

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 584 OF 2012

Dattatraya s/o Deorao Sonune,
Age 38 years, Occ : Service
r/o Chikana Taluka Lonar
District Buldhana.

..Appellant..

VERSUS

1. The State of Maharashtra,
Copy to be served on Govt. Pleader
High Court of Bombay Bench
at Aurangabad.

2. Ashabai w/o Namdeo Sable
Age : 27 years, Occ : Household
R/o : Shivaji Nagar, Majalgaon,
District Beed.

...Respondents...

.....

Mr. N. S. Ghanekar, Advocate for the Appellant
Mr. M. M. Nerlikar, A.P.P. for Respondent-State

...

WITH

CRIMINAL APPEAL NO.288 OF 2013

The State of Maharashtra,
Through Police Station, Shivajinagar,
Beed.

..Appellant..
(orig. complainant)

VERSUS

Dattatraya Deorao Sonune
age 37 years, Occ. Service,
(Prison Officer-Grade II),
R/o Mahar Chikna Police Station,
Khalegaon, Tq. Lonar, Dist. Buldhana.

..Respondent..
(Orig. accused No.1.)

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Mr M.M. Nerlikar APP for the Applicant State.

Mr N.S.Ghanekar Advocate for respondent.

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CORAM : S. V. GANGAPURWALA AND V. K. JADHAV, JJ.

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Date of Reserving the Judgment : 14.12.2015

Date of pronouncing the Judgment : 23.12.2015

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COMMON JUDGMENT (PER V.K. JADHAV, J.) :-

1. Both these appeals i.e. Criminal Appeal No.584/2012 filed by the appellant/accused no.1 Dattatraya Sonune for quashing and setting aside the impugned judgment and order of conviction passed by the learned Sessions Judge, Beed and Criminal Appeal No.288/2013 filed by the State of Maharashtra for enhancement of sentence awarded to respondent/accused no.1 Dattatraya Sonune vide impugned judgment and order passed by the learned Sessions Judge, Beed in Sessions Case No.134/2010 are decided by this common judgment.

2. In Criminal appeal No.584/2012, challenge is to the Judgment and Order of conviction and Sentence passed by the learned Sessions Judge, Beed, dated 25.09.2012 in Sessions Case No.134/2010, thereby convicting the present appellant/accused No.1 Dattatraya Deorao Sonune for the

offence punishable under section 304 Part II of the Indian Penal Code and sentencing him to suffer R.I. for a period of five years and to pay a fine of Rs.5,000/- (Rs. Five Thousand only), in default to suffer further R.I. for six months, and for the offence punishable under section 203 of the Indian Penal Code and sentencing him to suffer R.I. for six months. The learned Sessions Judge further directed that the substantive sentences shall run concurrently. The learned Sessions Judge, Beed, however, acquitted accused nos. 2 to 4 for the offences punishable under sections 302, 203 read with section 34 of the Indian Penal Code.

3. The prosecution version, as unfolded during trial, is as under :-

Death of Namdeo Vajinath Sabale, who was lodged in the District Prison, Beed, as under trial prisoner has given rise to the case.

The appellant/original accused no.1 Dattatraya Deorao Sonune is a Prison Officer, Grade-II, accused no.2 Ramesh Tarachand Deore is Subhedar, accused No.3 Rambhaji Ramrao Gadhekar is Hawaldar and accused No.4 Babusing Deorao Solanke is a Prison Officer Class-I. In the month of

March, 2009 all these accused persons were attached to District Prison, Beed.

4. Deceased Namdeo Vajinath Sable was arrested in connection with Reg.Cri.Case No.320/2002, which was pending against him in the Court of Judicial Magistrate First Class, Majalgaon. He was remained absent on the date of hearing and therefore, a non-bailable warrant came to be issued against him by the Judicial Magistrate First Class, Majalgaon. In execution of the said warrant, deceased Namdeo Sable was arrested on 14.03.2009 by Police Station, Majalgaon, and he was produced before the concerned Judicial Magistrate First class, at Majalgaon. He was then remanded to the Judicial Custody and therefore, on 15.3.2009 deceased Namdeo Sable was lodged in the District Prison, Beed.

5. Deceased Namdeo Sable was kept in barrack No.3 of the District Prison. At that time, under trial prisoners were asked to clean barracks inside the jail. On 16.3.2009, when the Circle in-charge asked deceased Namdeo Sable to clean the barracks, he refused the same under the pretext that he was sick. Thus, no work was allotted to Namdeo Sable on

16.3.2009. On 17.3.2009 accused No.1 Dattatraya Sonune visited barrack no.3. At that time, all under trial prisoners were made to stand in a queue. Deceased Namdeo Sable requested accused no.1 that he was sick and he be sent to the Hospital. However, accused no.1 Dattatraya Sonune gave fist and kick blows to deceased Namdeo and did not refer him for medical examination.

6. It is further case of the prosecution that on 27.3.2009, again accused no.1 Dattatraya Sonune and other accused persons assaulted deceased Namdeo Sable by means of kicks, fist blows and stick. Accused No.1 Dattatraya Sonune also pushed deceased Namdeo Sable. He fell down on the wall and sustained injuries on his head. On 28.3.2009 in the morning deceased Namdeo Sable was referred to Civil Hospital, Beed. On examination, the concerned Medical Officer declared him dead.

7. Thereafter, matter was reported to Shivajinagar Police Station, Beed, and accordingly inquest panchanama was conducted on the dead body through executive Magistrate. Dead body was thereafter sent for postmortem examination. It was transpired during the course of the postmortem

examination that deceased Namdeo Sable sustained 3-4 external injuries and there were two under scalp contusions on internal examination. In the opinion of the Medical Officer who has conducted postmortem examination, death was caused due to head injuries and, external injuries as noted were ante-mortem in nature. In view of this, police Inspector of Control Room, Beed, on behalf of the State, lodged complaint Exh.82 on 16.6.2009. On the basis of the said complaint Crime bearing No.106/2009 for the offences punishable under section 302, 201 read with section 34 of the Indian Penal Code came to be registered.

8. During the course of the investigation, investigating Officer conducted spot panchnama and also recorded statements of the witnesses. Even during the course of the investigation, statements of certain witnesses came to be recorded through Magistrate under section 164 of the Criminal Procedure Code. In due course, charge sheet was submitted against four accused persons as mentioned above. Case was committed to the Sessions Court as the offences alleged to have been committed by the accused are exclusively triable by the Court of Sessions.

9. In order to substantiate the charges levelled against accused, the prosecution has examined in all 12 witnesses. The defence of the accused is of total denial. The prosecution case rests upon evidence of two eye witnesses. PW 6 Anand Shankar Kuchekar (Exh.92), an eye witness, has not supported the prosecution case. Consequently, prosecution case entirely rests upon the evidence of PW 7 Panjab Ramdas Pawar (Eye witness) (Exh.95). PW 7 Panjab Pawar has supported the prosecution story to the extent of the allegations made against accused no.1 Dattatraya Sonune. The learned Sessions Judge, Beed, by its impugned Judgment and order dated 25.9.2012 in Sessions Case No.134/2010 found accused No.1 Dattatraya Deorao Sonune guilty for the offences punishable under section 304 part II and 203 of the Indian Penal Code and sentenced him as detailed above.

10. Mr. Ghanekar, the learned counsel for the appellant/accused no.1 submits that initially A.D.No.7/2009 came to be registered on 28.3.2009 and inquiry of the said A.D. was entrusted with PW 2 Onkar Chavan. Learned counsel further submits that, after receipt of the postmortem report and opinion about death, crime came to be registered

on the basis of the report submitted by the PW 2 Onkar Chavan. Thereafter, investigation was handed over to PW 12 Sudarshan Laxmanrao Munde, who was then working as Police Inspector at Local Crime Branch, Beed. Learned counsel further submits that date of incident is 28.3.2009 and statement of PW 7 Panjab Pawar was recorded on 16.7.2009. There is delay of about three and half months in recording the statement of such an important eye witness, however, the prosecution has not explained said delay. Furthermore, PW 7 Panjab Pawar, in his cross examination has admitted that on 28.3.2009 itself, police inquired with him and he told the police whatever he was knowing. It thus appears that earlier statement of PW 7 Panjab recorded during the course of inquiry. Learned counsel thus submits that statement of PW 7 Panjab Pawar recorded during the course of the inquiry is not produced before the Court. Learned counsel further submits that adverse inference could be drawn against the prosecution that earlier statement was not favouring the prosecution.

11. Learned counsel for the appellant submits that deceased Namdeo Sable was assaulted on 17.3.2009 and 27.3.2009 as

deposed by PW 7 Panjab Pawar, however, as per medical evidence, probable age of the injuries is 3 to 7 days prior to the death. Learned counsel, thus, submits that medical evidence does not corroborate the evidence of so called eye witness PW 7 Panjab Pawar.

12. Learned counsel further submits that deceased Namdeo Sable was kept in barrack no.3 and barrack nos. 4 and 5 alongwith barrack no.3 are situated in one circle/yard and barrack no.6 and 7 are in different circle/yard. Since walls of the circle/yard are at the great height, one cannot see what is going on in another circle/yard. Learned counsel further submits that there is no evidence to show that PW 7 Panjab Pawar was working as a Circle In-charge at the time of alleged incident. Learned counsel further submits that motive in this case is not established. The alleged motive in this case is that deceased Namdeo Sable refused to work and therefore, he was assaulted. However, the under trial prisoners were not required to do any work. Learned counsel further submits that PW 7 Panjab Pawar gave clean-chit to accused nos. 2 to 4 and only deposed against accused No.1 Dattatraya Sonune. Thus, he is no more reliable witness. There are material

omissions and contradictions in his evidence.

13. Learned counsel further submits that deceased Namdeo Sable was kept in barrack No.3. There were 22 prisoners in barrack no.3, however, none of them have been examined. Furthermore, prosecution also did not examine the officer who was in-charge of the Circle/yard between 17.03.2009 to 27.03.2009.

14. Learned counsel further submits that since the prosecution case rests on the direct evidence, it is not incumbent upon the accused to explain the circumstances leading to custodial death of deceased Namdeo Sable as required under section 106 of the Indian Evidence Act. Learned counsel thus, submits that the prosecution has failed to prove the case against appellant/accused no.1 and therefore, the impugned judgment and order of conviction dated 25.9.2015 passed by the learned Sessions Judge, Beed in Sessions Case No.134/2010 is liable to be quashed and set aside and accused No.1 Dattatraya Sonune may be acquitted.

15. Learned counsel for the appellant/accused no.1, in order to substantiate his submissions placed his reliance on

following judgments :-

1. **Nasimbanoo widow of Allanoorkhan Vs. State of Maharashtra and others** reported in **2011 ALL MR (Cri) 3875.**
2. **Smt. Shakila Abdul Gafar Khan Vs. Vasant Raghunath Dhoble and another** reported in **2004 ALL MR (Cri) 253 (S.C.).**
3. **Ganesh Bhavan Patel and another Vs. State of Maharashtra** reported in **1979 Supreme Court 135.**
4. **Ashok Raghunath Bawane and ors. Vs. State of Maharashtra** reported in **2007 ALL MR (CRI) 2554.**
5. **Ashok s/o Rambhau Chandne and others Vs. State of Maharashtra** reported in **2007 (2) Mh.L.J. (Cri) 638.**
6. **Hanuman Kisanrao Kadam Vs. State of Maharashtra** reported in **2006 ALL MR (Cri) 1654.**
7. **Murlidhar and others Vs. State of Rajasthan** reported in **AIR 2005 SC 2345.**
8. **Bhausahab Maruti Kalane and others Vs. State of Maharashtra** reported in **2006 ALL MR (Cri) 1130.**
9. **Mahendra Madansingh Thakur and another Vs. State of Maharashtra** reported in **2012 (4) Bom.C.R.(Cri) 66.**
10. **Ram Kishan Singh Vs. Harmit Kaur and another** reported in **(1972) 3 Supreme Court Cases 280.**

16. Mr. Nerlikar, the learned APP submits that, homicidal death of deceased Namdeo Sable is proved by the prosecution. As per final report regarding cause of death, deceased died on account of the head injury. PW 2 P.I. Onkar Chavan has

made queries with the autopsy surgeon regarding nature of injuries, age of injuries and weapon used in the offence. Accordingly, report was received from the surgeon and same is marked as Exh.81. PW 2 PI Onkar Chavan took opinion of his superior officer and accordingly lodged complaint at Exh.82. On the basis of his complaint Crime was registered in the concerned police station and further investigation was handed over to Local Crime Branch (L.C.B.).

17. Learned APP further submits that, PW 6 Anand Kuchekar has not supported the prosecution case. He has admitted that his statement was recorded by the Magistrate and his signature was also obtained thereon. Learned APP also submits that PW 7 Panjab Pawar is an eye witness to both the incidents occurred i.e. the incident of 17.3.2009 and 27.3.2009, respectively. The learned APP further submits that actual investigation was commenced when the investigation in the crime was handed over to Local Crime Branch (L.C.B.). The learned APP, thus, submits that PW 12 Sudarshan Munde has, thereafter, recorded statement of PW 7 Panjab Pawar and the same cannot be said to have been recorded belatedly. Learned APP submits that accused no.1 Dattatraya Sonune

was working as Prison Officer Grade-II at the relevant time and, so far as custodial death of Namdeo Sable is concerned, it is for accused no.1 to explain his death which is exclusively within his knowledge. The learned APP thus submits that the learned Judge of the Sessions Court has rightly placed reliance on the evidence of eye witnesses PW 6 Anand Kuchekar and PW 7 Panjab Pawar and convicted the accused no.1 accordingly. There is no reason to interfere in it and, therefore, the appeal is liable to be dismissed.

18. The learned APP, in order to substantiate his contentions, placed his reliance on the following judgments :-

1. **Manik Sitaram Jibhkate Vs. State of Maharashtra** reported in **2012 (1) Bom.C.R.(Cri) 239.**
2. **Trimukh Maroti Kirkan Vs. State of Maharashtra** reported in **2006 (10) SCC 681.**
3. **Central Bureau of Investigation Vs. Sakru Mahagu Binjewar** and others reported in **2010 ALL MR (Cri) 3128. (Delay in recording the statement.)**

19. So far as homicidal death of Namdeo Sable is concerned, before we discuss the findings recorded in the postmortem notes, it is necessary to peruse the contents of the inquest panchnama and the evidence of PW 1 Vishwanath Gangadhar Khurpe (Exh.68), who happened to be a panch on inquest

panchnama and PW 9 Abhay Devilal Mhaske (Exh.101), a Naib Tahsildar, who has conducted inquest panchnama on the dead body of Namdeo Sable. PW 1 Vishwanath Khurpe has deposed that there were injuries on the right hand, right arm and elbow and there was also swelling on left temporal region of the dead body. Even he has gone to the extent by saying that blood was oozing from head and ears. The inquest panchnama is marked as Exh.69. On perusal of the inquest panchnama Exh.69, it appears that the injuries were not found on any part of the body. It has only mentioned that the blood has come out from the left eye and froth was oozing from the nose. It has specifically mentioned in the inquest panchnama that there were no injuries on hands, legs, back abdomen and head. It has also mentioned that no blood is oozing from the ears or any other part of the body. It has, however, mentioned that inside of the right hand, there is a red mark and some bruises below the right arm pit. PW 1 Vishwanath has also admitted in his cross examination that, it is mentioned in the inquest panchnama that there were no injuries or scar marks on hands, legs and other parts of dead body. He has also admitted that it is mentioned in the panchnama that no injuries or marks were noticed on the

portion of head of the dead body.

20. PW 9 Abhay Mhaske (Exh.101) Naib Tahsildar, who conducted inquest panchnama on the dead body of Namdeo has deposed that on examination of the dead body some abrasions found on right hand elbow, and there was reddish mark on the right side inner portion of shoulder. Some scratches were found inside the shoulder portion. He has admitted in paragraph no.4 of his cross examination that, on examination of the dead body, he did not notice any injuries on hands, legs, back or stomach. He has also admitted that no injuries or marks were found on the head.

21. PW 10 Dr. Sachin Gadge, who has conducted postmortem examination on the dead body of Namdeo Sable, has deposed that, on examination of the dead body, he noticed following external injuries :-

- i] Evidence of contused abrasion of size 3x2 cms present over posterior aspect of right elbow, irregular in shape, reddish brown scab present.
- ii] Evidence of contusion of size 2x1 cm present over medial aspect of right arm, middle one third, reddish blue in colour. (contusions mentioned above on cut section show blood infiltration in underlying tissues).
- iii] Linear scratch abrasion of length 5 cms present over lateral aspect of right side of chest, middle one third, reddish brown scab present.

He further deposed that, on internal examination following injuries were noticed:-

- i] Under scalp contusion of size 3x2 cms present over left frontal region, brownish black in colour.
- ii] Under scalp contusion of size 5x3 cms present over left parieto temporal region, brownish black in colour.

In his opinion, all the injuries were ante-mortem in nature and head injury individually is sufficient to cause the death in the ordinary course of nature. Postmortem notes are marked at Exh.109. It appears from the evidence that, initially the opinion about cause of death was reserved till the receipt of histo-pathological and CA reports. On receipt of the same, opinion regarding final cause of death given and the same is marked at Exh.80.

22. On perusal of the case papers, we have noticed that in the provisional postmortem report cum death certificate it is stated as under :-

“Opinion as to manner of death is reserved till examination of scene histopathology and chemical analysis report ; significant autopsy findings :- Head injury”.

Viscera and other than viscera kept for chemical analysis report, organs kept for histopathology. It thus

appears from the contents of the provisional postmortem report that the injuries are not specifically mentioned and only the significant autopsy finding is recorded as "*Head Injury*".

23. In light of these, the admissions given by PW 1 Vishvanath Khurpe and PW 9 Abhay Mhaske, Naib Tahsildar are significant. It is to be repeated here that in the inquest panchnama Exh.69 no such injuries are mentioned.

24. PW 3 Ashabai, who happened to be the widow of Namdeo Sable, deposed that, on seeing dead body of her husband, she had noticed injuries on the right hand, right elbow, arms, below the shoulder and on the left side of the head and bleeding from the ears, however, when she was confronted with her police statement, she could not explain as to why these facts are not so specifically mentioned in her statement. It appears from the above discussion that after the final cause of death is given and postmortem notes were issued, PW 2 Onkar Chavan has lodged the complaint and accordingly the evidence moulded in a specific direction and shape.

25. PW 10 Dr. Sachin Gadge has admitted in his cross

examination that, cerebral irritation may result by a fall on the fore-head temple or occipital region, which may cause cerebral oedema. He has further admitted that cerebral subdural hemorrhage can be caused by fall. PW 10 Dr Sachin Gadge alongwith two other medical officers conducted postmortem examination under the Video recording. After receipt of the histo-pathological report, the team of the doctors given the opinion regarding the final cause of death as "Head Injury". The histopathological report is also placed on record and it is marked as Exh.110. PW 10 Dr. Sachin Gadge has further deposed that the injuries on the head suffered by the deceased is possible by assault with stick or by contact with hard and blunt object. We are not inclined to replace the expert's opinion, however, it is to be noted here that there is no clear opinion about homicidal death of deceased Namdeo Sable in this case, however, considering the postmortem notes Exh.109, histopathological report Exh.110 we accept that death of Namdeo Sable is homicidal death in this case.

26. Prosecution case entirely rests on the evidence of eye witnesses i.e. PW 6 Anand Kuchekar and PW 7 Panjab Pawar. Before discussing the ocular evidence in this case, it is

necessary to discuss the evidence of PW 2 Onkar Chavan (Exh.71) and PW 12 P.I. Sudarshan Munde. On 28.3.2009 PW 2 Onkar Chavan was the in-charge Police Inspector of Shivaji Nagar Police Station. He had received a report from ASI Jadhav about death of deceased Namdeo Sable in jail and accordingly A.D.No.7/2009 came to be registered. He also gave information to the Executive Magistrate and accordingly inquest panchnama was carried out. He then referred the dead body for postmortem examination. He has drawn spot panchnama and also seized clothes on the person of the deceased. He has received the final cause of death Exh.80. Thereafter, he has made some queries with the autopsy surgeon regarding nature of injuries, age of injuries and weapon used in the offence. He has received opinion about the said queries which is marked as exh.81. Thereafter, on 16.6.2009 he has lodged complaint on behalf of the State and same is marked as Exh.82. He has admitted in his cross examination that during the course of inquiry of the A.D. he found that on the day of incident deceased Namdeo Sable was kept in barrack no.3 of the Jail. He has further admitted that he was aware about the names of the prisoners in barrack no.3. He made inquiry with the other prisoners from barrack

no.3 and recorded their statements. He further admitted that he took prisoners in confidence, however, he did not find that any cognizable offence had taken place. He has further admitted in paragraph no.8 of the cross examination that when investigation was transferred to Local Crime Branch, he handed over all the investigation papers to them. PW 12 PI Sudarshan Mundhe also admitted in paragraph no.7 of the cross examination that, in barrack no.3 there were 22 under trial prisoners and out of those he made inquiry with some of them. He could collect the information about names and under trial prisoners from the register maintained in the jail. He has also obtained permission from the Judicial Magistrate First Class to record statement of Panjab Pawar and Balu Ganfade. According to him, these two persons were lodged in barrack no.3. He has further admitted that in the statement of witnesses recorded on 25.6.2009, there was no reference to the name of PW 7 Panjab Pawar. It is necessary to be mentioned here that on 25.6.2009 statements of certain inmates came to be recorded by the police including the statement of PW 6 Anand Kuchekar. He has further admitted that when he recorded statements of Vikas Jogdand, Pramod Gaikwad, Panjab Pawar and Anant Kuchekar at that time, he

was not aware that their statements were recorded in the previous inquiry.

27. The date of incident is 28.3.2009 and statement of PW 7 Panjab Pawar was recorded on 16.7.2009. On 17.6.2009 investigation of the crime no.106/2009 was handed over to L.C.B as per the directions of the superior officers. PW 12 PI Sudarshan Mundhe has recorded statements of three witnesses including PW 6 Anand Kuchekar. PW 7 Panjab Pawar as deposed by him was kept in barrack no.7. PW 12 PI Sudarshan Munde has not placed on record the list of those 22 inmates kept in barrack no.3. It is difficult to understand as to what lead PW 12 PI Sudarshan Munde to issue a request letter on 13.7.2009 to the Magistrate seeking permission to record the statement of PW 7 Panjab Pawar. PW 2 P.I. Onkar Chavan has recorded statement of inmates of barrack no.3 and also other inmates. It appears that, no cognizable offence was detected and therefore, PW 2 Onkar Chavan had not lodged any complaint till the month of June,2009. In the backdrop of this, evidence of eye witnesses requires a careful and closure scrutiny.

28. PW 6 Anand Kuchekar has not supported the prosecution case in any manner. He denied the portion mark of his police statement, however, he has admitted that his statement was recorded by the Judicial Magistrate First Class on 20.7.2009. He was subjected to cross examination at length by the APP before the trial court. He has admitted in his cross examination that he has stated before the Magistrate that appellant/accused had assaulted deceased Namdeo Sable with stick and so he fell down. He has also admitted his signature on the statement recorded by the Magistrate. In the cross examination on behalf of the accused, he has admitted that he has stated so before the Magistrate under the influence and pressure of P.I. Sudarshan Munde. He has admitted that he has no personal knowledge as to how and in what manner deceased Namdeo Sable died.

29. The learned Sessions Judge in paragraph no.38 of the judgment observed that, evidence of PW 6 Anand Kuchekar inspire confidence. It is rather well settled that a statement under section 164 of the Criminal Procedure Code is not a substantive evidence. It can be used to corroborate a statement of witness. It can also be used to contradict a

witness. PW 6 Anand Kuchekar has not supported the prosecution case in any manner. Only on the basis of his admission about recording of the statement by a Magistrate and his signature thereon, his statement before the Magistrate cannot be read as substantive piece of evidence. He has also given certain admissions in his cross examination on behalf of the accused that under what circumstances he gave such a statement before the Magistrate. So, in view of this, he is unreliable, untruthful witness and his evidence is unworthy of credence. His evidence is liable to be rejected in toto.

30. PW 7 Panjab Pawar has deposed that on 16.3.2009 he was a circle in-charge. He has witnessed both the incidents i.e. 17.3.2009 incident and the incident dated 27.3.2009. He has explained that the appellant/accused had assaulted deceased Namdeo Sable with kick and fist blows, belt and stick and pushed him on the wall and, as a result deceased Namdeo Sable fell down on the wall. Thereafter, deceased Namdeo Sable was put inside the barrack no.3, but on next day i.e. on 28.3.2009 all the prisoners woke up, but, deceased Namdeo did not wake up and accordingly, he was taken to the hospital. According to PW 7 Panjab Pawar, he was circle in-

charge and there were three barracks bearing no.3,4 and 5 under that circle. He has further deposed that, the work of cleaning the barracks from the new under trial prisoners was entrusted to him and accordingly he had asked deceased Namdeo Sable to clean the barracks. Deceased Namdeo avoided to do it under the pretext of his ill-health and accordingly informed about the same to appellant/accused. According to PW 7 Panjab Pawar, on 17.3.2009 accused gave fist and kick blows to Namdeo Sable. So far as incident of 27.3.2009 is concerned, PW 7 Panjab Pawar has simply deposed that appellant/accused had assaulted Namdeo Sable and beaten him with fist and kick blows, belt and stick and pushed him on the wall. He has not deposed about the cause for beating Namdeo Sable on 27.3.2009.

31. It appears from the admission given by PW 7 Panjab Pawar that he is history-sheeter. In the year 2007, a crime was registered against him for extortion at Shivaji Nagar Police Station, Beed. Furthermore, in the same police station, crime of decoity came to be registered against him. He was convicted for the offence of theft. During the period between 1998 to 2005 four crimes were registered against him at City

Police Station, Beed. In addition to that, two crimes were registered against him at Georai Police Station, Tq Georai, Dist Beed and some more crimes were registered against him in Majalgaon police Station, (Tq. Majalgaon) Dist Beed.

32. PW 7 Panjab Pawar has further deposed that, all the prisoners are lodged in different barracks and attendance of all the prisoners is taken everyday. In paragraph no.6 of his cross examination he admitted that during the period of 17.3.2009 to 27.3.2009 he was in barrack no.7. He has further admitted that barrack nos. 3, 4 and 5 are situated in one circle and barrack no.6 and 7 are situated in other circle. He has further admitted that from one barrack the position in another barrack is not visible. He has explained further that from inside the circle of barrack no.6 and 7 barrack nos.3, 4 and 5 are not visible. There is absolutely no evidence to show that PW 7 Panjab Pawar was appointed as circle in-charge. There must be some record in jail showing that PW 7 Panjab Pawar was appointed as circle in charge. If PW 7 Panjab Pawar was lodged in barrack no.7, then he had no reason to monitor the barrack nos.3 to 5 situated in another circle.

33. PW 4 Santram Harde was the acting Superintendent, District Prison, Beed. He in paragraph no.5 of his cross examination admitted that no work is allotted to under trial prisoners, and, if under trial-prisoner wants to work, then, he has to file an application in writing to the Superintendent. After seeing the under-trial prisoner, the Superintendent can allot the work to such under trial prisoner if found suitable. He has further admitted that a record is maintained in respect of the work carried out by such under trial prisoners and wages are also given for such work. So, there was no reason for PW 7 Panjab Pawar to direct the deceased Namdeo Sable to clean the barracks on 16.3.2009. It is difficult to accept that, on 17.3.2009 deceased Namdeo was subjected to beating by appellant because he requested to send him in the hospital on account of his illness. So far as alleged incident dated 27.3.2009 is concerned, as per the evidence for no reason deceased Namdeo was subjected to beating.

34. PW 7 Panjab Pawar, in paragraph no.8 of his cross examination, admitted that after death of deceased Namdeo police officers had visited the jail premises for inquiry and they had also made inquiry with him. He has further explained

that, police had come inside the jail on 28.3.2009 and whatever he was knowing he told the police. It is necessary to repeat here that, PW 2 PI Onkar Chavan has deposed that, till filing of the complaint in the month of June, 2009 nothing was transpired in the inquiry though he has recorded statements of inmates in the jail. PW 2 Onkar Chavan has further explained that, he has handed over all inquiry papers to PW 12 PI Sudarshan Munde. Even PW 12 PI Munde has admitted in his cross examination that, that he has perused all the papers of inquiry A.D. PW 7 Panjab Pawar has deposed that during the period of 17.3.2009 to 27.3.2009 he was kept in barrack no.7. He has further come with a story that he was appointed as a circle in-charge and therefore, he was looking after the cleaning of all the barracks. PW 12 I.O. Sudarshan Munde has deposed that, there were 22 under trial prisoners kept in barrack no.3 and PW 7 Panjab Pawar and Balu Ganfade were also lodged in barrack no.3. Even though, list of 22 under trial prisoners was made available to him, same is not placed on record. He has further deposed that, when investigation was handed over to him, at that time, 78 days were already expired from the date of incident. It is not clear as to what led PW 12 I.O. P.I. Sudarshan Munde to choose

PW 6 Anand Kuchekar and PW 7 Panjab Pawar. On 17.6.2009 PW 12 I.O. PI Sudarshan Munde took over the investigation of the crime and recorded statement of Anand Kuchekar on 25.6.2009. Thereafter, on 13.7.2009 he has recorded statement of PW 7 Panjab Pawar. There is no explanation whatsoever tendered by him for such belated recording of the statement of the important eye witnesses.

35. The evidence of PW 7 Panjab Pawar is full with contradictions and omissions. PW 7 Panjab Pawar has restricted his evidence against the appellant/accused no.1 and given clean chit to the other accused persons. On the other hand, he has deposed before the court that other accused Deore and Gadekar asked the appellant/accused not to assault Namdeo. This fact does not find place in his police statement and also the statement before the Magistrate. PW 7 Panjab Pawar has also improved the story by deposing that appellant/accused assaulted Namdeo with the help of belt and pushed him on the wall. PW 7 Panjab Pawar could not explain as why these facts are not so specifically mentioned in his statement before the police and also in the statement recorded by the Magistrate.

36. PW 12 I.O. PI Sudarshan Munde has not explained the recording of statement of PW 7 Panjab Pawar, belatedly. It is needless to say that, the order of priority in investigating the crime like murder is recording of statements of eye witnesses, if available. It appears from the circumstances as discussed in the foregoing paragraphs at length that PW 12 I.O. PI Sudarshan Munde was deliberately marking the time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced. Thus, in the facts of the present case, delay in recording statement of PW 7 Panjab Pawar casts a serious doubt on the credibility of the prosecution's case. Furthermore, we do not find PW 7 Panjab Pawar as a reliable and trust worthy witness. His evidence does not inspire confidence in the matter.

37. The learned APP submits that, deceased Namdeo met with a custodial homicidal death. It is within the knowledge of the appellant/accused about cause of his death. It is, thus, incumbent upon the appellant/accused to explain it in view of burden of proof u/s 106 of the Indian Evidence Act. The learned counsel for the appellant/accused placed his reliance on a case of Murlidhar and others and Hanuman Kisanrao

Kadam (supra) to substantiate his submission that if the prosecution led evidence of eye witnesses to the fact of murder and if the evidence of such eye witnesses was disbelieved, it was not open to the Court to have fallen back on the Rule of burden of proof under section 106 of the Indian Evidence Act. In view of this, the submission made by the learned APP in this regard is liable to be rejected.

38. PW 10 Dr. Sachin Gadge after referring the histopathological report Exh.81 opined that age of the injuries sustained by the deceased was prior to 3-7 days since time of the death. He has further explained it in the cross examination that there was no injuries caused on the person of the deceased within three days before conducting the postmortem. Postmortem was conducted on 29.3.2009. It thus appears that said injuries are caused either prior to 26.3.2009 or after 18.3.2009. In light of these admissions, it thus appears that medical evidence does not corroborate the evidence of so called eye witness PW 7 Panjab Pawar.

39. There is inordinate delay in recording the statement of PW 7 Panjab Pawar. The prosecution has not explained the

delay. It also appears that, in the light of postmortem notes and injuries mentioned therein the investigator had decided to give shape to the case in a particular manner and accordingly introduced the eye witnesses. PW 6 Anand Kuchekar another eye witness has not supported the prosecution's case in any manner and his statement recorded under section 164 of the Criminal Procedure Code by the Magistrate can only be used for the purpose of corroboration or contradictions and the same cannot be used as a substantive piece of evidence. PW 6 Anand Kuchekar, since has not supported the prosecution case in any manner, his evidence is liable to be rejected in toto. He is unreliable, untruthful witness and his evidence is unworthy of credence. PW 7 Panjab Pawar is not reliable and trust worthy witness. His evidence is full with omissions and contradictions. Medical evidence does not corroborate his evidence. It appears from the evidence that PW 7 Panjab Pawar was introduced as an eye witness at later stage to support the prosecution's case.

40. So, in view of the above discussion, we are inclined to allow the Appeal. We quash and set aside the conviction and sentence imposed upon the appellant/accused No.1

Dattatraya Deorao Sonune for the offence punishable under section 304 part II and sentencing him to suffer RI for a period of 5 years and to pay fine of Rs.5,000/- (Rs. Five Thousand only), in default to suffer RI for six months and also conviction under section 203 of the Indian Penal Code sentencing him to suffer RI for six months.

41. Since we allowed the appeal preferred by the appellant/accused No.1, the appeal preferred by the State for enhancement of the sentence is liable to be dismissed. Hence, following order.

ORDER

1. Criminal appeal is hereby allowed.
2. The judgment and order of conviction dated 25.9.2012 passed by the learned Sessions Judge, Beed in Sessions Case No. 134 of 2010, thereby convicting the appellant Dattatraya Deorao Sonune for the offence punishable under section 304 part II of Indian Penal Code and sentencing him to suffer R.I. for a period of five years and to pay fine of Rs.5000/- i/d to suffer further R.I. for six months and further convicting him for the offence punishable under section 203 of I.P.C. and sentencing him to further R.I. for a period of six months, is hereby quashed and set aside.

3. The appellant Dattatraya Deorao Sonune is hereby acquitted of the offences punishable under sections 304 part II and 203 of I.P.C. Fine amount, if paid, be refunded to the appellant.

4. Criminal appeal No.584/2012 is accordingly disposed of.

5. Criminal Appeal No.288/2013 is hereby dismissed.

Sd/-
(V. K. JADHAV, J.)

sd/-
(S. V. GANGAPURWALA, J.)

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aaa/-