

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

CRIMINAL APPEAL NO. 386 OF 2001

The State of Maharashtra

... Appellant

VERSUS

1. Suresh S/o Nagnath Gaikwad,
Age : 35 yrs., Occu. Agri.,
2. Sanjay S/o Nagnath Gaikwad,
Age : 22 yrs., Occu. Agri.,
Both R/o Sarola, Tq. Ausa,
Dist. Latur.

... Respondents
(Orig. Accused)

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Mr S. J. Salgare, APP for the appellant/State
Mr Chaitanya C. Deshpande, Advocate h/f Mr C. R. Deshpande,
Advocate for respondents/accused
Appeal abated as against accused no. 1 – Suresh as per court's order.

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WITH
CRIMINAL REVISION NO. 308 OF 2001

Savitrabai w/o Santram Gaikwad,
Age : 45 years, Occu. Household and
Agril, R/o. Sarola, Tq. Ausa, Dist. Latur.

Appellant
(Orig. Complainant)

VERSUS

1. The State of Maharashtra.
2. Suresh S/o Nagnath Gaikwad ,
Age : 39 yrs., Occu. Agriculture,
R/o. Sarola, Tq. Ausa, Dist. Latur.
3. Sanjay S/o Nagnath Gaikwad,
Age : 26 yrs., Occu. Agril.,
R/o As above.

... Respondents
(Respd. Nos. 2 and 3 Orig. Accused)

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Mr B. N. Patil, Advocate for appellant
Mr S. J. Salgare, APP for respondent No.1/State
Appeal abated as against accused no. 1 – Suresh as per court's order.
Mr Chaitanya C. Deshpande, Advocate h/f Mr C. R. Deshpande,
Advocate for respondents/accused No. 2

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CORAM : T. V. NALAWADE &
A. M. DHAVALA, JJ.

DATE : 04.12.2017.

ORAL JUDGMENT (PER A. M. DHAVALA, J.) :

1. In Sessions Case No. 191/97, Id. Addl. Sessions Judge, Latur by judgment dt. 26.06.2001 acquitted the respondents herein of offences punishable u/s 302, 324, 506 r/w 34 IPC. The aggrieved State has preferred Criminal Appeal No. 386 of 2001 while the informant Savitrabai , widow of the deceased and injured has filed Criminal Revision No. 308 of 2001 with a prayer for convicting the accused persons. During the pendency of appeal, accused no. 1 Suresh Gaikwad has expired and appeal stands abated against him. The matters proceeded only against accused no. 2 - Sanjay.

2. The prosecution was initiated on the basis of FIR lodged by PW3 Savitrabai, wife of the deceased on 17.08.97 at 02:00 p.m. at Police Station, AUSA. The FIR reveals that, on 17.08.97 at 10:00 a.m.,

PW3 Savitrabai and her brother-in-law Shivaji had gone to their field for some agricultural operations. At about 12:00 noon, accused no. 1 Suresh tried to forcibly take his cattles through their field where there was crop of hybrid Jowar. Shivaji raised objections to him. That time, accused no. 1 Suresh challenged his right to object and abused him and thereafter gave blows by stick. Shivaji sustained injuries to his head. Then accused no.2 Nagnath and Juvenile accused Sajnay ran towards the spot and they also assaulted Shivaji with stick. Shivaji sustained injuries to his right wrist, thigh and right calf. When PW3 had intervened, Suresh had assaulted her with a stick on her wrist, thigh and tibia. Then PW8 Navnath and PW5 Mudrika, his wife, had been there to their rescue. Initially, crime was registered as C.R. No. 92/97 u/s 324, 323, 504 r/w 34 IPC. The injured were forwarded to the hospital for medical treatment at AUSA and thereafter FIR was lodged. Injured Shivaji was shifted to Civil Hospital at Latur where on the next day at 03:00 p.m., he succumbed to the injuries.

3. During investigation, the statement of material witnesses were recorded and the spot panchanama was drawn. The medical evidence in the form of medical certificate and PM report was collected. The accused were arrested. In pursuance of their voluntary statement, discovery of weapons sticks were made and after

completion of investigation, the charge-sheet was submitted in the court.

4. On committal of the case, the ld. Addl. Sessions Judge framed charge at Exh. 16. The accused pleaded not guilty. the prosecution examined 12 witnesses. The defence of the accused is of total denial. After considering the evidence on record, the ld. Addl. Sessions Judge acquitted the accused. Hence, this appeal by the State and revision by the informant/victim.

5. Heard ld. APP Shri. S. J. Salgare for the State and Shri. Chaitanya Deshpande h/f Shri. C.R. Deshpande, learned counsel for respondent no 2. None present for the informant.

6. Ld. APP argued that, there was direct evidence of PW3 Savitrabai, who had seen the assault by the accused on deceased Shivaji and she herself was also assaulted. Her presence on the spot cannot be doubted. Her evidence is consistent. It is supported by PW5 Mudrika and PW8 Navnath, who had arrived on the spot. There is corroborative evidence of discovery of sticks and medical evidence. The prosecution evidence should have been believed and the accused should have been convicted.

7. Per contra, ld. advocate Shri. Chaitanya Deshpande supported the judgment of the trial Court. He argued that, the evidence of prosecution witnesses is not trustworthy and reliable and therefore it is rightly discarded by the trial Judge. The points for our consideration with our findings thereon are as follows :

Sr.No.	Point	Finding
1	Whether deceased Shivaji met with homicidal death?	In the affirmative.
2	Whether accused nos. 1 and 2 in furtherance of their common intention committed murder of Shivaji?	In the affirmative.
3	Whether accused nos. 1 and 2 in furtherance of the common intention voluntarily caused hurt to Savitrabai by means of deadly weapon?	In the negative against accused no. 2.
4	Whether accused nos. 1 and 2 in furtherance of their common intention intentionally insulted PW3 Savitrabai and deceased Shivaji so as to provoke them to commit breach of public peace?	In the negative against accused no. 2.

5	What order?	The Appeal & Revision are dismissed.
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REASONS

8. The prosecution has examined 12 witnesses who could be categorised as follows :

(1) PW3 Savitrabai - sister-in-law of deceased Shivaji. FIR Exh.

33.

(2) PW5 - Mudrika and PW8 Navnath, eye-witnesses.

(3) PW2 - Dr. Kulkarni, Medical Officer, who conducted Post-mortem (PM Notes Exh.31).

(4) PW9 - Dr. Gaus, who examined Shivaji at AUSA and issued certificate Exh. 44. He also examined Savitrabai and issued certificate Exh. 45.

Police and Panch witnesses :

(1) PW12 - Head Constable Sandipan. He has drawn spot panchanama Exh. 29 and seized blood mixed soil and

ordinary soil from the spot. He had arrested the accused and recorded their memo and seized the sticks (his evidence about discovery of sticks is extremely vague). He had sent muddemal to CA for analysis and submitted charge-sheet. He has proved contradiction of Mudrika and Navnath 9PW5 & 8) Exh. 56 and 57.

Spot Panch :

- (1) PW1 - Ramkisan, the spot is in the field of PW4 Santram, brother of deceased Shivaji and husband of Savitrabai .
- (2) PW11 - Sanjay Shinde. He stated that, accused Gaikwad confessed and produced the stick. Memorandum Exh. 49 and 50. Then accused Sanjay also confessed and produced the stick Exh. 51. He identified the stick, seizure memo Exh. 49, 50, 51, 52 and 53.

Other witnesses :

- (1) PW4 Santram, brother of deceased Shivaji. He has no personal knowledge. He stated that, he met his wife in the hospital and she narrated him the incident. He had also

asked Shivaji about the incident and he had told him that both the accused and Nagnath had assaulted him.

(2) PW6 has no knowledge. He merely stated that, he met Savitrabai in the bus.

(3) PW7 Tukaram has also no knowledge. Savitrabai had requested him to help Shivaji in boarding the bus. He is declared hostile.

(4) PW10 Gangaram. He had met Shivaji while boarding the bus. He had sustained bleeding injuries on the head. He stated that, both the accused and their father were standing on the Bandh of their field and accused no. 1 Suresh was having a stick in his hand.

Whether the death is homicidal?: -

. PW2 Sanjay Kulkarni has conducted post-mortem on the dead body of Shivaji on 19.08.1997. He noted following injuries on his person. His PM notes are at Exh. 35.

1. Contusion over right fronto temporal region size 6 c.m. X 4.5 c.m.

2. Contusion over left fronto temporal region size 6 c.m. X 5 c.m.
3. Abrasion over left parietal region size 6 x 6.5 cm.
4. Contusion over left elbow posteriorly size 2 cm x 3 cm

. There were following internal injuries.

1. Haematoma under scalp in right fronto temporal region size 8 c.m. X 7 c.m. by half.
2. Evidence of fracture in fronto temporal region fracture is obliquely place of size 4 c.m. X 1.2 ml. mtrs.
3. Equidural haematoma of size 7 x 8 x 2 cms on right fronto temporal region.

9. All injuries were ante-mortem. He has issued PM report Exh. 31 and provisional death certificate Exh. 26. He deposed that, Shivaji died due to head injury. It could be caused by stick. The factum of death of Shivaji due to the head injury is not disputed. Hence, we answer point no. 1 in the affirmative.

10. According to evidence of PW3 Savitrabai, on the fateful day, she had gone to her field and her brother in law Shivaji was also in the field. The accused are her husband's cousins. There was hybrid crop standing in the field. At 12:00 noon, accused no. 1 Suresh tried to take cattle through her field and Shivaji had obstructed him.

Accused no. 1 challenged his authority as to who was he to obstruct him. Then she stated that, accused no. 1 Suresh gave a stick blow on Shivaji's head. Shivaji cried and fell down on the ground . When she went near him, accused no. 1 Sanjay and Nagnath also came to the spot with sticks. She stated that, they had assaulted her and Shivaji with sticks. Suresh had also assaulted her. She had sustained injuries on her right wrist, elbow, right thigh and right foot. That time, Navnath PW8 & Mudrika PW5 had been there and Mudrika provided water to Shivaji. In her cross-examination, she has stated that she had no knowledge about land dispute between her husband and the accused. Her husband Santram PW4 has admitted that, his grand father had gifted land of 8 acres and 8 gunthas to accused No. 1 Suresh by executing a Gift Deed and he was demanding share in the said land to which accused no.1 was not ready. He admitted that, he and Shivaji had dispute with the accused with regard to the land from Mango tree upto Nala and the accused were not allowing them to enter the said land. He had filed suit against Shivaji in respect of land of his grand-father but his suit was dismissed.

11. It is material here to note that, as per evidence of PW3 Savitrabai , firstly there was quarrel between accused no.1 Suresh and deceased Shivaji and that time, accused no. 1 had given blow of stick on his skull and Shivaji had cried and fell on the ground. Till

that time, accused no.2 Sanjay and juvenile accused Nagnath were not there. They came there thereafter. PW3 has stated that, both of them and accused Suresh had assaulted her and Shivaji with sticks.

12. PW9 Dr. Gaus has examined deceased Shivaji while alive on 17.08.1997 and noted following injuries.

1. Contusion over right fronto parital region size 5 x 4.5 cm.
2. Contusion over left fronto parietal region skull 5 x 3 cm.
3. Abrasion over left parital region 6 x 6 inch.

13. He had then examined PW3 Savitrabai and noted following injuries on her person.

1. Contusion over dorsal of right hand 5 x 5 cm.
2. Contused lacerated wound over right forearm upper third 2 x 2.5 cm deep upto sub-tutations.
3. Contusion over left leg upper third, 2 x 2 cm
4. Contusion over left thigh lower third 5 x 5 cm.

14. He opined that, all the injuries were simple and caused by hard and blunt object. He issued Certificate Exh. 43. The case papers Exh. 44 of Shivaji and Injury Certificate of Savitrabai Exh. 45.

15. According to PW3 Savitrabai, PW8 Navnath had arrived on the spot while the incident was going on. He has deposed a different

story. He deposed that, on the day of incident, at about 11:00 a.m. he was alone in the field. Accused no. 1 Suresh was grazing cattle in the stream (Odha). Then there were exchange of words between Shivaji and Suresh on account of grazing of cattle which resulted into scuffle. Then Nagnath came there. Suresh was lying on the ground and Shivaji was on his body. Then Nagnath gave stick blow on his skull and Shivaji sustained bleeding injury and he rescued Shivaji. He had asked his wife to tie cloth on the injury of Shivaji. He stated that, Savitrabai was present there. Ld. APP cross-examined him with the permission of the court. He denied that, he had given statement portion marked 'A'.

16. PW5 Mudrika is wife of PW8 Nagnath. She has also stated that, there was scuffle between Shivaji and Suresh. Suresh fell down. Deceased Shivaji sat on his body. Then Nagnath came there. He gave a blow of stick on the skull of Shivaji. Thereafter, Savitrabai came there and her husband rescued the quarrel. She had given water to deceased Shivaji. Learned APP cross-examined her and she denied the prosecution story about obstruction by Shivaji to taking the cattle by accused no. 1 to his field and giving of stick blow by accused no.1 Suresh to Shivaji. She has denied the portion of her statement to that effect. She admitted that, accused no. 1 had given a cow to her husband and she was serving with several persons

including accused Suresh. She admitted that, she was deposing falsely.

17. Though PW4 Santram has deposed about dying declaration of Shivaji, the Police have not recorded written dying declaration through Special Judicial Magistrate or through anybody else. There is no evidence of other witnesses that Shivaji was in position to speak. Therefore, the alleged dying declaration by Shivaji before PW4 cannot be believed.

18. Evidence of panch witness PW1 Salunke, PW6 Vali Shaikh, PW7 Tukaram is not of any help to the prosecution to link the accused with the crime. PW10 Gangaram has stated that, he helped Shivaji in boarding the bus proceeding towards Ausa. That time, PW8 Navnath was with him and he had bleeding injury on his skull. He stated that, he saw both the accused and their father standing on the bandh of their field and accused no. 1 Suresh was having stick in his hand. In cross-examination, he admitted that, his statement regarding seeing the accused and their father standing on the bandh is improvement as it is not there in his statement. Thus, his evidence is also of no help to the prosecution.

19. The evidence of PW11 Sanjay Shinde, panch to the

discovery panchanama is not properly recorded. The ld. trial Judge as well as learned APP should have properly understood the provisions of Section 27 of Evidence Act with regard to discovery and about the admissible material. Without considering the purport of Section 27, vague statements are recorded about discovery of stick by accused nos. 1, 2 and 3. It is merely stated that, accused nos. 1, 2 and juvenile accused had confessed the crime and their memorandum was recorded and in pursuance of the memorandum, the accused produced sticks. The muddemal sticks were not shown to him and were not marked as articles. Thus, sticks were also not shown to the witnesses to prove that those were weapons of offence. Hence, his evidence is also of no use.

20. Thus, the prosecution heavily relies on the evidence of PW3. The ld. trial Judge has not properly recorded statement u/s 313. It is very cryptic consisting of only 11 questions including formal questions 1, 9, 10 & 11. Recording of statement u/s 313 is not an empty formality. The material circumstances appearing against the accused should be properly placed before the accused so as to give them opportunity to explain those circumstances. The judgment delivered by the trial Judge also suffers from lack of proper reasoning. He recorded in para 15 that, PW3 had gone after hearing the shouts of Shivaji and therefore she had no knowledge whether

accused no. 1 Suresh had assaulted her or not. Her evidence shows that, she was at a distance of only 10 ft from the spot and she had actually seen the assault. We find that, the 1st trial Judge has discarded her evidence without giving proper reasons. Besides, the 1st trial Judge has referred to accused Subhash whereas there is no accused by name Subhash. Accused no. 1 is Suresh and accused no.2 is Sanjay. It is therefore difficult to understand to whom he was referring to.

21. On carefully considering the evidence on record, we find that, the evidence of PW3 could not have been totally discarded. It should have been recorded in detail with regard to the nature of assault by each accused and the parts selected by them for assault. But we find that, accused no. 1 Suresh is dead, whereas; accused no.2 Sanjay was not present when the assault by stick blows was made by accused no.1 Suresh on Shivaji and till Shivaji had fallen down. PW3 has deposed that, accused Sanjay and Nagnath had been to the spot thereafter and assaulted her and Shivaji. Her evidence is extremely vague whereas; PW8 Navnath and PW5 Mudrika who admittedly had been to the spot have deposed a different story. According to them, there was scuffle between Shivaji and accused no. 1 Suresh and besides Shivaji was sitting over accused no. 1 Suresh and that time juvenile accused Nagnath had given a blow of stick to

Shivaji. PW5 and PW8 have not given any role to accused no. 2 Sanjay. Whereas, evidence of PW3 Savitrabai with respect to role of accused no. 2 Sanjay is vague.

22. As per evidence of PW9 Dr Gaus, Shivaji had sustained two contusions on fronto parietal region and one abrasion. It is obvious that, abrasion must have been caused by fall. The contusions are 5 cm. in length and 4.5 cm in width. It is well known that, the shape of contusion tallies with the size of weapon. The width 4.5 cm indicates that, the weapon may be different from a stick. In any case, there are only two contusions and the assault could not have been by three person on deceased Shivaji. The evidence shows that, accused no.1 Suresh and juvenile accused Nagnath had given stick blows to Shivaji. Therefore, it is doubtful whether accused no. 2 Sanjay had given any blow to Shivaji or not.

23. As far as PW3 Savitrabai is concerned, she had sustained four contusions, one on dorsal part of right hand, two on left leg and one CLW on right forearm. She has not specifically deposed as to on which part accused no. 2 Sanjay had given blows to her and which was weapon of offence used by him. She has not identified the muddemal stick as particular stick used by accused no. 2 Sanjay. In the light of these facts, the evidence of PW3 Savitrabai cannot be

cross checked by medical evidence as to whether accused no.2 Sanjay had given stick blows to her or not. If she would have disclosed the specific stick used by accused no.2 and the specific parts of her body where the accused no.2 Sanjay had given blows, it could have been considered whether accused no.2 Sanjay had assaulted her or not. PW5 and 8 have not deposed about presence of accused no.2 and assault by him on Shivaji or PW3 Savitrabai. They are deposing only about assault by juvenile accused Nagnath. In the light of these facts, accused no. 2 Sanjay deserves to get benefit of doubt. Hence, we uphold the finding of ld. trial Judge as against accused no. 2 Sanjay. As accused no.1 is dead, it is not necessary to consider the evidence against him. In view of the above facts, no interference is called for in the judgment of acquittal. Hence, the order.

ORDER

(1) The Criminal Appeal No. 386 of 2001 & Criminal Revision No. 308 of 2001 are dismissed.

[A. M. DHAVALE]
JUDGE

[T. V. NALAWADE]
JUDGE

Punde