

SANJAY KHANDERAO WADANE

A

v.

STATE OF MAHARASHTRA

(Criminal Appeal No.1962 of 2011)

AUGUST 03, 2017

B

[A.K. SIKRI AND R.K. AGRAWAL, JJ.]

Penal Code, 1860 – ss.143, 147, 148, 302 r/w s.149 and s.326 r/w s.149 – Deceased beaten to death by appellants owing to a long standing dispute – Concurrent conviction of appellants by Courts below – Plea of appellants that one of the prosecution witness (PW-8) stated that he ate 'Bhel' with deceased immediately before the incident however, said fact of eating 'Bhel' by deceased had not come up in his post mortem examination which casts a doubt on the narration of the whole incident by the witness, thus the same was a result of afterthought – On appeal, held: Evidence of a medical person is merely an opinion which lends corroboration to the direct evidence in the case – On a careful perusal of the post mortem conducted by PW-10 (doctor), it is clear that the death was caused by means of a sharp edged weapon- possibly a sword – Evidence given by PW-10 fully corroborates with the version given by PW-5 and PW-8 that the appellants caused the death of the deceased using swords and iron pipes – Since, the eye witnesses' account was found credible and trustworthy, medical opinion pointing to alternative possibilities cannot be accepted as conclusive – No infirmity in orders passed by High Court with regard to conviction and sentence of the appellants-accused.

C

D

E

F

Medical jurisprudence – Alleged uncertainty w.r.t. time of occurrence as well as death of the deceased – Plea of appellants that PW-8's version that he ate 'Bhel' with the deceased before the incident was falsified, as according to the medical evidence there were no food particles in the stomach of the deceased – Held: Judging the time of death from the contents of the stomach, may not always be the determinative test – It will require due corroboration from other evidence – Plea with regard to absence of food particles in the intestine of the deceased has no basis as digestion varies

G

H

A *from person to person, and sometimes even with the same person at different times – Further, if prosecution is able to prove its case, including the time of death, and the same points towards the guilt of the accused, then it may not be appropriate for the Court to wholly reject the case of prosecution and to determine the time of death with reference to the stomach contents of the deceased.*

B

Evidence:

Medical Witness – Opinion of – Evidentiary value of – Discussed.

Dismissing the appeal, the Court

C

HELD: 1.1 In the instant case, on a careful perusal of the *post mortem* conducted by PW-10, it is very much clear that the death is caused by means of a sharp edged weapon and that too possibly by means of sword. The evidence given by PW-10 fully corroborates with the version given by PW-5 and PW-8 that the appellants caused the death of the deceased using swords and iron pipes. It has been specifically mentioned in the report that injuries could be possible by various blows of the weapons. Further, the death was caused due to cardio respiratory arrest due to hemorrhage as well as neurogenic shock due to very extensive lacerated wound over face including brain along with multiple bone fractures on face. The evidence of a medical person is merely an opinion which lends corroboration to the direct evidence in the case. It has been observed in various cases of this Court that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. [Para 7] [545-E-H]

D

E

F

2.1 Further, the presence or absence of food at the time of *post-mortem* in relation to the time of death is based on various factors and circumstances such as the type and nature of the food consumed, the time of taking the meal, the age of the person concerned and power and capacity of the person to digest the food. In the present case, though PW-8 has stated that he had 'Bhel' with the deceased just before the incident, there is no evidence about the exact time when the meals were taken or the quantity of 'Bhel' consumed by the deceased. Judging the time

G

H

of death from the contents of the stomach, may not always be the determinative test. It will require due corroboration from other evidence. If the prosecution is able to prove its case beyond reasonable doubt and cumulatively, the evidence of the prosecution, including the time of death, is proved beyond reasonable doubt and the same points towards the guilt of the accused, then it may not be appropriate for the court to wholly reject the case of the prosecution and to determine the time of death with reference to the stomach contents of the deceased. Where there is positive direct evidence about the time of occurrence, it is not open to the court to speculate about the time of occurrence by the presence of faecal matter in the intestine. The question of time of death of the victim should not be decided only by taking into consideration the state of food in the stomach. That may be a factor which should be considered along with other evidence, but that fact alone cannot be decisive. [Para 9] [546-D-F, H ; 547-A-B]

2.2 Medical opinion is admissible in evidence like all other types of evidence and there is no hard-and-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct in its absolute terms. So far as the food contents are concerned, they remain for long hours in the stomach and the duration thereof depends upon various other factors. [Para 10] [547-B-C]

Modi's book on Medical Jurisprudence and Toxicology – relied on.

2.3 It is clear from the depositions of the prosecution witnesses, viz., PW-5 and PW-8 which corroborates with the deposition of PW-10 that the injuries were sustained by a sharp cutting object and not by hard and blunt object. Further, the plea raised by the appellants with regard to non-founding of food particles in the intestine of the deceased is of no basis as the digestion varies with different person even with same material, and sometimes even with the same person at different times. With incomplete digestion, no reliable opinion can be given on a medical basis. In fact, there is no positive evidence that the deceased had 'Bhel' along with others. If the period of digestion

A is six hours, the food will be in semi-digested stage upto 2 to 2½ hours and if someone takes food then it remains in stomach for half an hour and then it goes to the intestine. Even if it be taken that the deceased had ‘Bhel’ along with others and five minutes thereafter the incident started in which he succumbed to his injuries, the food will not be converted into semi-digested state and the doctor will not find any food particles in the intestine. The digestion of food is one of the important data which guide the medical officer in arriving at an opinion as to the time of death. This is possible on internal examination. [Para 12] [547-E-H]

B
C 2.4 The evidence of PWs 5, 8 and 12 are found to be trustworthy and fully corroborated with each other on the point of alleged incident with regard to the involvement of the appellants. Further, their evidence fully corroborates with the medical evidence given by the Doctor who conducted the *post mortem* of the deceased. The evidence of the witnesses cannot be brushed aside merely because of some minor contradictions, if any, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy. [Para 14] [548-C-D]

Malay Kumar Ganguly v. Sukumar Mukherjee AIR 2010 SC 1162 : [2009] 13 SCR 1 – relied on.

E

Case Law Reference

[2009] 13 SCR 1

relied on

Para 11

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1962 of 2011.

F From the Judgment and Order dated 11.01.2011 of the High Court of Bombay, Bench at Aurangabad in Criminal Appeal No. 246 of 2009.

WITH

Crl. A. No. 604 of 2012.

G Sudhanshu S. Choudhari, Vatsalya Vigya, Rajat Kapoor, Advs. for the Appellant.

Mahaling Pandarge, Addl. Govt. Adv., Nishant Ramakantrao Katneshwarkar, Adv. for the Respondent.

H

The Judgment of the Court was delivered by

A

R.K. AGRAWAL, J. 1. The above appeals have been filed against the common judgment and order dated 11.01.2011 passed by the High Court of Judicature of Bombay, Bench at Aurangabad, in Criminal Appeal Nos. 246 and 250 of 2009 whereby the Division Bench of the High Court confirmed the order of conviction and sentence dated 09.04.2009 passed by the Court of Sessions, Ahmednagar in Sessions Case No. 88 of 2008 for the offences punishable under Sections 143, 147, 148, 302 read with Section 149 and Section 326 read with Section 149 of the Indian Penal Code, 1860 (in short 'the IPC').

B

2. **Brief facts:**

C

(a) It is the case of the prosecution that on the fateful evening of 31.01.2008, Ravindra Kale (since deceased) was beaten to death by the appellants herein and others, who were 12 (twelve) in numbers and were armed with swords and iron pipes, owing to a long standing dispute between the deceased and the accused persons.

D

(b) Shaila Kale (PW-12) – wife of the deceased, filed a complaint with regard to the alleged crime which got registered as Crime No. 14 of 2008 against the accused persons. After investigation, the charges were framed and the case was committed to the Court of Sessions and numbered as Sessions Case No. 88 of 2008.

E

(c) Vide judgment and order dated 09.04.2009, the Court of Sessions, Ahmednagar, convicted the appellants herein, viz., Pandurang Shridhar Wadane and Sanjay Khanderao Wadane along with others under Sections 143, 147, 148, 302 read with Section 149, Section 326 read with Section 149 of the IPC and sentenced to rigorous imprisonment (RI) for life along with fine.

F

(d) Aggrieved by the judgment and order dated 09.04.2009, the appellants herein, along with others, preferred Criminal Appeal Nos. 246 and 250 of 2009 before the High Court. A Division Bench of the High Court, vide common judgment and order dated 11.01.2011, confirmed the order of conviction and sentence passed by the Court of Sessions against the appellants herein.

G

(e) Being aggrieved by the order dated 11.01.2011, the appellants have preferred these appeals by way of special leave before this Court.

H

A 3. Heard learned counsel for both the sides and perused the records.

 4. The alleged incident is said to have occurred on 31.01.2008 at about 5:00 p.m. There was some dispute between the deceased and the accused persons and earlier also there were incidents of scuffle between the parties. On the date of the incident, the deceased was standing in front of a tea stall in his village. Anil Kale (PW-5), brother of the deceased was also present there. Suddenly, the appellants herein, along with other accused persons, came to the spot in a car and 2 motorcycles. The car gave a hit to the deceased due to which he fell down. Immediately thereafter, the accused persons, along with others, started beating him with swords and iron pipes. Anil Kale (PW-5), who was present at the spot and is an eye-witness to the incident, immediately rushed to call the wife of the deceased who was working nearby. When the wife of the deceased reached the spot, she also witnessed that the accused persons, along with others, were beating her husband. Sunil Raosaheb Kale (PW-8), Devdas Magar and Shridhar Salve were also present at the spot and also sustained injuries while rescuing the deceased. The information of the said incident was given by Anil Kale to the police over phone and the deceased was shifted to the Hospital where he was declared brought dead. The charges were framed against the accused persons under various Sections of the IPC including Section 302 read with Section 149 and were later on confirmed by the Sessions Court and the High Court against them. Since a common question of law has arisen in these appeals, the same will be disposed of by way of this common judgment.

F 5. For a better appreciation of the matter, it is pertinent to throw light upon the versions of the prosecution witnesses. Since in the present set of appeals only the appellants herein are before us, we are confining our discussion to them only. There is no doubt that the death was homicidal. Anil Kale-real brother of the deceased, who was examined as PW-5, very categorically narrated the whole incident as to how the accused persons reached the spot in a Van and motorcycles. Further, the appellants herein got down from the car and were armed with swords and others were armed with iron pipes. One Sambhaji Aher gave two blows on the head of the deceased using sword. On seeing this, he rushed to call Shaila Kale (PW-12) – wife of the deceased, who was

H

working near to the place of the incident. On his return, he witnessed that the accused persons were beating his brother using swords and iron pipes. He also witnessed that Sunil Kale, Devdas Magar and Shridhar Salve also got injuries while rescuing the brother of the deceased. Anil Kale made a phone to the police station informing about the incident. This witness further deposed that there was long standing rivalry between the parties. Anil Kale had seen the accused persons while causing injury on the head of his brother by means of swords and iron pipes. His evidence clearly shows that he had seen Sambhaji Aher giving two blows on the head of the deceased and had also seen the appellants herein causing injury on the person of the deceased. He also witnessed the injuries caused to Sunil Kale (PW-8) and Shridhar Salve during the said incident. Though the High Court has discarded the testimony of this prosecution witness, on a perusal of the examination and cross examination of this witness, we are of the opinion that he has narrated the incident exceptionally well and contradictions, if any, are so minor in nature that it does not go to the root of the matter.

6. Sunil Raosaheb Kale – cousin brother of the deceased was examined as PW-8. He deposed before the Court that the accused persons reached the spot in a Van and on two motorcycles. The appellants herein got down from the Car and were armed with swords. First blow was given by Sambhaji Aher using sword on the head and second on the face of the deceased. The appellants herein were also causing injuries to the deceased using iron pipes and swords. When he tried to rescue the deceased, Sambhaji Aher gave a sword blow to his left leg. He further deposed that Anil Kale brought the wife of the deceased at the spot. The police brought him to the hospital at Shevgaon from where he was shifted to Civil Hospital, Ahmednagar for further treatment. During his cross-examination, he deposed that he ate 'Bhel' with the deceased before the incident. Learned counsel for the appellants pointed out that the fact of eating 'Bhel' by the deceased had not come up in the *post mortem* examination of the deceased which creates a doubt that the narration of the whole incident by the witness is a result of an afterthought.

7. Learned counsel for the appellants contended that the story of PW-8 that he and the deceased had 'Bhel' is falsified by the evidence of Dr. Neeta (PW-10), who conducted the *post mortem* of the body of the

A

B

C

D

E

F

G

H

A deceased wherein she stated that she did not find any food particles in the intestine of the deceased. In this backdrop, it is pertinent to mention here the *post mortem* examination of the deceased which is as under:-

B “A very extensive lacerated wound over face including both eyes, nose, mouth, tongue, right cheek along with multiple bone fractures including right orbital bones, right maxilla, nestle bone, right mandible along with this both eye balls are collapsed.

Incise wound over infra mandible area of about 5 x 0 x 2 x 2 cm.

Incise wound over frontal area with fracture frontal bone of 5 x 0.5 x 3 cm.

C Incise wound over left wrist dorsal aspect of about 4 x 0.5 x .5 cm.

Incise wound over right partial area of 5 x 5 x 0.5 x 0.5 cm.

Contusion over left side lower abdomen of 8 x 2 cm.

D According to my opinion the probable cause of the death of deceased is due to cardio respiratory arrest due to hemorrhage as well as nurogenic shock due to very extensive lacerated wound over fact including brain along with multiple bone fracture of face. Accordingly, I have prepared PM Notes which is in my hand writing. I am shown the same. It bears my signature, contents are correct. It is at Exh. 67. The injuries mentioned in Cl. 17 and 19 were ante-mortem injuries. The said patient may die instantly on account of causing injuries to him as mentioned in post mortem notes. Incised wound caused to the deceased could be possible by means of sharp edged weapon. Incised could caused to the deceased as mentioned in Col. 17 could be possible by means of sword i.e., Art. No. 16 and 17 which are now shown to me before the Court. The injury No. 16 as mentioned in PM Notes could be possible by article No. 18 and 19 which are now shown to me. Injury No. 1 mentioned in CL. 17 of PM Notes could not be possible by various blows of the weapon. The dead body of the deceased Ravindra was lying in dead house of Shevgaon and I have carried out post mortem examination over the dead body of the deceased there.”

H

Further, during cross-examination, PW-10 deposed as under:-

“Time of death of person can be ascertained by looking into the stomach contains, if someone eats food then it remains in stomach for half an hour and then it goes to the intestine. One can identify the food particles eaten by said patient within the period of two hours from that time. I did not find any food particles in the intestine of the deceased.”

A medical witness who performs a *post-mortem* examination is a witness of fact though he also gives an opinion on certain aspects of the case. The value of a medical witness is not merely a check upon the testimony of eyewitnesses; it is also independent testimony because it may establish certain facts quite apart from the other oral evidence. From the evidence on record, inferences are drawn as to the truth or otherwise of the prosecution case in criminal matters and truth or otherwise of a claim in civil matters. In this process, the medical evidence plays a very crucial role. If there is inconsistency or discrepancy between the medical evidence and the direct evidence or between medical evidence of two doctors, one of whom examined the injured person and the other conducted *post mortem* on the injured person after his death or as to the injuries, then in criminal cases, the accused is given the benefit of doubt, and let off. Where the direct testimony is found untrustworthy, conviction on the basis of medical evidence supported by other circumstantial evidence can be done, if that is trustworthy. On a careful perusal of the *post mortem* conducted by PW-10, it is very much clear that the death is caused by means of a sharp edged weapon and that too possibly by means of sword. The evidence given by PW-10 fully corroborates with the version given by PW-5 and PW-8 that the appellants herein caused the death of the deceased using swords and iron pipes. It has been specifically mentioned in the report that injuries could be possible by various blows of the weapons. Further, the death was caused due to cardio respiratory arrest due to hemorrhage as well as neurogenic shock due to very extensive lacerated wound over face including brain along with multiple bone fractures on face. The evidence of a medical person is merely an opinion which lends corroboration to the direct evidence in the case. It has been observed in various cases of this Court that where the eye witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive.

A

B

C

D

E

F

G

H

A 8. Now, we shall deal with the other aspect of the argument
advanced on behalf of the appellants i.e. in relation to uncertainty in the
time of occurrence as well as death of the deceased, with reference to
expert evidence. The contention is that as per the statement of PW-8,
they had 'Bhel' just before the incident. However, according to the
B medical evidence, there were no food particles in the stomach of the
deceased. Therefore, the version of PW-8 is falsified by the evidence of
PW-10, more particularly, wherein she has stated that she did not find
any food particles in the intestine of the deceased. According to the
learned counsel for the appellants, this causes a serious doubt on the
very basis of the prosecution story. This argument appears to be of
C some significance at the first brush, but when examined in depth in light
of the entire evidence, it clearly lacks merit.

9. The presence or absence of food at the time of *post-mortem* in
relation to the time of death is based on various factors and circumstances
such as the type and nature of the food consumed, the time of taking the
D meal, the age of the person concerned and power and capacity of the
person to digest the food. In the present case, though PW-8 has stated
that he had 'Bhel' with the deceased just before the incident, there is no
evidence about the exact time when the meals were taken or the quantity
of 'Bhel' consumed by the deceased. Judging the time of death from the
contents of the stomach, may not always be the determinative test. It
E will require due corroboration from other evidence. If the prosecution is
able to prove its case beyond reasonable doubt and cumulatively, the
evidence of the prosecution, including the time of death, is proved beyond
reasonable doubt and the same points towards the guilt of the accused,
then it may not be appropriate for the court to wholly reject the case of
F the prosecution and to determine the time of death with reference to the
stomach contents of the deceased. Even in *Modi's Jurisprudence*, it
has been recorded as under:

G "... The state of the contents of the stomach found at the time of
medical examination is not a safe guide for determining the time
of the occurrence because that would be a matter of speculation,
in the absence of reliable evidence on the question as to when the
deceased had his last meal and what that meal consisted of."

Where there is positive direct evidence about the time of
occurrence, it is not open to the court to speculate about the time of

H

occurrence by the presence of faecal matter in the intestine. The question of time of death of the victim should not be decided only by taking into consideration the state of food in the stomach. That may be a factor which should be considered along with other evidence, but that fact alone cannot be decisive. A

10. This Court in a catena of cases has stated the dictum that medical opinion is admissible in evidence like all other types of evidence and there is no hard-and-fast rule with regard to appreciation of medical evidence. It is not to be treated as sacrosanct in its absolute terms. Agreeing with the view expressed in Modi's book on *Medical Jurisprudence and Toxicology*, this Court recorded that so far as the food contents are concerned, they remain for long hours in the stomach and the duration thereof depends upon various other factors. B C

11. Further, in *Malay Kumar Ganguly vs. Sukumar Mukherjee* AIR 2010 SC 1162, it has been held by this Court that the opinion could be admitted or denied. Whether such evidence could be admitted or how much weight should be given thereto, lies within the domain of the court. D

12. It is clear from the depositions of the prosecution witnesses, viz., PW-5 and PW-8 which corroborates with the deposition of PW-10 that the injuries were sustained by a sharp cutting object and not by hard and blunt object. Further, the plea raised by learned counsel for the appellants with regard to non-founding of food particles in the intestine of the deceased is of no basis as the digestion varies with different person even with same material, and sometimes even with the same person at different times. With incomplete digestion, no reliable opinion can be given on a medical basis. In fact, there is no positive evidence that the deceased had 'Bhel' along with others. If the period of digestion is six hours, the food will be in semi-digested stage upto 2 to 2½ hours and if someone takes food then it remains in stomach for half an hour and then it goes to the intestine. Even if it be taken that the deceased had 'Bhel' along with others and five minutes thereafter the incident started in which he succumbed to his injuries, the food will not be converted into semi-digested state and the doctor will not find any food particles in the intestine. The digestion of food is one of the important data which guide the medical officer in arriving at an opinion as to the time of death. This is possible on internal examination. E F G

A 13. Shaila Kale-wife of the deceased was examined as PW-12. She also deposed that when she was asked by Anil to come, she immediately rushed to the spot and noticed that the appellants herein were armed with swords and were beating her husband who succumbed to his injuries then and there. She lodged a report with the Police about the incident which was reduced into writing by mentioning the names of all the accused persons therein.

B 14. In this view of the matter, the evidence of PWs 5, 8 and 12 are found to be trustworthy and fully corroborated with each other on the point of alleged incident with regard to the involvement of the appellants herein. Further, there evidence fully corroborates with the medical evidence given by the Doctor who conducted the *post mortem* of the deceased. Even the injuries sustained by PW-8 while rescuing the deceased from the clutches of the accused persons have been examined and proved by Dr. Kundalick (PW-11) who found them to be of grievous nature. We are of the view that the evidence of the witnesses cannot be brushed aside merely because of some minor contradictions, if any, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy. However, the prosecution failed to examine Devidas Magar and Shridhar Salve who said to have rescued the deceased.

E **Conclusion:**

F 15. The prosecution has examined material witnesses, viz., PW-5, PW-8 and PW-12 who are the eye-witnesses to the alleged incident. In our opinion, the High Court was not right in discarding the testimony of PW-5 and PW-12 taking into consideration the role played by the appellants herein. The presence of the above witnesses at the place of occurrence is clearly established and is not at all doubtful. Though there are certain discrepancies but those are so minor in nature that it cannot harm the case of the prosecution. Their evidence inspires confidence and is natural one which clearly shows that the accused persons formed an unlawful assembly along with others with a common object to murder the deceased which was done by causing injuries to his person using fatal weapons which fully corroborates with the oral evidence as well as the *post mortem* report of the Doctor (PW-10) who conducted the *post mortem*. We do not find any conflict between the oral evidence of the above witnesses and medical evidence of PW-10 as alleged by learned

H

counsel for the appellants, particularly, on the point of injuries caused to the deceased on face and head using swords and iron pipes. A

16. In view of the foregoing discussion, we do not find any infirmity in the orders passed by the High Court with regard to the conviction and sentence of the appellants-accused. The appeals are accordingly dismissed. B

Divya Pandey

Appeals dismissed.