(1974) 04 BOM CK 0011

Bombay High Court (Nagpur Bench)

Case No: None

Namdeo Atmaram Ramteke	APPELLANT
Vs	
The State of Maharashtra	RESPONDENT

Date of Decision: April 25, 1974

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 288
- Evidence Act, 1872 - Section 157
- Penal Code, 1860 (IPC) - Section 324

Citation: (1976) CriLJ 871 : (1975) MhLj 36

Hon'ble Judges: Shimpi, J

Bench: Single Bench

Judgement

Shimpi, J.

The accused appellant was charged in Sessions Trial No. 67 of 1971 by the Additional Sessions Judge, Bhandara that on 13th February, 1971 at village Masalmeta, Tahsil Sakoli, District Bhandara, he caused injuries with an axe to Mahadeo son of Bhiwaji Ganvir, resident of the same village and attempted to commit his murder. In the course of the same transaction and at the aforesaid time he also attempted to commit murder of his aunt Smt. Ithabai wife of Mangali of the same village and thu9 the accused was charged u/s 307 of the Indian Penal Code for attempting to cause murder of these two persons.

2. The learned Additional Sessions Judge held that the evidence so far as attempting to cause the murder of Mahadeo was concerned was not sufficient to connect the accused with that crime. At any rate he observed that doubt arose in his mind as regards the complicity of the accused in attempting to commit murder of Mahadeo. This finding has been given by the Additional Sessions Judge in paragraph No. 21 of his judgment. However, the learned Sessions Judge on appraisal of the evidence before him which consisted of the testimonies of Ithabai and her mother-in-law

brought on record u/s 288 of the Criminal Procedure Code as corroborated by the other independent circumstances such as the first information report of Kotwal and the human blood stains found on the clothes of the accused as well as the nail-clippings. The learned Judge held that the offence that was brought home to accused so far as causing of the injuries with an axe to Ithabai was not u/s 307 of the Indian Penal Code but u/s 324, I.P.C. He held accused guilty for causing Injuries to Ithabai by a sharp weapon like an axe and convicted him under .Sec. 324 of the Indian Penal Code to suffer rigorous imprisonment for two years.

3. The facts in brief are as under: It is seen that the accused appellant is the nephew of Ithabai (P.W. 2). Par- wati (P,W. 3) is the mother-in-law of Ithabai. Jangli is the elder brother of the husband of Ithabai and one Sugandha (P.W. 4) is the wife of Jangli. These persons resided in village Masalmeta. Ithabai was living in a part of a house. Vikram (P.W. 5) is also the nephew of Ithabai. Thus, Vikram is the cousin of the accused. Vikram''s house is adjoining to the house of Ithabai. It is also not in dispute that the accused was residing in a separate house near the house of Ithabai, On 13-2-1971 at about 7-30 P.M. Ithabai was busy in preparing vegetable in a court-yard under the Chapri of her house. Her mother-in-law Parwati and Sugandha were in the house. When she was pouring the sweat oil for preparing vegetable it is the allegation of the prosecution that accused Namdeo came from behind and assaulted her by means of an axe and caused injuries en her head as well as on her neck. It is the allegation of the prosecution that accused before causing injuries to Ithabai had come running from the side of a Pan Thela where on the way he had first assaulted Mahadeo (P.W. 7) by means of an axe by causing injuries on his neck. It is the allegation of the prosecution that Mahadeo identified the accused and had some talk with him. Thereafter, he fell down and was removed to Lakhani by his brother Kisan (P.W. 8). It is to be noted at this stage that police patil had sent a report about the incident. He could not contact this Mahadeo because Mahadeo had become unconscious and was removed bv his brother but at the trial Mahadeo has been disbelieved by the learned Judge so far as injuries caused to him.

4. It appears that Police Patil (P.W. 6) and Tulshiram Kotwal (P.W. 9) on receiving the information went to the spot. They taw injuries on the neck and head of Ithabe.i. It is the allegation of the prosecution that Ithabai implicated accused as her assailant in the presence of the Police Patil but it appears from the report Exh. 16 submitted by the Police Patil that according to him Ithabai was unconscious and was unable to name her assailant.

5. Police Patil Laxman scribed report Exh. 16 and sent it with Tulshiram Kotwal (P.W 9) to Police Station Lakhani. One Head Constable who was on duty appears to have questioned Tulsiram and Tulsiram thereafter has added as is seen from Exh. 16 that Ithabai told him that Namdeo Atmaram Ramteke i.e. accused assaulted her. The Head Constable obtained the signature of Tulsiram and thereafter appears to have registered the offence, He also reduced to writing this written statement in the first

information which is Exh, 24 and on the basis of which the investigation has proceeded.

6. It appears that Mahadeo and Ithabai were taken to the hospital. One Dr. Madhav (P.W. 12) examined her at Bhandara at mid-night. He noticed lacerated wound 2"X1/2" X 2/3" on the back of the neck on the left side running oblique. He also noticed lacerated wound 1 l/2"Xi"Xi" on the right side of the occiput running above downwards oozing. In the opinion of the Doctor the above injuries could be caused by a hard and edged object. Axe was shown to him and in his opinion the injuries could be caused by the axe. I need not reproduce his evidence as regards Mahadeo in view of what I have stated in the earlier part of the judgment.

7. During investigation a discovery of axe (Article 3) was made consequent to certain information supplied by accused. One panch by name Dashrath was examined. The other panch to the panchanama of discovery was also examined but they have not supported the prosecution version. The learned Judge, therefore, did not accept the evidence as regards discovery as reliable and did not use it against the accused. Therefore, I need not discuss it.

8. It appears that nail-clippings of accused were taken. This has been proved by the evidence of P.S.I, as well as the Panch Dashrath but the report of the Chemical Analyser Exh, 39 shows that the nail-clippings were not found stained with blood. Apart from the question whether any human blood was found on it. It is further seen that one underwear styled as Baniyan, one open-shirt and a Pyjama which are alleged to be the clothes of the accused have been attached when accused appears to have been arrested. Panch Dashrath had not supported this evidence and has failed to identify those clothes as the clothes of the accused. P.S.I, refers to the seizure memo of these clothes but the learned Judge has not put any question to the accused as regards these clothes and further did not question the accused whether they were seized from his person or from the possession. I am emphasising this fact because in the latter part of the judgment the learned Judge has considered the question of stains of human blood found on the clothes of the accused as a corroborative piece of evidence but if the learned Judge wanted to use it as a corroborative piece of evidence and wanted to treat it as an incriminating circumstance against the accused it was his bounden duty to examine the accused u/s 342 of the Criminal Procedure Code and to give him opportunity to explain this incriminating circumstance appearing against him. It is true that every and each omission in the examination of an accused is not vital. It may only amount to an irregularity curable under the provision of the Criminal Procedure Code but if it is shown that prejudice is caused then certainly the omission of putting any question about the incriminating circumstance assumes importance. It is seen that the accused has explained blood stains on his clothes. But the vital fact whether these clothes belonged to the accused has not been established by cogent evidence and if the learned Judge treated it as a cogent evidence it was his duty to put that

circumstance to the accused. I shall deal with this aspect a little later when I discuss the other evidence,

9. It appears that after completing the investigation the charge-sheet was filed in the Court of Judicial Magistrate, First Class Sakoli who ultimately committed the accused to stand his trial in the Court of Session.

10. The defence of the accused in the Sessions Court was of denial. He stated that he was not present in the village at about the time of the incident and he has been unnecessarily implicated. He admitted that while affecting arrest his nail-clippings were collected and tickets of State Road Transport were also seized from his person. According to him, he had gone to Mundipar one day prior to the incident. On the day of the incident he came to Bhandara. Therefore he went to his village and on the way between his village Masalmeta and Lakhori, there were thorny trees and shrubs and due to their contact he got bloody scratches which he rubbed against his Pyjama and hence his clothes stained with blood. The police had seized tickets from him which he had regarding the journey which he performed from Bhandara to Mundipar to and fro He denied that he discovered the axe. He did not state that the clothes which were attached by the P.S.I, were his and were attached from his person and I have already stated that he has not been strictly questioned about it. In short, he abjured guilt.

11. In the trial Court Ithabai, Par-wati, Sugandha and Vikram were examined as eye-witnesses to the occurrence. However, they have turned hostile and they did not support the prosecution that it was accused who caused injuries to Ithabai. Ithabai (P.W. 2) stated that she was residing with her husband. Accused Namdeo was his nephew and his house is adjoining to her house. At the time of the incident she was in the Chapri cooking evening meals. Her mother-in-law i.e. Parwati, Jangli''s wife i.e. Sugandha were at home but they were not in the Chapri. In the meanwhile somebody came and assaulted her and ran away, She did not know with what instrument that person had assaulted her. Her bangles were broken. She does not know as to what happened to the bottle in her hand. Due to the assault she fell unconscious. She received four injuries. One was on her head, neck and palm. We have noted that the doctor noted only two injuries on her person. She was then removed to Lakhani In the police station wherefrom she was sent to the hospital at Bhandara. She has been declared hostile and contradictions were brought on record so also her statement was recorded by the Taluka Magistrate which was probably taken considering her condition to be serious as a prospective dying declaration. It will be seen that statements made before the police are not substantive evidence and they cannot be used for the purpose of corroboration. They can only be used for the purpose of contradiction. A statement u/s 32 of the Evidence Act though not relevant because in this case Ithabai survived could be treated as a former statement and could be used for corroboration u/s 157 of the Indian Evidence Act. But for that purpose, the Taluka Magistrate should have been examined to show

and to prove that such a statement was recorded at the instance of Ithabai. In this case the evidence of, Taluka Magistrate witch recorded her for-j mer statement in the hospital has not been examined though the learned Judge allowed the contradiction from this statement to be put to the witness. It must be said in fairness to him that he did not use those contradictions as a corroborative piece of evidence to her testimony which she gave in the Committal Court. It is seen that this witness was examined in the Committal Court and in the Committal Court she has stated that "near the oven there was light of lantern". In the meanwhile Namdeo armed with an axe came from behind to assault me and he lifted the axe to assault me and at that time my mother-in-law protested and therefore I saw and Namdeo then assaulted me on my head and neck by means of an axe and I also then raised my hands saying don''t beat me". This statement of the witness has been brought on record u/s 288 of the Criminal Procedure Code and the learned Judge has dealt with it as a substantive evidence. It would thus be seen that the witness has made two statements on oath. One implicating the accused and one in the Sessions Court showing that she did not know who assaulted her. I shall deal as regards the evidentiary value of these statements after I discuss the evidence of the other witnesses.

12. Parwati (P.W. 3) stated that the accused Namdeo is her grand-son. She was inside the house at the time of the incident when she heard the cry of Ithabai. She immediately went outside. Ithabai sustained injuries on her head. Thereafter Ithabai was removed to La-khani. She has been declared hostile. The contradictions from her police statement have been pointed and are brought on record. It is not necessary to deal with these contradictions because they simply described in the police statement and named the accused as assailant. She haa been examined in the Committal Court and in the Committal Court she has stated "5 or 6 months back on the day of the incident at about 7 or 7-30, Ithabai was cooking in the court-yard. I was in the Chapri. My son and his wife Sugandha were inside the house. Accused Namdeo came and assaulted Ithabai on her head and neck by means of an axe and he ran away. Ithabai then fell unconscious". She denied to have made this statement but this being a statement made by the witness on oath in a Committal Court it was brought on record under the provisions of Section 288 of the Criminal Procedure Code and was treated as a substantive evidence. Both these witnesses Ithabai and Parvati stated that they gave the statements in the Committal Court at the pressure of the police. Ithabai further stated that at the material time she was going in the court-yard. The incident took place in the second fortnight of the month. According to Hindu Calendar when there is no moon in the sky, moon rises late and for few hours. At the time of the incident which took place at about dinner time it was all dark. She had bent down to pour the oil and therefore she could not see who was her assailant when blow was given on her head. Parwati in her cross-examination stated that her statement before the police as well as before the Committal Court were recorded at the threats and pressure of the police. Her substantive evidence in

this Court is that she came out after Ithabai had fallen down. The two other witnesses Sugandha and Vikram have also resiled from their police statements and denied to have any knowledge of the assailant of Ithabai.

13. The learned Judge held the statement of Ithabai given in the Committal Court as a substantive evidence sufficient to establish the complicity of the accused. He further held, that if that evidence requires corroboration the evidence of Ithabai was corroborated by the testimony of Parwati given in the Committal Court and it was further corroborated by the evidence of Laxman Kotwal and also by the blood stained clothes of the accused. I would, therefore, deal with these findings of the learned Judge hereinafter.

14. The question that will have to be considered is, how far the evidence given in the Committal Court by a witness who resiles from it at the trial in the Sessions Court and which is brought on. record u/s 288 of the Code of Criminal Procedure should be accepted and whether it requires any corroboration. This question has been considered1 by the Supreme Court first in Shranappa Mutyappa Halke Vs. State of Maharashtra, . His Lordship Das Gupta J. who has spoken lor the Bench has considered many authorities ol the various High Courts in India and has observed in paragraph No. 10, page No. 1359 (of AIR) :Para 10 at p. 361 of Cri LJ) as follows:

We cannot do better in this connection than to quote from the observation on this question by their .Lordships of the Privy Council in AIR 1949 257 (Privy Council) In that case the evidence of an approver in the Committing Court had been brought on the record u/s 283 of the Code of Criminal Procedure, dealing with the question as to the value that can be attached to such evidence their Lordships observed tiius:

Apart from the suspicion which always attaches to the evidence of an ac complicit would plainly be unsafe, as the Judges of the High Court recognised, to rely implicitly on the evidence of a man who had deposed on oath to two different stories.

This, if we may say so, with respect, is the crux of the question. Where a person has made two contradictory statements on oath it is plainly unsafe to rely implicitly on his evidence. In other words, before one decides to accept the evidence brought in u/s 288 of the Code of Criminal Procedure as true and reliable one has to be satisfied that this is really so. How can that satisfaction be reached? In that cases this satisfaction can come only if there is such support in extrinsic evidence as to give a reasonable indication that not only what is said about the occurrence in general but also what is said against the particular accused sought to be implicated in the crime is true. If there be a case and there is such infinite variety in facts and circumstances of the cases coming before the courts that it cannot be dogmatically said that there can never be such a case-where even with-otrt, such extrinsic support the Judge of facts, after bearing in mind the intrinsic weakness of the evidence, in that two different statements on oath have been made, is satisfied that the evidence is true and can be safely relied upon, the Judge will be failing in his duty not to do so."

We have, therefore, to find out whether there is any intrinsic corroboration to the evidence of Ithabai or whether there is An extrinsic corrdboration to the evidence of Ithabai. The learned Judge has quoted two authorities. One is of the Supreme Court reported in Bansilal Vs. The State of Rajasthan, and the other of the Orissa High Court reported in Thukuda Khadia and Another Vs. The State, and has reproduced the proposition which also clearly shows that the evidence treated as substantive evidence u/s 288, Cr.P.C. of a witness can be acted apron if it is corroborated by independent evidence. However the learned Judge lost sight of the observations which he has reproduced and sought corroboration to the testimony of Ithabai not from an independent evidence but a tainted evidence, if I may use the word which also was brought on record u/s 288, Cr.P.C. namely that of Par-wati. The learned Judge has considered the question as regards the injuries suffered by Ithabai and held that the evidence of the doctor goes to corroborate the evidence of Ithabai that she was injured. The evidence of doctor may go to corroborate Ithabai as regards the general structure of the crime but what is required corroboration to the complicity of the accused. The learned Judge has lost sight of this fact in dealing with the principle of corroboration. The learned Judge then held that Parwati''s evidence was corroborated with the evidence of Ithabai in her deposition in the Court. Parwati''s evidence suffers from the same infirmity from which Ithabai''s evidence suffers. If Ithabai''s evidence cannot be accepted unless it is corroborated by an independent evidence, Parwati''s evidence also cannot be accepted. Therefore, I say that the learned Judge committed an error in law in seeking corroboration of a tainted evidence from another piece of tainted evidence. The learned Judge therefore was not right in relying upon the evidence of Parwati as a corroborative evidence to the evidence of Ithabai.

15. The learned Judge then observed that the evidence of Laxman Kotwal is corroborative evidence to Ithabai''s statement made in the Committal Court and as there is extrinsic corroboration, Ithabai''s evidence could be safely acted upon. It would be, therefore, necessary to examine the evidence of Laxman Kotwal. It is to be seen that the learned Judge has discussed the question whether Exh. 16 or Exh. 24 is the first information. In my opinion, nothing hinges on that point because Exh. 16 is itself treated and is reproduced in the first information report Exh. 24. Therefore, it would be simply quibbling to say as to whether Exh. 16 is the first information or Exh. 24 is the first information. The material question for us to decide is whether Lax-man''s evidence can be accepted to hold that he heard Ithabai saying that it was accused who caused the assault to her. Laxman (P.W. 9) stated that he got the information that P. W- Mahadeo was killed. On hearing this information he along with Patil went to the spot. They did not see Mahadeo at the spot where he was injured and they learnt that Mahadeo was already removed by his brother. Then they went to the house of Ithabai and saw the injuries- on her neck. On enquiry, Ithabai told them i.e. the witness and the Police Patil that accused Namdeo had assaulted her. Police Patil then scribed the report as Exh. 16 and that report was

taken by him to the police station. In the police station his report was also written by the police. Exh. 24 is that report. In the cross-examination he admitted that in his presence Police Patil made enquiries and after making enquiries with Ithabai Police Patil wrote the report. Whatever was written by the Police Patil was true as per the circumstances He reiterated that Ithabai was not absolutely unconscious ﷺbut was able to talk. It is not true that when he went there, Ithabai was completely unconscious. He also denied the suggestion that Police Patil or he did not make any enquiry with Ithabai at that time. In the instant case, therefore, the report Exh. 16 assumes importance and evidence of Police Patil also assumes importance,

16. Police Patil stated that since 1954 he is the Police Patil of the village. On the day of the incident on getting information he went first to the place of Mahadeo but he was removed. He saw injuries to the neck of Ithabai and he scribed Exh. 16 and handed it over to the Kotwal. It will be seen from the original police report Exh. 16 that it is written in black ink by the Police Patil and thereafter a statement of Kotwal is reduced to writing. That Exh. 16 is in blue ink in which this Tulsiram implicates accused as the assailant of Ithabai and to have learnt that information from Ithabai. I have reproduced the evidence of Police Patil as well as village Kotwal and it is seen that both had gone to the house of Ithabai. Ithabai at that time was unconscious. Police Patil had seen the injuries on the neck of Ithabai and he could not know the name of the assailant either from Ithabai or from those persons who were in the house. Under such circumstances it appears to me that Tulshiram on some hearsay information has given this report to the Head Constable which he was not authorised to do by the Police Patil. Therefore, it will be risky to rely upon the evidence of Tulsiram Kotwal to hold that Ithabai told him that accused had assaulted her. The learned Judge was, therefore, not right in treating that circumstance as a corroborative piece of evidence to the statement of Ithabai made in the Committal Court.

17. The other circumstance relied upon by the learned Judge was as regards the blood stained clothes. I have already discussed about it. I have shown that the learned Judge ought to have put this incriminating circumstance to the accused. He has failed to do it. It is seen from the seizure-memo that the State Transport Bus tickets were found in the pocket of the accused. They were attached. They go to corroborate the version of the accused that he had gone to Mundipar and from Mundipar he had come to Bhandara and from Bhandara he had come to hia village, it is accepted by the witness that there were wild shrubs from Bhandara to his village but the learned Judge held that blood stains would not appear on his clothes because of the thorny shrubs pricking to the body of the accused. The learned Judge would have been justified in drawing whatever inference had he put this circumstance to the accused. In the instant case there is no cogent evidence that the clothes which are alleged to have been stated by the police officer to be of accused were of the accused. Evidence of Dashrath Panch does not show that clothes of the accused were attached in his presence. There is only a seizure-memo which has

been proved by the police officer but this circumstance that the clothes were attached from the person of the accused or from his possession has not been put to the accused. His explanation has not been obtained.

18. Under the circumstances, it appears to me risky to treat that circumstance which is also brought on record u/s 288, Cr.P.C. In that view I hold that the learned Additional Sessions Judge was in error in holding accused guilty u/s 324 of the Indian Penal Code. As there is no legal evidence against the accused connecting the accused with the crime, the accused will have to be acquitted. I, therefore, set aside the order of conviction passed by the learned Additional Sessions Judge, and acquit the accused for the offence charged. The bail bond stands cancelled.