

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO. 489 OF 2015

Popat Bapu Mandale	]	
Age 38 years, Occ. Labour Work	]	
R/o Village Alegaon, Taluka-Sangola,	]	
District. Solapur	]	... Appellant
		/Original Accused No.1

Versus

The State of Maharashtra	]	... Respondent
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Mr. D. G. Khamkar for the Appellant.
Mr. Arfan Sait, APP for the Respondent/State.

**CORAM : B.P. DHARMADHIKARI &
MRS. SWAPNA S. JOSHI, JJ.
DATE : 03/07/2019.**

JUDGMENT (Per B. P. Dharmadhikari, J.)

1. Appellant accused has challenged judgment and order dated 30/4/2012 delivered by Additional Sessions Judge, Pandharpur in Sessions Case No.20/2010 holding him guilty under section 302 of IPC and sentencing him to suffer life imprisonment as also to pay fine of Rs.5,000/- and in default thereof to suffer RI for 3 months.

2. The incident of crime has taken place on 25/10/2009 at village Alegaon at about 7.00 p.m. Deceased Ashok was then talking with some one on mobile in the lane in front of house of PW-5-Sanjay Koli. Informant Bandu Jadhav, the elder brother of Ashok and his mother were talking

infront of their house. Informant heard shout of Ashok as “Aai ga”. Hence he went there running and saw appellant accused delivering blows of axe on Ashok shouting why Ashok was visiting house of Poonam. Poonam happens to be married sister of accused residing at Pune and it is case of prosecution that deceased Ashok also serving at Pune used to visit her house. Uttering these words accused was giving blows and informant saw blow being given on head, on right shoulder, right face. Seeing informant accused ran away. Within short period Priyanka, the wife of informant (PW-4); Bandu Jadhav (PW-3), PW-5 and other persons also reached there. Injured Ashok was taken to hospital of Dr. Gawade at Sangola in an auto (tuntum) owned by Shri Babar. Ashok became unconscious. On medical advise, Ashok was shifted to Medicare ICU Hospital at Pandharpur in ambulance. Ashok expired at about 10.00 p.m. in that hospital. Informant Bandu (PW-3) then lodged report at 11.50 p.m. at Pandharpur Police Station.

3. Pandharpur police registered crime with 0 number, reached hospital, conducted inquest panchanama, seized clothes of deceased and referred body for post mortem.

4. As offence was within territorial jurisdiction of Sangola Police Station, Pandharpur City Police Station transferred investigation to Sangola police along with documents. Sangola Police Station thereafter registered

Crime No.343/2009 punishable under section 302 of IPC. Further investigation was then carried out by API Jadhav. He carried out spot panchanama, arrested accused, proceeded with discovery under section 27 of the Evidence Act and recovered weapon Axe and clothes concealed by accused. He completed investigation. He also seized mobile on which deceased was talking from one Sunil Jadhav. Chargesheet was then filed in the Court of JMFC, Sangola, who in turn made it over to Sessions Court.

5. Before us homicidal nature of death of Ashok is not in dispute. We have heard Mr.Khamkar learned counsel for the appellant-accused and Mr. Arfan Sait, learned APP for the State.

6. Our attention is invited to sequence/chronology in which investigation has proceeded. Mr.Khamkar, learned counsel submitted that FIR was ante-timed and appellant/accused has been implicated in a false case. He relies upon evidence of PW-3-Bandu to show that he has made material improvement and he has not seen the offence at all. His wife PW-4-Priyanka has assisted the prosecution by repeating whatever PW-3 has stated. The alleged offence took place in front of house of PW-5-Sanjay which is located in side lane. Spot was not visible from the place where PW-3 or his mother or then PW-4 were standing. After hearing shouts of deceased Ashok, PW-5 also claims that he came out. PW-5 therefore should have reached first. PW-3 and PW-4 saw accused running away and

thereafter they reached spot. PW-5, therefore has not seen accused at all. He pointed out that incident has taken place at 7.30 p.m. in night and in this situation claim by prosecution witnesses that they saw accused or then identification of weapon by them is misconceived.

7. Our attention is invited to medical report to show that said evidence brings on record use of two types of weapons. Evidence of PW-2 Dr. Sudhir Deshpande is relied upon to urge that injury No.2 was not possible by axe. Learned counsel argued that this material shows involvement of two weapons and therefore two accused persons.

8. Our attention is drawn to the fact that prosecution did not get any mobile on spot and said mobile was seized on 30/10/2009 from one Sunil Jadhav. Evidence shows that mobile had a Sim card which belong to Sunil but handset belonged to his friend Prakash. Sunil and his friend were workers who used to cut sugarcane and therefore using sickle/cyath. Injury No.2 was possible only by such sickle. Investigating Officer has not carried out proper investigation in this direction only with a view to implicate present appellant.

9. Alleged recovery of weapon and blood stained clothes from the appellant under section 27 of the Evidence Act is also false in as much as the Investigating Officer was very much aware of that spot. Evidence of

PW-8 Pintu is relied upon for this purpose.

10. Our attention is invited to report of Chemical Analyzer that the grouping of blood on axe could not be done but blood of 'AB' group is found on clothes of accused while blood group of accused is "B". Blood group of deceased has not been determined.

11. Judgment reported in the case of *Bhimappa v. State of Karnataka, AIR 1993 Supreme Court 1469* is relied upon to submit that when name of witnesses is not appearing in FIR his status as eye witness needs to be discarded.

12. Learned APP heavily relies upon evidence of PW-3, PW-4 and PW-5 as eye witnesses. He submits that those are natural witnesses and their statements are corroborated by other material on record.

13. Deposition of PW-2-Dr. Sudhir Deshpande is relied upon to show that there were total 7 injuries and those injuries are possible by axe. The manner in which injuries are inflicted brings out the intention to kill. Therefore material on record links Accused with the crime. There is direct evidence as also circumstantial evidence in the form of recovery of weapon and blood stained clothes with blood of deceased upon it.

14. He further states that mobile did not belong to deceased Ashok and was later on recovered from original owner during investigation. This rules out any manipulation. Ocular evidence shows use of axe only as a weapon and hence inference drawn by PW-2-Doctor cannot be used to introduce some other weapon. He submits that evidence of eye witnesses is consistent with other material. He has therefore prayed for dismissing the appeal.

15. PW-2-Dr. Sudhir Deshpande in examination in chief, in paragraph No.4 has deposed that Axe Article 9 could have caused all injuries except injury No.2. Injury No.2 is CLW 20 c.m. x 3 c.m. x 1 c.m on right side face. His cross examination shows that injury No.2 may be caused by cyath of that much length and sharpness and it is not possible by axe before the Court. He has accepted that injuries on deceased may have been caused by more than one weapon.

16. In this backdrop when one attempts to find out the spot, the spot is in a side lane. That side lane is perpendicular to the road which is infront of house of PW-3 and PW-4 and after some distance. House of PW-5-Sanjay is in that side lane. Map Exhibit 13 drawn by PW-1-Namdeo supports this position. Even the spot panchanama shows this.

17. Evidence of PW-4 reveals that at 7.00 p.m. on the date of

incident she, her husband (PW-3) and her mother-in-law and wife of her brother-in-law were in front of their house. Deceased Ashok was then talking on mobile in front of house of PW-5. She heard words of Ashok “Aai ga” All of them looked in that direction and found accused assaulting Ashok with axe. Ashok fell down and accused ran away with axe. They went running there and saw accused. Her cross examination shows that police did not make any inquiry about the incident from her.

18. Her husband PW-3-Bandu deposed all most on same lines. He deposed that when they looked at Ashok they saw accused assaulting him with axe. Accused gave blow of axe on head, on back and right side of face of Ashok. Hence they all rushed towards Ashok running. Accused ran away with axe. Ashok was lying in pool of blood and thereafter immediately PW-5-Sanjay Koli and his wife came there.

19. In cross examination PW-3 has denied that spot was not visible from his house. He denied that axe and cyathe was lying on floor. He could not explain why fact of accused running away with axe did not appear in his complaint. He also could not explain why fact of Sanjay Koli and his wife arriving there did not appear in his complaint.

20. Statement in support of FIR Exhibit 18 shows that at about 7.00 p.m. he and his mother were both talking in front of their house.

Younger brother Ashok was talking on mobile with somebody in vicinity in front of house of PW-5. After hearing shout of Ashok he went running into the lane. Accused was there with axe and he saw accused shouting "Why deceased was going to house of Poonam at Pune". He gave blow of axe on back side of head, on right side shoulder and on right side of face. After seeing the complainant, he ran away. Other persons also came there and Ashok was shifted to hospital.

21. Thus, from deposition of PW-4-Priyanka and PW-3-Bandu, it seems that the incident has taken place in lane in front of house of PW-5-Sanjay. Police report shows that when PW-3 ran into lane he saw accused. In police report, PW-3 did not state that when he entered lane deceased was already injured. PW-3 also did not state that his wife PW-4 was with him. He specifically stated that he and his mother only were talking in front of their house.

22. Fact that deceased must have shouted after receiving blow of axe is apparent. So part of the incident may have been missed by PW-3. PW-5-Sanjay has his house very close to spot. He claims that he went out after hearing shout of Ashok they saw accused running away with axe and Ashok was lying by side of road in front of his house. He states that PW-3 and PW-4 and mother of PW-3 was also there.

23. Thus, in normal circumstances PW-5-Sanjay Koli ought to have reached the spot first. He therefore, could have witnessed everything which PW-3 Bandu claims to have seen. If accused ran away before PW-3 reached the spot, it is apparent that PW-5 could not have seen accused. The position of spot in lane and deposition of PW-3 that he witnessed assailant from the place where he was standing in front of his house therefore creates doubt about the status of PW-3, PW-4 and PW-5 as eye witness. PW-3 has not mentioned either his wife or PW-5 Sanjay as eye witness in his statement to police on the basis of which cognizance was taken.

24. When medical evidence is considered in this situation, it becomes clear that opinion of expert that injury No.2 may not have been caused by axe and there were two weapons used adds to confusion. Use of two weapons means two assailants. None of the prosecution witnesses pointed out second assailant.

25. The cross examination of API Jadhav reveals that mobile found at spot was owned by one Prakash Vithal Jadhav and in it Sim card was of Sunil Tanaji Jadhav. Sunil Jadhav works as a labourer as sugarcane cutter. Thus, Investigating Officer did not attempt to find out tower location of said mobile.

26. He also speaks of the fact that Sunil Jadhav did not give any

explanation as to how and why that mobile phone was handed over to him. Exhibit 38 on record is panchanama and that mobile is handed over to police on 31/10/2009 by Sunil Jadhav.

27. Material on record therefore does not show how mobile handset in name of Prakash with sim of Sunil Jadhav went to deceased and then came back to Sunil Jadhav. Investigating Officer PW-13 has deposed that during investigation mobile was found on spot which militates with Exhibit 38.

28. This brings us to circumstances of recovery of blood stained clothes and weapon under section 27 of the Evidence Act. PW-8 Pintu is panch witness to recovery. His deposition shows that in police station accused volunteered to produce weapon and there panchanama was prepared. He does not depose that accused disclosed type of weapon or then stated the specific place where weapon was concealed. In discovery panchanama, it is recorded that accused produced clothes and axe concealed in bush. In disclosure memorandum, Accused has not spoken about clothes. In cross examination this witness accepted that he was told by PSI Jadhav (PW-13) that they have to go to village Alegaon to recover clothes and weapons used by accused which he kept in his house. He also states that accused was then handcuffed. This material therefore shows that PW-13 Investigating Officer was knowing that at Alegaon, he has to recover

weapon and clothes. This answer in cross examination by PW-8 creates doubt about correctness and authenticity of discovery of weapon and clothes.

29. In this situation, we find appellant accused entitled to benefit of doubt. Accordingly, we proceed to pass following order:

- i) Judgment and order dated 30/4/2012 delivered by Additional Sessions Judge, Pandharpur in Sessions Case No.20/2010 is quashed and set aside;
- ii) Appellant/accused is acquitted of the charges framed by giving him benefit of doubt. He be set free if his custody is not required by the State in any other matter;
- iii) Muddemal property be dealt with as directed by the Trial Court after the appeal period is over.
- iv) The appeal is accordingly allowed and disposed of.

(MRS. SWAPNA S. JOSHI, J.)

(B. P. DHARMADHIKARI, J.)