

Nilkanth and Another Vs. The State of Maharashtra and Others

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Court : Mumbai Nagpur

Decided On : Jan-19-2016

Judge : B.P. Dharmadhikari & V.M. Deshpande

Appeal No. : Criminal Appeal Nos. 172 of 2004 & 268 of 2004

Appellant : Nilkanth and Another

Respondent : The State of Maharashtra and Others

Judgement :

B.P. Dharmadhikari, J.

1. The 1st Adhoc Additional Sessions Judge, Gondia has on 29.4.2004 while delivering judgment in Sessions Trial No.78 of 2002 acquitted Accused no. 1 Jaiprakash, no. 3 Govinda, no. 4 Mahendra, no. 5 Prabhudayal and no. 6 Dindayal of offences punishable under Sections 147, 148, 149 and 302 of Indian Penal Code. Accused no.2 Nilkanth alone is convicted of offence under Section 304 part one, and sentenced to suffer RI for 10 years, to pay fine of Rs. 5000/- or in default, to suffer SI of three months. All 6 accused have also been acquitted of offence under Section 135 of the Bombay Police Act. Criminal Appeal No. 268 of 2004 is directed against this acquittal, and all 6 accused are party respondents therein. Accused no. 2 Nilkanth assails his conviction under Section 304 part one, in Criminal Appeal No. 172 of 2004. According to prosecution, on 12.8.2002 at 2.30 PM at village Bhadrutola, Karanja; these accused constituted an unlawful

assembly and in furtherance of their common object, murdered one Ganesh s/o Gosai Rahmatkar due to old pending land dispute.

2. We have heard APP Shri Thakare for the State and Advocate Shri Amol Mardikar for all accused in both these Appeals at length.

3. Shri Thakare, learned APP has argued that there are three eye witnesses to the crime and most of their testimony is consistent with each other. The trial Court has in fact accepted it to convict accused No. 2 “ Nilkanth, but, not under Section 302 of Indian Penal Code. The same logic ought to have been extended and accused No. 5 “ Prabhudayal also needed to be convicted, as Prabhudayal handed over the sword to Nilkanth. He adds that the material on record shows that all the 6 accused persons were waiting for the deceased Ganesh to arrive and they were armed with various weapons . Thus the murder has been committed with premeditation. The land dispute between two families is the root cause and as such, the trial Court ought not to have proceeded to acquit any accused of the offence punishable under Section 302 Indian Penal Code as charged. In any case, there is no material to enable it to invoke Section 304, Part II of Indian Penal Code. He has taken us through oral evidence of three eye witnesses.

4. He submits that contradictions or submissions being pressed into service are peripheral and do not affect the merits of, or substantive part of testimony of these eye witnesses. All these eye witnesses are eyewitnesses and merely because they are related to the deceased, their testimony cannot be disbelieved. PW2 “ Ashok Lichade is an independent person who has witnessed the entire incidence and he is not related with the deceased.

5. He has produced before us a chart showing which eye witnesses has placed which accused in possession of a particular weapon. He explains consistency therein and draws support from the judgment of the Hon'ble Apex Court in the case of **Krishna Mochi vs. State of Bihar “ (2002) 6 SCC 81)** and **Inder Singh vs. State of Rajasthan (2015) 2 SCC 734)**. Both these judgments consider the impact of principle laid down in **Masalti vs. State of U.P. (AIR 1965 SC 202)**.

6. He relies upon cross examination of eye witnesses by accused persons to contend that the accused persons indirectly admit their presence at the crime scene. Attention is invited to report of Chemical Analyser (C.A.) to show presence of human blood on the clothes of accused and on two weapons. Blood group 'B' is found on one weapon i.e. on iron rod. He argues that this report of C.A. is not in dispute and, therefore, the alleged non-sealing of weapons or clothes cannot be fatal to prosecution. It does not advance the case of accused persons at all.

7. He states that the accused persons were arrested immediately, except accused No. 6, who was in the hospital. Accused No. 6 was arrested later on when he reported in Police Station along with the weapon. He submits that in this situation, when all material facts are proved, advantage of technical violations, if any, cannot be given to accused persons. He has also taken us through the evidence of Panch witnesses and evidence of Investigating Officer to show that the investigation has been conducted fairly and impartially.

8. From case diary, he attempts to demonstrate that situation in village Bhadrutola on that day was very tense and after murder of Ganesh, accused persons allege attack by brothers of Ganesh on accused No. 6 " Dindayal. Dindayal was admitted in hospital for few days. The police authorities were required to handle the difficult situation and hence minor lapses cannot be made a bone of contention by the accused persons.

9. Shri Mardikar, learned counsel, on the other hand, submits that the involvement of accused No. 2 " Nilkanth in crime is itself not established. The story narrated by PW1 " Sunita sister of the deceased and allegedly recorded at Bhadrutola immediately by PW7 at Exh. 33, and her oral deposition show the important omissions and contradictions. Her evidence, therefore, ought not to have been relied upon. He also states that PW3 " Gosai is father of the deceased Ganesh, and it is not very clear whether he was following Ganesh or then has witnessed the incident or not. According to him, the story of Sunita that she returned from field on 12.08.2012 to feed her young child and then was going back to field thereafter, itself raises some doubts. The evidence of PW2 " Ashok also suffers from material improvements and he had no business to be at the spot of crime on

12.08.2002. The prosecution has implanted him and, therefore, his statement under Section 161 of Code of Criminal Procedure has been recorded on the next day.

10. He points out the evidence on record to show hostilities between family of Ganesh and also between PW2 “ Ashok and accused No. 5 “ Prabhudayal. Panch witnesses are also biased and against accused persons. The police have carried out investigation in most casual manner and the way in which three statements under Section 27 of the Evidence Act have been recorded simultaneously, allegedly in police station in the presence of the very same panch witnesses, speaks for itself. PW7 “ Investigating Officer “ Bhaiyalal Thakre, could not explain this situation and, therefore, even during in his chief, he committed a blunder. If accused No. 1 “ Jaiprakash had not disclosed anything in Police Station, it was not necessary and he could not have been taken to house of Prabhudayal. He points out that all recoveries are shown from the house of Prabhudayal, one after the other.

11. The fact that weapons and clothes were not sealed, is borne from the record and also from oral evidence of PW7 “ Investigating Officer and PW5 Panch witness. PW1 claims that sword was found at a distance of 2.5 kms from murder spot while according to panchnama, it was recovered from a spot at a distance of 250 feet. The panchnama is itself defective inasmuch as crime scene has not been properly explained and it is difficult to find the position of alleged eye witnesses with reference to spot. He argues that bicycle of Ganesh and his body, both were found in the field, while no other bicycle was found on the spot by the police. He has taken us through the relevant evidence to urge that a very cautious approach is essential in this matter. He draws support from the judgment of the Hon'ble Apex Court in the case of **Satyanarain vs. State of M.P., (AIR 1972 SC 1309)**, and seeks dismissal of appeal filed by the State challenging acquittal of all accused and prays for allowing appeal, filed by Nilkanth, assailing his conviction.

12. We have briefly mentioned the arguments of the respective counsel above. The evidence to which they have invited our attention with material on record, is being looked into while dealing with their contentions.

13. Here, in order to avoid prolixity, we find it appropriate to mention the history which necessitates cautious approach. Enmity with or bias against accused and relationship with the deceased are the reasons therefor.

14. Reporter PW1 Sunita is real sister of the deceased while their father Gosai Rahmatkar is PW3. Both of them claim to be the eye witnesses. Sunita, in her chief, points out old pending land dispute between her father Gosai and Accused no. 3 Govinda. She admits that on police complaint lodged by Accused no. 1 Jaiprakash, all 17 family members of her family were arrested under Sections 147, 148, 149, 427 and 336 Indian Penal Code by Gondia Rural Police and released on bail. That prosecution was pending on 18.12.2003 when her deposition was recorded. She also accepted that on report dated 12.8.2002 itself, lodged by accused no. 6 Dindayal, her brother Dinesh, Krishna and two others are chargesheeted under Sections 307, 147, 148, 149, 452, 427 of Indian Penal Code and Section 135 of the Bombay Police Act. Her father Gosai in chief states that since last 40 years, accused no. 3 Govinda is on cross terms with him over the land dispute. According to him, Govinda wrongly believed that after partition, Gosai retained possession of more land. He also repeats whatever PW1 Sunita has stated about police complaints by accused no. 1 Jaiprakash and accused no.6 Dindayal.

15. PW2 Ashok Lichade is the remaining eyewitness. In cross examination, he accepts that he was accused in Sessions Trial no. 57 of 1989 for committing murder of one Alkabai. Accused no. 5 Prabhudayal was the prosecution witness therein. This witness resides at Fulchurtola which is at a distance of 1 Km. from Bhadrutola, where Ganesh was murdered. He claims to be present at spot in connection with his work as property dealer and to have witnessed the crime. Police have recorded his statement on next day i.e., on 13.8.2002.

16. PW1 Sunita also states that Karu Harde, Jiyalal and Raju Harde are also amongst 17 accused persons who were arrested on complaint of accused no.1 Jaiprakash, She admits that Jiyalal and Raju Harde are the nephews of Shriram Harde, examined in the instant matter as PW5. Investigating officer PW7 PSI Bhaiyalal Thakre admits that PW6 Karu Harde is also one of these 17 persons

chargesheeted on complaint of Accused no. 1 Jaiprakash. He also admits police complaint dated 12.8.2002 by accused no.6 Dindayal against Dinesh, Krishna and two other persons. Dindayal was an indoor patient after 12.8.2002, and as per this Investigating Officer, came to be arrested on 21.8.2002 for the murder of Ganesh. PW5 Shriram and PW6 Karu are the only pancha witnesses examined by the prosecution. It is well settled now that merely because all eyewitnesses support each other on one particular fact, that fact can not be held as proved. It is not the number or quantum of witnesses, but, quality of their deposition which matters. Here, we have to find out whether the oral evidence of the three eyewitnesses is trustworthy. For that their evidence individually must inspire the confidence and then, if necessary, effort can be made to find out whether it is corroborated by the other eyewitnesses.

17. PW3 Sunita deposes that on 12.8.2002, she was working in the field. From paragraph no.3 of her deposition, which is first para of her cross-examination it appears that she was working in the field of her father and Ganesh. Her oral report lodged immediately after the incident, also demonstrates this. She has deposed that she returned to the village from work to feed her child. Then she saw all accused who were proceeding towards the grazing ground with a gunny bag. In gunny bag, she could see handle of a blue colour of a weapon.

18. Accused no. 6 was on bicycle. After feeding the child, she started back for the field. She saw her brother Ganesh returning to the village on bicycle. When Ganesh reached near the field of Homendra Pandharam, all accused were standing by the field of Pandharam. Accused no. 1 Jaiprakash and accused no. 5 Prabhudayal made Ganesh to fall down on ground from the bicycle. Accused no. 5 Prabhudayal took out a sword out of gunny bag and gave it to accused no. 2 Nilkanth. Nilkantha started giving repeated blows of sword to Ganesh, he gave 5 to 6 blows. Blows were given on head, hands, legs. She added that 7 to 8 blows were given. Accused no. 3 Govinda and Accused no. 5 Prabhudayal were armed with sticks, accused no. 1 Jaiprakash and accused no. 6 Dindayal were holding iron bars, while accused no. 4 Mahendra was having an iron pipe. They assaulted Ganesh with the respective weapons She screamed wachawa, wachawa?. Her father was then standing near a tamarind tree located about 40 feet away from the

spot of incidence. Villagers gathered at the spot and accused persons fled away.

19. In cross-examination, she states that she saw all accused while returning back to the field after feeding child. All accused were having 4 bicycles. Accused no.1 Jaiprakash, accused no.5 Prabhudayal and accused no.6 Dindayal were riding bicycles. Accused no. 3 Govinda and accused no. 4 Mahendra were being carried by Jaiprakash and Prabhudayal. Accused no. 6 Dindayal was carrying the gunny bag of half quintal capacity. She denies that weapons could not have been carried in 50 Kg, bag. She also does not say that accused no.2 Nilkanth was riding any bicycle. She states that she was returning to the field on footway and saw incident when she was on kachha murum road. She was near the house of her landlord Mulchand and she denied that spot of occurrence is not visible from there. Her father Gosai was behind Ganesh. She did not see any grazers and her father ran away towards the field. She expressed inability to name the villagers who gathered at the spot. Accused persons ran away on foot. Police immediately reached the spot. Only one bicycle was found on spot and it was of Ganesh. Though she identified the bamboo stick found on spot, she could not state which accused used it. She also could not point out which weapon was used by which accused.

20. PW1 while deposing in chief, about oral report stated that her signature was obtained on blank paper and her report was not reduced into writing. In next breath, she stated that it was reduced into writing and then. Proved it as Ex. 33. She also identified the weapons when the same were shown to her. She denied that it was lodged at 4.00 PM and asserted that it was lodged at 2.30 PM. She even denied time 4.00 PM mentioned in report Ex. 34 to be correct. She stated that she told police that she accused persons while she was coming from field to feed her child at 1.00 PM. She could not assign any reason why said fact was missing in her report Ex. 33. She has accepted the suggestion that it did not happen that she saw accused while proceeding to field after feeding child at 2.30 PM, to be correct. Statement to that effect in Ex. 33 marked as portion A? is deposed to be incorrect by her. She deposed that fact that Accused no.1 Jaiprakash and accused no.5 Prabhudayal made Ganesh to fall down on ground from the bicycle was narrated by her to police and could not explain its absence in Ex. 33. However this is not put to Investigating Officer PW7. She stated that, she

pointed out the spot to police and article 5 sword was found near the house of accused no. 5 Prabhudayal at a distance of 2.5 Kms. from the spot.

21. This witness is studied upto 6th standard and deposed that her house is at distance of about 0.5 to 0.75 Kms. From the house of her father. She denied that as child was alone, she kept him in custody of her mother. Her father's fields are adjacent to Karanja-Pindkepar road. From Marathi deposition, this road appears to be a tar road.

22. This oral evidence of PW1 therefore creates doubt whether she accused persons or not. In police report Ex. 33, it is mentioned that she saw them while returning to work after feeding the child and report does not mention her seeing them before that. This has been duly proved through Investigating Officer PW7 Bhaiyalal Thakre. Her deposition in chief before the Court shows that she saw them twice. While in cross-examination, she accepted she did not see accused while proceeding to field after feeding child at 2.30 PM. Police found only the bicycle of deceased on spot and did not find any other bicycle there though this witness speaks of use of four bicycles by the accused. She deposes that accused fled away on foot and thus left their bicycles behind. Though she points out four bicycles, she could associate only 5 accused persons with it and did not state that accused 2 Nilkanth was riding any bicycle. She claims that Article 5-sword allegedly used by Nilkanth was found at 2.5 Kms. From the spot i.e., near house of Accused no. 5 Prabhudayal. She also could not name the villagers who rushed to the spot because of her shouts. More comments on her deposition can be made while appreciating the oral evidence of other two eyewitnesses.

23. At this stage, it would be proper to appreciate the evidence of her father PW3 Gosai. He deposes that after completing sowing operations, he and Ganesh were returning back to village on foot and his pair of bullocks was in his front. Ganesh came on bicycle from his back and proceeded ahead. Ganesh may have crossed distance of 100 feet, when he heard shouts of his daughter Sunita as Dhava, Dhava?. He looked ahead and saw that 2 to 3 persons made Ganesh to fall to ground. Accused no. 2 Nilkanth made Ganesh to fall to ground and immediately, accused no.5 came there armed with sword. He gave sword to Nilkanth and

himself lifted the iron bar. Prabhudayal then uttered the words maro saleko? and all accused then rushed towards Ganesh. He speaks about the weapons with individual accused and states that they started beating Ganesh. He went towards field boundary (bandhi) to hide and concealed himself. After accused left the spot, people gathered. As his two sons Dinesh and Krishna were out of town, he sent Sunita to lodge report. It is to be noted that accused no. 6 Dindayal has lodged report of murderous attack at about 3.30 PM on him and his house by these two sons and two more persons on the same day. He identified Article 5 sword as the weapon used in attack but, did not identify Articles 13 and 24 i.e., iron bars and Article 12 i.e., iron pipe.

24. His cross-examination shows that house of Mulchand where his daughter Sunita (PW1) resides was 2 furlongs from his house and spot of incidence is 100 feet from Mulchand's house. He accepted that there were big trees in front of Mulchand's house. He accepts that 12.8.2002 was the last day of plantation of paddy and he started for home at 2.15 PM. Ganesh came from behind on Tire Road and overtook him. This tire road is admitted to be incorrect recording for Tar Road? by the parties during arguments and it is supported by Marathi deposition also. PW3 was in field of Homendra Pandharam near second bandhi (dhura) i.e., northern boundary when he heard shouts of Sunita. Village is on southern side of this field or bandhi. Entire assault took place near muth. He narrated to police that accused no. 2 Nilkanth made Ganesh to fall to ground but he could not explain why it did not appear in his police statement. He saw towards the spot only after hearing the cries of Sunita. He denied that she cried only after the incident. He was unable to point out specific weapon used by accused no.5 Prabhudayal and stated that it could be either stick or iron bar. He accepted that provocative words maro saleko? used by Prabhudayal were not narrated to police by him. He did not remember whether the fact that his two sons had gone to Gondia and hence, he asked Sunita to lodge report was told by him to police. He admitted both these facts were not mentioned in his police report. Similarly, the fact of his hiding behind bandhi did not figure in his police statement. He denied that he ran away seeing the assault and deposed that portion A? in his report which recorded his running away due to fear, was not correctly recorded. This is duly proved through PW7 Bhaiyalal as Ex.70/A. This evidence of PW3 Gosai therefore shows some

material improvements, as also omission creating doubt whether he witnessed the assault or not.

25. PW2 Ashok Lichade is the remaining eyewitness on whom learned APP has placed strong reliance due to the fact that he is not relative of deceased. But, his testimony also calls for cautious scrutiny as he apparently may have some grudge against accused no. 5 Prabhudayal. He resides in a locality which is about 1 Km. away from the spot and claims that he was present at spot at the time of occurrence due to his business as property dealer. He saw Ganesh on bicycle proceeding towards village at a distance of about 300 feet from him. He saw that accused no. 5 Prabhu and accused no.6 Dindayal made Ganesh to fall and assaulting him using stick and iron bar respectively. Ganesh started running and he went upto math/muth. Accused Jaiprakash, accused no. 2 Nilkanth, No.3 Govinda and No. 4-Mahendra then assaulted Ganesh. He saw accused no.5 Prabhudayal taking out a sword from the gunny bag and handing it over to accused no.2 Nilkanth. Nilkanth then assaulted Ganesh with sword. Accused no.1 Jaiprakash attacked Ganesh with iron rod, accused no.3 Govinda with stick, accused no. 4 Mahendra with iron pipe. PW3 claims that he saw Gosai at a distance of 100 feet from the spot. PW1 Sunita was also approaching the spot at the same time. She shouted Dhava, Dhava?. After assaulting, all accused fled away. Villagers slowly gathered at spot and he also went near it. He informed others. Ganesh was already dead.

26. In cross-examination, he accepts that he went on motorcycle by tar road which is abutting block no. 351, while block no. 349 was slightly away from the tar road. He had been to Bhadrutola in connection with these two lands. Owner of these lands was not with him and he was alone. He could not say whether incidence occurred in southern portion of block no. 340. He saw the incident when he was on tar road and immediately added that, that he saw it from block no. 351. He saw Sunita near house of Ghanshyam Uike. Ganesh was made to fall about 50 away from muth on field side. He states that police recorded his statement on next day i.e., 13.8.2000. He did inform police that he saw Gosai 40 feet behind Ganesh and could not explain why this fact did not appear in his statement. He denied that he saw Gosai coming hurriedly from Bandhi side and Sunita followed Gosai. Portion

mark A? in his police statement was deposed to be incorrect recording. This portion is proved through PW7 Bhaiyalal. He denied that because of fear, he did not go nearer and watched attack from distance of about 100 meters. Assault occurred at two places. First assault was at 40 feet from the spot where later assault took place. He denied that first assault was with sword. Except the sword, he could not associate the other weapon with any particular accused. A gunny bag of 100 Kg. capacity was found near the spot. He stated that Ganesh was first assaulted by two persons and remaining four came on spot later on.

27. Thus, this witness is a chance witness who first puts himself on tar road and in next breath, shifts to a field adjacent to tar road. He claims to have seen Ganesh approaching the point of first attack and therefore, claims to have seen accused falling him down. He however did not see all 6 accused when Ganesh was made to fall down. He denies his disclosure to police that PW3 Gosai came to the spot first and Sunita followed him. Fact that Gosai was 40 feet behind Ganesh does not appear in his statement. We find that deposition of all these so called eyewitnesses inherently weak and unsafe to rely upon.

28. Spot position needs to be understood first to comprehend the impact of these depositions on the case of prosecution. Prosecution had prepared and filed on record a sketch map of the spot before the Trial Court. But, it took no steps to prove it and to summon the tracer for that purpose though he was named as a prosecution witness. Learned APP has not made any grievance that the Trial Court did not grant prosecution sufficient opportunity to produce that tracer. Trial Court has in paragraph 17 and paragraph 39 of its judgment attempted to find out topography of the area. In paragraph 17 itself it notices some inconsistency between the sketch map produced by the State and pad map produced by the accused. Nobody has come forward to prove the correct map. Basic burden was upon prosecution to do that and trial court has, in para 17, has found it disgusting that prosecution did not take pain to bring the clear position on record. Still, it proceeded further to analyze the evidence on the strength of said conjecture. Had it attempted to co-relate the position emerging from spot panchanama with these maps, it would have found it very risky. Trial Court should have then attempted to comprehend the spot position by referring to spot panchanama only. Spot

panchanama at Ex. 44 reveals an East-West metalmurum road on Western side of village constructed by the Gram Panchayat. This is the only road legally on record which parties may have referred to as Tar road. On its Northern side is the government land used for grazing and beyond it is the field of Homendra Pandharam. Distance between road and field of Homendra is about 250 feet. On Western dhura or boundary of his field is a cement platform refereed to as muth. Body of Ganesh was seen on Eastern side of this platform in the field of Homendra, while his bicycle was found in other direction i.e., on Western side of platform, at a distance of 40 feet from body. The bicycle is in field of Maniram Rangari and house of Maniram is, also in same field. House of Uike from where PW1 Sunita saw the incidence is between the muth platform and East-West tar road. Boundaries of the spot where body was found show that on East and North of body of Ganesh, field of Homendra is situated. On its Southern side, there is grazing ground while on Western side is the field of Maniram Rangari.

29. This panchanama does not show any tar road or tire road and it does not also bring on record any foot way allegedly used by PW1 Sunita claimed to be on footway and saw incident when she was on kachha murum road but, the prosecution failed to bring on record any such way or road. Spot Panchanama does not show house of Mulchand or then fields of deceased. The tamarind tree where Sunita saw her father standing, is also not shown. PW3 Gosai states that Ganesh came from his back and crossed him on tar road. Thus, both of them were on tar road only. No tar road or metal murum road passes abutting the field of Homendra and as such, PW3 Gosai could not have gone to or in field of Homendra with bullocks, if he was on this road. Similarly, Ganesh riding a bicycle on road need not have entered the field either of Maniram or Homendra. The unproved map drawn by tracer shows a way between the field of Maniram and Homendra. This map only shows the dead body and house of Uike. This kuchha road appears to be on dhura between field of Maniram and Homendra. Grazing ground is on southern side of these two fields and then a Tar road or West-East tar road or metalmurum road is shown on southern side of grazing ground. Fields of Maniram and Homendra are at a distance of about 48. 35 meters i.e., 150 ft. roughly from this road.

30. PW2 Ashok was going on motorcycle on this tar road. If he saw the incidence from tar road, grazing ground lay between him and spot. He also shifts himself to field survey no. 351, but, it is not shown in the maps. As per PW3 Gosai, village was on Southern side i.e., after this tar road. Hence, even if one presumes that Gosai was coming from this kuchha road with bullocks, Ganesh could not have crossed him on tar or tire road. No tar or tire road crosses this kuchha way and this kuchha way must be emerging on East-West tar road. Even in that case, it was not necessary for Ganesh to enter with bicycle the field, either of Maniram Rangari or Homendra Pandharam.

31. As per all eyewitnesses, PW 1 and PW 3, Ganesh was made to fall to ground from his bicycle by accused no.1 Jaiprakash and accused no. 5 Prabhudayal. As per PW2 accused no. 5 Prabhu and accused no.6 Dindayal did this. Thus, bicycle of Ganesh would have been on tar or tire road or on kuchha road. Here the bicycle is in the middle of field of Maniram. If deposition of PW3 Gosai is accepted, he and Ganesh were returning after completing the work of transplanting paddy. When daughter of Gosai or sister of deceased had returned to village at about 1.00 PM to feed her child, they must have known that work was getting over and hence, normally they would not have expected Sunita to come back. Question is, Whether PW1 Sunita was really returning back to the field or then has posed as an eyewitness and to facilitate that purpose, story of her return is prepared. Difference in her police statement and deposition creates serious doubt in this respect. She in her chief, states that her father was standing? near a tamarind tree at a distance of about 40' from the spot. She does not depose that Gosai was returning with bullocks from field to his home. It is the accused who in cross-examination bring that story on record. Sunita claims that she shouted save, save? (English translation of wachawa, wachawa) i.e., rush for help while, PW3 and PW2 both depose that she shouted run, run? (English translation of dhawa, dhawa) i.e., rush for help. Gosai could have seen accused persons before Ganesh reached near them. PW2 Ashok has informed police that he first saw Gosai and Sunita was following Gosai. Fact that Gosai and Sunita could not have come to spot from same direction is indisputable.

32. Ganesh, after he fell from bicycle may have left the road and entered the fields to evade the attack but, his bicycle ought to have been either on kuchha road or tar road. No other bicycle was found on spot though at least 4 bicycles are used by the accused, as per PW1 Sunita. PW1 does not expressly say that accused no. 2 Nilkanth was riding any bicycle. She only points out occupants of three bicycles. Thus, presence of convicted accused no. 2 Nilkanth at spot is itself rendered doubtful. Similarly all witnesses state that accused no.5 Prabhudayal took out a sword from gunny bag and gave it to accused Nilkantha, who inflicted its blows on Ganesh. As per PW1, this gunny bag of 50 Kg. capacity was carried by accused no.6 Dindayal on his bicycle. According to PW2 Ashok, gunny bag was of 100 Kg. capacity and he also saw it on spot. PW7 Bhaiyalal could not recover any gunny bag. Contradictions about number of bicycles, size of gunny bag, its absence or absence of any bicycle allegedly used by the accused; all cast a serious doubt on the entire prosecution version. Omission to bring on record all relevant reference points like house of Mulchand, house of Prabhudayal, direction or location of fields of Gosai, alleged foot way, position of tar road or metal murum road, tamarind tree through proper panchanama or map, all enure to the benefit of accused. We are therefore not commenting upon the distances thereof from the spot of occurrence as deposed by PW1 Sunita or PW3 Gosai.

33. At this stage it is necessary to refer to the seizures or recoveries pressed into service by the prosecution. In the light of discussion above, it is apparent that this evidence of seizure of weapons or recoveries by itself, is insufficient to implicate any accused. There are three witnesses in this respect. They are PW5-Shriram Harde, PW6-Karu Rahmatkar and PW7 Investigating Officer Bhaiyalal Thakre. It will be proper to first see the Chemical Analysis report at Ex. 68 for said purpose. Human blood is found on art. 21 which is full pant of accused 4 Mahendra. Weapon Exh. 23-bamboo stick, Exh. 25-iron rod, 26-iron pipe, 27-sword and Exh. 28-another bamboo stick. Blood on Exh. 25 Iron rod is of group 'B' i.e., of blood group of Ganesh. Group of blood on other exhibits could not be decided. Thus, in addition to weapons deposed to by the eyewitnesses, one gets two bamboo sticks also.

34. There are three recoveries under Section 27 of the Evidence Act. Those are at 59, 61, 63 and from accused no. 1 Jaiprakash, accused no. 4 Mahendra and accused no. 5 Prabhudayal. Their disclosure memorandum is recorded at same time in same police station (as alleged) in presence of same pancha witnesses. Recording of these three disclosure memorandum starts at 10,25 AM and departure to the spot disclosed is at 10.30 AM. All are shown to be written simultaneously thereby belying out the fact that these documents are fabricated one. On the strength of these disclosures, all three recoveries are from one and same place i.e., house of Prabhudayal, that too one after the other. All witnesses on these panchanama accept non-sealing of the recovered weapon. PW7 Investigating Officer also admits that in seizure memos Ex. 60, 62 and 64, the articles recovered are not shown as sealed. Difficulty faced by PW7 while deposing about these recoveries is apparent from paragraph 4 of his chief. Paragraph 4 shows that accused no.1 Jaiprakash made disclosure after seizure of stick from Prabhudayal and that too, at house of Prabhudayal. If he had not disclosed any thing in police station on 14.8.2002, Jaiprakash could not have been carried to house of Prabhudayal. Not only this PW7 Investigating Officer also admits that sealing is not recorded in any seizurememo Ex. 45 and 46. Same admission is given by him qua the clothes of accused persons seized allegedly vide Ex. 48 to 52 on 14.8.2002. All these articles were forwarded to RFSL on 4.9.2002, and hence, were lying unsealed in police custody for period of about three weeks. Accused no. 6 Dindayal who was in hospital came to be arrested in police station on 21.8.2002 with a weapon iron rod vide Ex. 57 witnessed by same pancha witnesses. This Exhibit carries the date 20.8.2002 and does not speak of any sealing. Thus, neither the material found on spot i.e., weapon like sword or then recoveries like alleged blood stained cloths of accused persons or then discovery of weapons from them under Section 27 of the Evidence Act can be said to be conclusively established. In the light of these findings and observations supra, this CA report ceases to be a clinching circumstance.

35. The Investigating Officer admits that he recorded statement of PW1 Sunita Ex. 33 at Bhadrutola itself, but, then it was shown as recorded at police station. He got knowledge of crime on telephone and hence came down to Bhadrutola first. After recording her statement, Sunita was sent to Gondia to lodge police report. We

have already appreciated Ex. 33 while commenting on deposition of Sunita. Trial Court has discarded evidence of PW2 Ashok as also discoveries under Section 27 of the Evidence Act. It has in same breath accepted recovery of sword and stick from spot. It also tries to reason that PW1 Sunita may not have witnessed the whole of episode of assault. We find it unsustainable.

36. This discussion leads us to conclude that the prosecution has failed to bring on record cogent, consistent and convincing material to establish the guilt of accused beyond reasonable doubt. Their involvement in the assault on Ganesh has not been established. Role of convicted accused no. 2 in the matter is also not proved. He could not have been punished even under Section 304(part-II) of Indian Penal Code.

37. We accordingly dismiss Criminal Appeal No. 268/2004 filed by the State and allow Criminal Appeal No.172/2004 filed by Nilkanth. He is acquitted and be set at liberty, if his custody is not required by the State in any other matter. Muddemal property be dealt with as per the directions of the Sessions Court after the appeal period is over.

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