent at the hospital at Sadak Arjuni. Then he was shifted to Bhandara Hospital and there he learnt about death of his brother Lobhan. He identified the wooden stick at Article '1', as stick with which accused no.1 Shamkumar assaulted Lobhan on his head and body.

14. In cross-examination, he accepted that Lobhan came to spot after quarrel had begun. He denied that he had come to spot with stick to assist Moreshwar in digging pit. He denied that Lobhan and Moreshwar assaulted Ramchandra. He denied that he assaulted Bhimabai with stick and gave its blows on her head. He denied that there was scuffle between Lobhan and Ramchandra, or that Lobhan fell down in pit and injured himself because of stones therein. He could not explain why police did not record the fact that head of Lobhan was broken open. In his statement he accepted the Lobhan was lifted and brought home by them, however, immediately he added that he did not lift Lobhan. He could not explain why name of Ramchandra was written by police in his statement in place of name of Bhimabai, was not known to him. He denied that he was not assaulted by Bhimabai and Vasantabai. In further cross-examination, he denied that he was not in a position to state who assaulted Lobhan by stick. He asserts that Shamkumar assaulted Lobhan by sticks. Impliedly, he states that accused no.4 Ramlal [father of Shamkumar] did not assaulted Lobhan with stick.

15. This witness [Nepal] submits that police recorded his statement at Chikhali as also at Bhandara. Statement at Bhandara was recorded 4 to 5 days after the incident, while statement at Chikhali was recorded thereafter. He stated that his statement at Chikhali was recorded after recording of statement at Bhandara. He has denied that a false case was fabricated by him to implicate Bhimabai and Vasantabai.

16. Post mortem report of Lobhan is proved by P.W.6- Dr. Vikas Meshram. He submits that he found lacerated wound over left

parietal region of the size of 2 x ½ x ½ Inch. Haematoma was present over right cerebral hemisphere. He further stated that injury on dead
a body could have been caused by hard and blunt object like stick, which was sent to him for opinion. In cross-examination this doctor has denied that lacerated wound could have been caused by fall during scuffle on stone. Injury i.e. haematoma cannot be caused by
b fall on edged sharp stone. He further stated that there was no evidence of fracture of skull.

17. Post mortem report Exh.36, while taking note of wounds and injuries on deceased, against column no.17, PW-6 Doctor leaves everything blank. Thus, he mentions that there were no external
c injuries. While taking note of internal injuries in column no.19, lacerated wound over left parietal region, is recorded as seen upon internal examination of skull. While referring to brain, presence of haematoma over right cerebral hemisphere is recorded. In column
d no.22, Hemorrhagic shock due to head injury is given as cause of death. Neither State nor doctor has even attempted to whisper that lacerated wound over left parietal region was in fact an external injury.

18. This Doctor who has proved post mortem report never deposited that lacerated wound over left parietal region was not an internal injury. On the contrary, his deposition and post mortem
e report does not show that any external injury may have contributed to haematoma in right cerebral hemisphere.

19. N.C. report lodged by accused no.2 Bhimabai reveals that quarrel between Ramchandra and Moreshwar and effort by her to persuade not to quarrel. She then complains that Lobhan and Nepal
f beat her with stick and she sustained injuries on left side of her head. Defence of accused no.1 Shamkumar in Section 313 statement, while answering the last question is, when he intervened to separate/save his mother, Santosh and Kailash assaulted Lobhan.

20. Investigating Officer P.W.17 states that stick was recovered after statement of Shamkumar. Shamkumar stated that stick was
g lying outside his house and in normal seizure, he took it in custody. He identified Article-1 to be that stick and Article-A2 as the full pant of deceased. He has specifically stated that he did not seize stick
h under Section 27 of the Indian Evidence Act. He also states that Article-A2 was full pant seized from body of the deceased. In her report Exh.82, Babinanda states that Lobhan had sustained bleeding

injuries on his leg. Seizure panchnama Exh.28 of said full pant shows blood stains on right leg portion. Again it is important to note that no corresponding injury is found on leg of Lobhan by P.W.6 - Dr. Meshram. a

21. There is no C.A. report either on stick or on this full pant. In this situation, if statement was made by accused no.1 to show the stick which he used for commission of offence, it's non seizure under Section 27 of the Indian Evidence Act, is fatal to prosecution case. Neither this stick, nor blood stains on full pant of Lobhan can advance the story of prosecution. b

22. As already noted in Exh.82, there is no reference to accused no.2 Bhimabai or accused no.3 Vasantabai. In FIR also their names do not appear. We have already discussed evidence of P.W.8 Babinanda about role of accused nos. 2 and 3 in the matter. Evidence of P.W.9 Nisha Raut wife of Nepal, is that Bhimabai caught hold of his testicles and Vasantabai gave blow on his scalp. She could not explain why this fact of holding testicles or giving kick do not appear in her police statement. She deposes that police recorded her statement thrice. First her statement was recorded at Sadak Arjuni on the day of incident itself. Her second statement was recorded after 8 days at Bhandara and her last statement was recorded at her village after about one month. Thus, improvements made by her about attack on her husband Nepal are apparent. c
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23. Deposition of P.W.10 -Subhash Nandagawli shows that Vasantabai gave kick blows on stomach of Nepal, while Bhimabai had caught hold of his testicles. P.W.12 - Lilabai Bhendarkar states that Vasantabai had caught hold of hair of Babinanda. P.W.13- Pyarelal Walde does not name Bhimabai or Vasantabai in his examination-in-chief and he was declared hostile. P.W.14 - Shobabhai Walde states that when Nepal came to rescue of Lobhan, Vasanta and Bhima came to spot, they caught testicles of Nepal. f

24. P.W.15 - Moreshwar Walde is the person who was digging pit for latrine. He states that Ramchandra obstructed in the process. Lobhan was standing near him. Accused nos. 1 and 4 beat Lobhan by sticks. Lobhan received injuries on scalp by stick blows from accused no.1. Victim Nepal also came to spot at that time. Accused nos. 2 and 3 then caught hold and pulled the testicles of Nepal. Lobhan had a bleeding injury. g
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25. Thus, this militates with the version that these two ladies caught hold Nepal and brought him to spot.

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26. P.W.15 - Moreshwar during cross-examination accepts that he had stated before Police that when Kailash and Santosh were beating Nepal, Lobhan came to spot. It is to be noted that Kailash and Santosh are sons of Lobhan, and accused no.1 has also in reply to last question states that they were attacking Lobhan. Here Moreshwar appears to be supporting that version. Moreshwar thereafter has stated that Nepal went to his house on his own after the quarrel. Thus, in cross-examination, he deviates from his version and if his evidence is accepted, it becomes clear that Nepal was not unconscious at all.

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27. We have already noted above that Nepal himself in cross-examination states that they lifted Lobhan and brought him to house, but, then immediately attempted to dilute its impact by submitting that he did not lift Lobhan. In this connection perusal of evidence of P.W.11 Raghoba Walde reveals that after the attack was over, Lobhan had proceeded towards house of police patil to lodge a report, but, he fell down on square on stony surface. He also accepted that tractor had come from one side, but, he could not state whether Lobhan fell down because of tractor. Wife of PW-15 Moreshwar also throws some light. Evidence of said witness P.W.14- Shobhabai shows that Kailash and Santosh were beating Nepal and Lobhan. Victim Nepal then went to his house on foot of his own and collapsed inside the house because of his injuries. Her husband Moreshwar Walde and Lobhan proceeded towards house of police patil. Lobhan fell down in the square because of giddiness, near tractor. We have already briefly mentioned evidence of her husband P.W.15 Moreshwar. He also states that he [Moreshwar] proceeded towards the house of police patil to lodge report. He further accepted that Lobhan was sitting in square and he followed him. P.W.12 -Leelabai in cross-examination states that Lobhan did not advise anybody in her presence to measure the plot and thereafter to proceed to dig a pit.

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28. Perusal of evidence of P.W.7-Dr. Kewalram Gahane shows that he examined Nepal as also Lobhan first. Nepal had tenderness over lower abdomen and injury may have been caused by stick. He further stated that he did not see any injury of size 2 x ½ x ½ Inch on Lobhan. He has stated that Lobhan was unconscious and his condition was poor. He does not state that Nepal was unconscious.

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Thus, there is no material to show that Nepal had complained to this Doctor about any injury or violence to his private parts.

29. Discussion above therefore leads us to conclude that the prosecution has failed to prove the assault on Lobhan by accused no.1 Shamkumar or then by assault on Nepal by accused nos. 2 and 3. It shows that after the incident, Lobhan was very much active and did proceed in the direction of house of police patil to report the attack. Nobody then attempted to stop him as there was nothing to worry. This militates with version of attack on his head and his falling down on spot or then relatives lifting him to carry to his home. It also negates use of any violence by accused nos. 2 and 3 on Nepal.

30. In view of this conclusion, we do not find it necessary to discuss any of the precedents mentioned supra.

31. With the result, we allow both the Appeals. Conviction and sentence of appellants by the 2nd Additional Sessions Judge, Bhandara in Sessions Trial No. 5/2002 dated 27.09.2002 is quashed and set aside and set aside. They are acquitted of all the charges.

32. Bail bonds furnished by them are cancelled.

33. Muddemal property be dealt with after appeal period is over.

34. Fees of the Counsel appointed for accused nos. 2 and 3 in Criminal Appeal No. 563/2002 are quantified at Rs.7500/-.

Result:- Appeals allowed.
