

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

CRIMINAL APPEAL NO. 59 of 2002

Sudhakar s/o Baburao Ingle,
Age 31 years, Occu. Labour,
R/o main road, Soyegao, Taluka
Soyegaon, Dist. Aurangabad

..Appellant

Versus

The State of Maharashtra

..Respondent

Mr P.M. Gaikwad, Advocate for appellant
Mr M.M. Nerlikar, A.P.P. for respondent

CORAM : A.M. DHAVAL, J.

**DATE OF RESERVING
THE JUDGMENT : 11.9.2017**

**DATE OF PRONOUNCING
THE JUDGMENT : 15.9.2017**

JUDGMENT

1. This is an appeal by accused no.1 from Sessions Case No.199/1996 of Aurangabad Court, who was convicted by judgment dated 19.12.2001 for offence punishable under Section 304 Part II of the Indian Penal Code and was sentenced to suffer simple imprisonment for three years and also for offence punishable under Section 324 of the Indian Penal Code and sentenced to suffer simple imprisonment for two months.

2. The facts relevant for deciding the present appeal may be stated as follows :

P.W.1 Sukharabai, aged 45 years is widow of the deceased Jagan and is the informant. Her F.I.R. Exh. 32 shows that she was

residing with her three sons and three daughters along with her husband at Kalenagar, Soygaon and the family was earning their livelihood by doing labour work. P.W.1 Sakharabai was serving on a stone crushing machine of Raju Talele while her son Dattu was serving on tractor of Raju Talele. Her husband Jagan was taking she-goats for grazing. On 24.2.1996, P.W.1 Sakharabai learnt that the appellant Sudhakar had pushed down her son Dattu from a tractor trolley. Hence, she went to the appellant, her neighbour Sudhakar on 26.2.1996 at 10.30 a.m. to 11.00 a.m. and accosted him why he had pushed down her son. At that time, the appellant held her hand and slapped her twice on cheek. Appellant-Sudhakar threatened her that he just pushed Dattu from tractor, but in future he would kill Dattu under tractor. The neighbourers Anil, Manik and Baliram had intervened and rescued her. The contractor Mukinda Talele was present there. He did not like the act of the appellant. He removed Sudhakar from the job. On that day, at 5.00 p.m., P.W.1 Sakharabai returned home. She was cooking food. Her husband Jagan returned from forest and tied she-goats and went to the village. At about 7.00 p.m., appellant Sudhakar's mother Devkabai, wife Alkabai and sister Sakhu (minor) entered in the house of P.W.1 Sakharabai and started assaulting P.W.1 Sakharabai with chappal and kick blows. Appellant Sudhakar followed them and inflicted blow of axe and also caused weal marks on her back. As he was holding axe, nobody came to rescue. At that time, her husband Jagan returned and all the four persons started assaulting him. The ladies assaulted him with kicks and fist blows while Sudhakar inflicted a blow of axe on the skull near the ear pinna. Due to injury, Jagan died. On the same day at 11.15

p.m., P.W.1 Sakharabai lodged F.I.R. to that effect at Soygaon Police Station. The crime was registered at C.R. No.12/1996 and was investigated into.

3. P.W.1 Sakharabai was examined by Dr. Ambadas. P.W.2 - Dr. Ambadas also conducted post mortem on the dead body of Jagan. He noticed contused lacerated wounds on the skull of P.W.1 Sakharabai and deceased Jagan and also one contusion and one abrasion on the back of P.W.1 Sakharabai. The accused came to be arrested and as per his statement, weapon of offence axe came to be discovered. The spot panchnama was drawn. Statements of material witnesses were recorded. The articles relevant were seized and were sent for chemical analysis. After completion of investigation, charge-sheet was submitted in the Court. In due course, the case was committed to Court of Sessions.

4. The learned Additional Sessions Judge, Aurangabad framed charge at Exh.3 against the appellant Sudhakar, his mother and his wife under Sections 452, 302/34 and 307/34 of Indian Penal Code. The accused pleaded not guilty. The prosecution examined eight witnesses. The defence of the accused is that deceased Jagan tried to throttle accused no.2 Devakabai. At that time, accused no.1 had pushed him aside. He was in drunken state. He sustained injury by fall. Accused no.3 Alkabai was pregnant and Jagan had beaten her and sat on the chest of Devakabai and tried to throttle her. There was no common intention between accused no.1 and other accused. The learned Additional Sessions Judge almost accepted the prosecution case

in its entirety. But, he held that the injury to P.W.1 Sakharabai was simple and punishable under Section 324 of Indian Penal Code only, whereas injury to deceased Jagan was not intended to cause death and, therefore, accused no.1 was held guilty only for the offence punishable under Section 304 Part II and Section 324 of Indian Penal Code, while accused nos.2 and 3 were held guilty for the offences punishable under Sections 452, 323 read with Sec.34 only of Indian Penal Code. He imposed sentence of simple imprisonment for three years under Section 304 Part II of the Indian Penal Code to accused no.1 and simple imprisonment for two months for the offence punishable under Section 324. He convicted accused nos.2 and 3 for offence punishable under Sections 452, 323/34 of Indian Penal Code. Accused nos.2 and 3 had undergone the sentence. They did not prefer any appeal. The aggrieved accused no.1 has preferred present appeal.

5. Mr P.M. Gaikwad, learned Advocate for the appellant made following submissions :

- (I) The incident dated 24.2.1996 has not been proved;
- (II) There are material inconsistencies in the evidence with regard to incident dated 26.2.1996;
- (III) P.W.1 Sakharabai has given admission that she did not meet the appellant Sudhakar up to 8.00 p.m. whereas the incident had taken place earlier;

(IV) P.W.3 Chhaya, eye witness and daughter of P.W.1 Sakharabai has deposed as eye witness but her name is not shown in the F.I.R.;

(V) As per evidence, there were three injuries caused by accused no.1 by sharp edge of the axe;

(VI) There is no medical corroboration and there are no three injuries and the injuries are contused lacerated wound.

(VII) There is contradiction in the evidence of P.W.2 and P.W.3. P.W.2 stated that Sakharabai fell on the ground, but P.W.1 stated that she did not fall on the ground. The spot is in thickly populated locality but no independent witness has been examined. P.W.3 Chhaya was minor at the time of incident.

(VIII) As per the evidence of P.W.2 Dr. Ambadas, the injuries to P.W.1 Sakharabai and deceased Jagan were caused by hard and blunt object. The evidence of eye witnesses that the injuries were caused by axe falsifies his evidence. It is defence of the accused that Jagan was a drunkard. He had gone to the house of appellant Sudhakar and slapped his wife and mother and that time the appellant had pushed him aside. He sustained injury by fall. The recovery of weapon has not been proved, as the discovery panch turned hostile. There were no other injuries found on the person of P.W.1 Sakharabai and deceased Jagan. There is no evidence of enmity or any intention on the part of the accused to cause such injuries. Mr P.M. Gaikwad, learned Advocate alternatively argued that accused no.1 was in jail for

ten months during trial and for two months during appeal. Hence, in case of conviction, the sentence undergone by him is sufficient.

6. Per contra, learned A.P.P. Mr Nerlikar argued that the incident dated 24.2.1996 involving Dattu was proved by contractor P.W.7 Mukunda Talele. He had removed the appellant from the job. There is no cross-examination to the witnesses except one admission that Police did not record statement of P.W.7 Mukunda. Learned A.P.P. argued that the incident took place in front of house of P.W.1 Sakharabai and the spot panchnama shows a pool of blood on the spot. The evidence of P.W.1 Sakharabai and P.W.3 Chhaya is consistent to each other and is trustworthy. The accused are laymen. Hence, there is some exaggeration regarding number of injuries. It does not affect the core of the prosecution case. Size and shape of the injury show that it was caused by sharp side of the blade of the axe. Therefore, the medical evidence is not contrary to the ocular evidence. Hence, the appeal be dismissed and the sentence be confirmed.

7. On enquiry, it is learnt that the government has not preferred any appeal against this flee bite punishment.

8. After going through the entire record and considering the arguments advanced before me, the points for my consideration with findings are as follows :

- (1) Whether the deceased Jagan met with a homicidal death ?
- (2) Whether the appellant has caused injury on the skull of Jagan,

which resulted into his death and whether the conviction under Section 304 Part II deserves any interference ?

(3) Whether the appellant has caused injury on the skull of P.W.1 Sakharabai and Whether the conviction of the appellant under Section 324 of Indian Penal Code for the same needs any interference ?

(4) What order and sentence ?

I answer points no.1 and 2 in the affirmative, point no.3 in the negative and partly allow the appeal as per following order :

REASONS

9. The prosecution has examined eight witnesses, which can be categorised as follows :

(a) P.W.1 Sakharabai injured eye witness (F.I.R. Exh.32) and P.W.3 Chhaya, eye witness;

(b) Medical Officer P.W.2 Dr. Ambadas along with medical certificates Exh.37 and 38, letter of Police Exh.39, Chemical Analyst's report Exh.40 and post mortem notes Exh.41;

(c) P.W.7 Mukunda on the point of previous incident. He is supported by P.W.3 Chhaya. However, P.W.3 Subhash has turned hostile.

(d) Panch witnesses, spot panch, P.W.4 Vishnu, panchnama Exh.53. Memorandum and discovery panchnama Exh.54 (not proved). Seizure

of clothes of the deceased Exh.55. Seizure of clothes of P.W.1 Sakharabai, seizure Exh.56. P.W.6 Kailas, inquest panch. Panchnama Exh.60;

(e) P.W.8 Investigating Officer P.I. R.K. Raut. Request letters 66, 67, 68, Chemical Analyst's report Exh.69 to 75.

10. P.W.1 and P.W.3 have deposed that accused no.1 Sudhakar inflicted a blow of axe on the skull of deceased Jagan, who was husband of P.W.1 Sakharabai and father of P.W.3 Chhaya. P.W.2 Dr. Ambadas has produced letter received from police at Exh.39 dated 27.2.1996 disclosing homicidal death. He has conducted post mortem on the dead body. As per his evidence, he found one contused lacerated wound of the size of 5 cm x 1 cm x 1 cm bone deep on right temporo parietal scalp of deceased Jagan. It was oblique and reddish in colour. Dr. Ambadas opined that it was dangerous to life and it could have caused death in the ordinary course of nature. On internal examination, he opined that there was fissured fracture of skull bone. It was extending from right temporal region to right parietal and left parietal and to right temporal region and there was hemorrhage with brain tissue no bleeding in subarachnoid. It was cause of death. There is no dispute that deceased Jagan died of this injury on his skull. The post mortem notes to that effect are at Exh.41.

11. It is the defence of the accused that the deceased Jagan and his wife P.W.1 Sakharabai had gone to the house of the accused. Jagan assaulted Alkabai, wife of the appellant and mother of the appellant Devakabai. He sat on the chest and tried to throttle neck of

Devakabai. That time, accused no.1 appellant forcibly pushed him aside to save his mother. In the process, the deceased sustained injury by striking his head to the ground and has died. P.W.2 Dr. Ambadas stated that the injury was caused by hard and blunt object. His cross shows that he has not minutely inspected the injury under microscope or magnifying lens. Still, he stated that hair bulbs were crushed and hair were also crushed and, therefore, injury was caused by blunt object. He also gave admission that the said fissured fracture was possible, if the person fell on his head on prominent surface of ground. He admitted that at the time of fall, temporal region of skull comes into contact of surface of ground and there was no fracture to anterior, middle or lateral fossa. He went to the extent of admitting that forcible fall on the backward can cause the injury described in post mortem notes.

12. On careful examination of the nature of injury, it is found to be a contused lacerated wound having length of 5 cm, width of 1 cm and depth of 1 cm. Dr. Ambadas has admitted that the shape of injury matches to the shape of the weapon used. He has also admitted that such injury is possible by axe. I find that the injury described in post mortem notes is possible not by any blunt weapon. The axe is much wider on the blunt side and it would have caused much wider injury. The injury is only 1 cm in width. It means the injury was caused from the sharp blade side and the axe must have digged in to the level having width of 1 cm. From the nature of injury, it is obvious that such injury can be caused only by sharp but hard and rough object like axe. It was argued that the axe will cause incise wound, but it is

not acceptable. For incise wound, it is necessary to have extremely sharp object like blade or razor. In case of axe, though the blade is sharp, its sharpness is not sufficient to cause clean cut injuries. The injury is from left temporo region and right parietal region with a dent at the center. I find that such injury is not possible by a mere fall. Such injury is possible due to blow by a sharp object. There is nothing on record from the panch or evidence of witnesses that Jagan fell from hight.

13. For the reasons discussed later, I find the evidence of P.W.1 Sakharabai and P.W.3 Chhaya trustworthy and reliable with regard to causing of injury to Jagan by the appellant. Hence, I hold that it is a case of homicidal death.

14. Point Nos.2 and 3 : The evidence of P.W.1 and P.W.3 shows that they belong to labour class. Deceased Jagan was grazing cattle. P.W.1 Sakharabai was working as a labourer on a stone crushing machine of Raju Talele while her son Dattu, aged 16 years was working on tractor of same person. On 24.2.1996, in the evening, in absence of P.W.1 Sakharabai, there was one incident between the appellant Sudhakar and Dattu. The appellant pushed aside Dattu from a trolley and though there was no serious injury, Dattu was mentally hurt. He narrated the incident to his mother. P.W.3 Chhaya, sister of Dattu was also serving with Talele on stone crushing machine. P.W.7 Mukunda was contractor working there. She has stated that Sudhakar had pushed her brother from tractor. Though the prosecution had not examined Dattu, there is unchallenged evidence of P.W.7 contractor Mukunda Talele. He had not seen the said incident but on 26.2.1996,

i.e. the date of incident, he had seen P.W.1 Sakharabai accosting the appellant Sudhakar at 10.30 a.m. as to why he pushed her son and that time appellant had slapped her twice on her cheek. Sakharabai has stated so and is supported her daughter P.W.3 Chhaya and P.W.7 Mukunda. This incident led to the stoppage of work by labourers and, therefore, P.W.7 Mukunda had removed the appellant from work. This was the cause for the subsequent incident, which took place on the same evening.

15. P.W.1 Sakharabai stated that after completing her work, she returned at 5.00 p.m. Her husband returned from forest after grazing cattle and went to the village. She was cooking food. That time, at about 7.00 p.m., her daughters Chhaya and Usha were in the house. All of a sudden Alkabai, Sakhubai and Devakabai, wife, sister and mother of the appellant Sudhakar came to her house and dragged her outside the house and started beating her with chappal and kicks. Then, Sudhakar came there and he inflicted blow of axe on her skull. When her husband came to her rescue, the appellant Sudhakar inflicted blow of axe on his skull, whereby her husband died on the spot. She had stated that three ladies had also assaulted her and her husband with chappal and kick blows. As per evidence of P.W.2 Dr. Ambadas, P.W.1 Sakharabai had been to him and gave history of assault by the appellant Sudhakar. Besides medical certificate Exh.37, he has produced the copy of M.L.C. register Exh.38, wherein the history was recorded. P.W.2 Ambadas stated that Sakharabai was examined by him. Sakharabai came to him at 7.30 pm and on examination he found following injuries :

- (1) Laceration with contusion 1 x 1 x 1 cm on occipital scalp. Its colour was red and there was bleeding on touch.
- (2) Contusion 6 x 3 cm on right scapular region of back. It was obliquely reddish in colour.
- (3) Abrasion 1 x 1 cm on right side of back at intra-scapular region, reddish in colour.

He opined that these injuries were caused by hard and blunt object. He has proved certificates Exhs.37 and 38.

16. The cross-examination reveals that there is variance in the evidence of P.W.1 Sakharabai and P.W.3 Chhaya as to whether P.W.1 Sakharabai fell on the ground or not. P.W.1 denied that she fell on the ground. P.W.3 Chhaya admitted that her mother fell down. This injury is only 1 cm in length. P.W.1 Sakharabai has exaggerated the incident by stating that the appellant gave three axe blows on the skull of her husband and two axe blows on her skull. Her evidence on this point is not fully corroborated by medical evidence. There is only single injury each on the skull of P.W.1 Sakharabai and her husband Jagan caused by axe. Her injury is on occipital region which is possible by fall. Considering these facts, I find that when the axe blade was 4 to 5 cm in length, the possibility of causing injury of 1 cm length by said blade is remote. It is possible only if the tip of the blade hits the skull part. There is no specific evidence to that effect. In view of the above circumstances, I find the defence story that P.W.1 Sakharabai

sustained skull injury by fall probable. Considering the exaggeration made by her and in absence of any independent evidence, I find that the appellant deserves to be given benefit of doubt with regard to the causing of injury by him to P.W.1 Sakharabai.

17. However, I find that there is consistent evidence of P.W.1 Sakharabai and P.W.3 Chhaya that the appellant inflicted axe blow on the skull of Jagan. There is corresponding contused lacerated wound of 5 cm x 1 cm x 1 cm size which is consistent with the ocular evidence of assault by axe. The incident took place at 7 O'clock and immediately P.W.1 Sakharabai and deceased Jagan were taken in a bullock-cart to the Police Station and thereafter to the medical hospital. Doctor examined him at 7.30 p.m. and F.I.R. was lodged at Soygaon Police Station at 11.15 p.m. I find that P.W.1 Sakharabai is a rustic villager and there is prompt lodging of F.I.R. It is not possible to accept that there was hardly any scope of concocted story by her.

18. Mr P.N. Gaikwad, learned Advocate for the appellant argued that the evidence of P.W.1 Sakharabai that she received two axe blows and deceased Jagan received three axe blows is materially contradictory to the medical evidence. Both had received only one injury. It is true that the evidence of P.W.1 Sakharabai in this respect is exaggeration, but in her examination-in-chief, she has referred to only single injury and in the cross-examination, these questions were asked to her. Learned trial Judge has recorded that she has given answers due to misunderstanding.

19. In this regard, I find that the presence of appellant accused no.1 on the spot cannot be disputed. It is undisputed that there was quarrel between P.W.1 Sakharabai and her husband on one side and the appellant and his family members on the other side. Both have filed complaints against each other. According to the accused, the incident took place at his house and he was also injured, but the appellant has not produced his complaint nor his injury certificate. The spot panchnama shows pool of blood on the spot in front of house of P.W.1 Sakharabai. There is no evidence to show that no blood was found in the house of the accused. It is, therefore, clear that the incident took place in front of house of P.W.1 Sakharabai and the appellant had a quarrel with P.W.1 Sakharabai and her husband on the spot. Deceased Jagan has sustained injury, which caused his death and the said injury is consistent with the evidence of P.W.1 Sakharabai regarding assault by the accused by axe. It is followed with a prompt lodging of F.I.R. For the reasons recorded earlier, I have given benefit of doubt to the appellant with regard to the injury sustained by P.W.1 Sakharabai, but the same cannot be extended to the injury sustained by deceased Jagan.

20. Though Dattu was not examined, there is no substance in the contention that the incident of falling of Dattu was not proved. After the appellant had pushed Dattu on 24.2.1996, on 26.2.1996 morning, P.W.1 Sakharabai went to accost the appellant and the said incident was witnessed by P.W.3 Chhaya and P.W.7 Mukunda. P.W.7 Mukunda, contractor has stated that due to the act of the appellant, the workers stopped their work and, therefore, he was constrained to remove the

appellant from the job. His evidence has gone unchallenged. It is true that in cross-examination, he stated that Police did not record his statement.

21. Mr Gaikwad, learned Advocate for the appellant argued that there is contradiction as to who had fallen on the ground, whether Jagan or his wife P.W.1 Sakharabai. P.W.3 Chhaya stated that both had fallen on the ground while P.W.1 Sakharabai stated that Jagan had fallen on the ground. This contradiction has been considered with respect to assault on P.W.1 Sakharabai.

22. It is also argued that Sudhakar was lame and it is not probable that he would have assaulted Jagan. Though Sudhakar was lame, he was working on the site of Raju Talele. There is no material to show that his movements will substantially curtailed to to his disability.

23. It was argued that P.W.3 Chhaya was minor at the time of incident, but she was aged 15 years at the time of incident and was aged 21 years at the time of deposition. The fact of her minority is not relevant, as she was matured enough to understand the facts seen by her.

24. It was argued that no independent witness has been examined, but it is commonly found that many independent witnesses are reluctant to come forward and depose in respect of assault on somebody else.

25. It is defence that Jagan had assaulted Alkabai and Devakabai, but there is no evidence to that effect. There are bare suggestions,

which carry no weightage. Alkabai was pregnant, but her pregnancy was hardly two and half months old. Therefore, her participation cannot be said to be inherently improbable. Besides, after arrest she has given birth to a child in the jail.

26. It is argued that discovery of weapon axe is not proved and, therefore, the Chemical Analyst's report showing blood spots on the axe cannot be considered. I find that recovery of weapon of offence is not a must. In this regard, I rely on **Himanshu Mohan Rai Vs. State of Uttar Pradesh and anr. (2017) 4 SCC 161**, in which it in paragraphs 21 and 22, it is held :

“21. Apparently the police recovered a licensed gun from the accused Imran Afreen while he was boarding a train and the ballistic report showed that the licensed gun was not used for the killing. This means that the police did not recover the actual weapon used for the killing and the accused had ample time to dispose off the weapon. It is however not possible to reject the credible ocular evidence of the eyewitnesses who witnessed the shooting and who are found to be truthful.

22. It is possible that the prosecution may not recover the actual weapon in some cases. However, this cannot have the effect of discrediting reliable ocular testimony as we have here, that he accused shot and killed the deceased, particularly when the lead bullets have been recovered and are found belonging to a commonly used 7.65 mm calibre i.e. 32 bore weapon.”

I find that the ocular evidence is credible and trustworthy with respect to the injury caused by the appellant to Jagan. P.W.1 Sakharabai was also assaulted. There is contusion of 6 x 3 cm on her back. There is doubt about causing of injury to her by axe, but there is no doubt that she was assaulted by lady accused by dragging her outside the house.

27. It is argued that there is no evidence that the assault was from the blunt side of axe, whereas the Medical Officer has opined that the injury to deceased Jagan was caused by hard and blunt object. Considering the nature of injury, its depth, width and length, I have already held that the said injury was caused by axe and not by hard and blunt object. The Medical Officer's opinion is not consistent with the medical jurisprudence with regard to cause of injury.

28. Once it is proved that the appellant had caused injury on the skull of Jagan by axe, which resulted into his death, it was certainly a case of murder. The appreciation of learned trial Judge till the last stage is quite good, however, his reasoning to bring the offence to Section 304 Part II on assumption that there was no intention to commit murder is perverse. He has imposed flee bite punishment of three years simple imprisonment. It is well settled that when there is option of imposing rigorous imprisonment or simple imprisonment, rigorous imprisonment is a rule and only when there are special reasons, the simple imprisonment should be imposed. However, since the State Government failed in its duty to claim enhancement of punishment and to challenge the acquittal from Section 302 of Indian

Penal Code, I have no scope to interfere with the conviction so as to enhance it.

29. In the facts and circumstances, I find that there is absolutely no scope to show any leniency in the punishment already awarded. However, as stated earlier, the conviction under Section 324 of Indian Penal Code for assault on P.W.1 Sakharabai will have to be set aside. Hence, I pass the following order :

ORDER

- (I) The appeal is partly allowed.
- (II) The conviction of the appellant under Section 304 Part II of the Indian Penal Code and the sentence of simple imprisonment for three years is maintained. The conviction and sentence of the appellant for the offence punishable under Section 324 of the Indian Penal Code is set aside.
- (III) The appellant shall surrender before the trial Judge for undergoing the remaining sentence.

(A.M. DHAVAL, J.)

vvr