

THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

CRIMINAL APPEAL NO. 413 OF 2003

1. Datta s/o Bhagwan Mali,
Age 54 yrs, Occ: Agriculture.
2. Ambrushi s/o Bhagwan Mali,
Age 42 yrs, Occ: Service,
R/o. Walwad, Tq: Bhoom,
District: Osmanabad.

... APPELLANTS

VERSUS

The State of Maharashtra.

... RESPONDENT

WITH

CRIMINAL APPEAL NO. 637 OF 2003

The State of Maharashtra,
Through Bharat Bhagwan Mali,
(Deoalkar) Age 35 years,
r/o Walvad, Ta. Bhoom,
District Osmanabad.

... APPELLANT
(Ori. Complainant)

VERSUS

1. Datta s/o Bhagwan Mali
(Deoalkar), Age 45 years.
2. Ambrushi Bhagwan Mali
(Deoalkar), Age 37 years.
Both R/o. Walvad, Tq. Bhoom,
District: Osmanabad.

(Appeal abated against R. No.2
as per Hon'ble Court's order
dated 27.08.13)

... RESPONDENTS
(Ori. Accused Nos. 1 & 3)

...
Mr. Satej S. Jadhav, Advocate for Accused.
Mr. R. V. Dasalkar, APP for State.
...

CORAM : **T. V. NALAWADE &
K. L. WADANE, JJ.**

DATE : 06th June, 2018.

JUDGMENT: (Per T. V. Nalawade, J.)

. Both the appeals are filed against the judgment and order of Sessions Case No.177 of 1999, which was pending in the Court of Adhoc Additional Sessions Judge, Osmanabad. The Trial Court has convicted Accused No.1 Datta and Accused No.3 Ambrushi for the offence punishable under Section 307 read with 34 of the Indian Penal Code and each one of these two Accused is sentenced to undergo rigorous imprisonment for three years and pay fine of Rs.500/-. Other two Accused like Bhagwat Bhagwan Mali and Bapu Satva Mali are acquitted. The first appeal is filed by the convicted Accused and the other appeal is filed by the State against the convicted Accused for enhancement of sentence.

2 In short, the facts leading to institution of present two proceedings can be stated as follows:

Both Datta and Ambrushi are real brothers of informant Bharat Mali. Partition had taken place amongst these brothers. There is one more

brother by name Bhagwat. Bharat has no issue, but his brothers have issues. As Bharat has no issue, his brothers were asking him to take issue of one of the brothers in adoption. Bharat had said no to it and due to that, his brothers namely Datta and Ambrushi had become angry with him.

3 The incident in question took place on 12th December, 1996 at about 11:30 am. When Bharat was proceeding towards the field, he was intercepted by his three brothers and they again asked him to see that he takes one issue of one of his brothers in adoption. When he refused to do so, Datta and Bhagwat held his hands and then Ambrushi assaulted Bharat by using iron bar on his upper and lower limbs. In the assault, Bharat sustained fracture injuries. Allegations are made that other Accused namely Bapu was also there. When the first informant shouted for help persons like Vishwanath Shelke and daughter in law of Ramling Ingole reached there to rescue him. These persons, virtually threw the first informant into road side ditch. The first informant was then shifted first to Rural Hospital, then Civil Hospital, Osmanabad and from there to Civil Hospital, Solapur. He was indoor patient initially for 11 months and then from time to time, for taking treatment in respect of the injuries, which were inflicted on him in the incident. His statement came to be recorded in Osmanabad Hospital by Bhoom Police and crime came to be registered for the aforesaid offence.

4 During the course of investigation, spot Panchanama was prepared. Blood was found on the spot. Statements of witnesses came to be recorded. One iron bar came to be recovered on the basis of statement given by Accused Ambrushi. Iron bar was sent to C.A. office alongwith clothes of the injured. Blood was detected on the iron bar. Record of medical treatment was collected and then charge-sheet was filed against four Accused persons.

5 To the charge, both Datta and Ambrushi pleaded not guilty. Prosecution examined in all 13 witnesses for proving the offence. Trial Court believed the first informant and considered the medical record. Considering the relationship between the parties, Trial Court has given sentence only of three years imprisonment to Datta and Ambrushi.

6 During the pendency of appeal filed by Ambrushi (Criminal Appeal No.413 of 2003), Ambrushi died and his appeal came to be disposed of as abated. This Court has carefully gone through the evidence given as against Datta and the medical record. In substantive evidence, Bharat (PW-8) has stated that during the incident, he was held by Datta and the Ambrushi gave blows of iron pipe on his legs. He deposed that due to the blows, he sustained injuries to his legs. He deposed that he was then

thrown into road side ditch. The substantive evidence shows that he made allegations mainly against Deorao and Ambrushi and he did not make allegations against other two Accused. Against Datta, he has deposed that Datta had held him when Ambrushi was assaulting by using iron bar. Thus, all the injuries are attributed to the assault made by Ambrushi.

7 The evidence in the cross-examination of Bharat (PW-8) shows that there was dispute for more than 10 years amongst these brothers. In the past also, criminal case was filed against Ambrushi on the basis of report given by Bharat. In that case, Datta had stood surety for Ambrushi. The evidence shows that even after the present incident, many cases were filed against Datta and Ambrushi by family of Bharat. Due to the nature of dispute and number of cases filed, the evidence of Bharat needs to be scrutinized closely. There needs to be some corroboration to such evidence before basing conviction on it.

8 There is virtually no circumstantial evidence against Datta other than the circumstance of motive. The evidence of Bharat of assault is mainly against Ambrushi. This Court has carefully gone through the medical record of Osmanabad Hospital, the hospital where Bharat was taken immediately on 12th December, 1996. History was given that a brother had assaulted Bharat. The evidence of wife of Bharat (PW-12)

shows that she had reached the spot after learning about the incident and some boys had informed her about the incident. The persons, who could have witnessed the incident are not examined. The evidence of Mangal (PW-12) shows that no disclosure was made to her by Bharat. It appears that first disclosure was made in the Hospital at Osmanabad where the statement was recorded by Police. In that statement, allegations were made of assault against one brother by mentioning that a brother had assaulted him. This circumstance cannot be ignored as there is no circumstantial check to the substantive evidence given against Datta and further the allegations of assault are made only against Ambrushi. In the past also, case was filed against Ambrushi for making similar assault. He was acquitted in that case. Now Ambrushi is dead and the role attributed to Datta is that he had held Bharat when the assault was going on. This version does not appear to be probable in nature due to the aforesaid first disclosure made in the hospital to doctor and the circumstances that many injuries were sustained by Bharat in the incident. At two places, blood was found on the spot and that can be seen from the spot Panchanama at Exhibit 83. In ordinary course, circumstantial evidence could have been collected against Datta if there were bleeding injuries.

9 The medical evidence given by two doctors show that there were five contusions. Out of them, there were three diffused contusions.

There were fractures of right forearm, left forearm, right leg, left leg and parieto occipital region right side. Here only it needs to be mentioned that in substantive evidence Bharat has stated that assault was made only on his legs. Nothing is said about other three injuries found on the person of Bharat. This circumstance also creates doubt about the version of Bharat and there is possibility that he has tried to implicate every brother when assault was not made by Datta and other brother and Datta had not participated in the incident.

10 The Trial Court has not considered the aforesaid circumstances. Though there was a charge under Section 34 of the Indian Penal Code, it was necessary for the prosecution to establish the presence of Accused persons on the spot. In view of the nature of allegations, it can be said that Bharat did not want to exclude the real assailant and so he took the name of Ambrushi as the person, who caused him injuries. There is possibility that Datta did not participate in the incident and that is why he attributed smaller role to Datta. Considering that possibility, this Court holds that the Trial Court has committed error in giving conviction to Datta Mali. This Court holds that such conviction cannot sustain in law. Other evidence need not be considered as the Appellant No.2 Ambrushi is dead. In the result, the following order is passed:

ORDER

- I. Appeal of sole Appellant Datta Bhagwan Mali (original Accused No.1) is hereby allowed.
- II. The judgment and order of the Trial Court convicting him for the offence punishable under Section 307 read with Section 34 of the Indian Penal Code, is hereby quashed and set aside.
- III. Fine amount, if any, deposited by him is hereby refunded to him.
- IV. Criminal Appeal No.637 of 2003 stands dismissed.

[K. L. WADANE, J.]**[T. V. NALAWADE, J.]**