

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

CRIMINAL APPEAL NO. 1459 OF 2011

Marryapa Appa Dharmale
R/at Amroli, Tal. Chandgad
Dist. Kolhapur

..Appellant

V/s.

The State of Maharashtra
(At the instance of Chandgad
Police Station, District: Kolhapur)

..Respondent

Mr. P.R. Arjunwadkar a/w Ms. Prabha Badadare for the
Appellant.

Mrs. M.M. Deshmukh, APP for the Respondent/State.

**CORAM : NITIN JAMDAR AND
C.V. BHADANG, JJ.**

DATE : 10 AUGUST 2021

JUDGMENT (PER: C.V.BHADANG, J.)

. The challenge in this Appeal is to the Judgment and Order dated 03 October 2011 passed by the learned Sessions Judge at Gadhinglaj in Sessions Case No. 19 of 2010. By the impugned Judgment, the Appellant/accused has been convicted for the offence punishable under Section 302 of IPC for having intentionally caused death of his brother Tukaram Dharmale. The Appellant has been sentenced to suffer imprisonment for life

and to pay a fine of Rs.1000/- and in default to suffer simple imprisonment for three months.

2. The prosecution case may be briefly stated thus:

That the Appellant and the deceased are real brothers. The incident is dated 16 June 2010 at about 14.00 hrs on the public road in front of Marathi Vidya Mandir at village Amroli, Taluka Chandgad, District Kolhapur. According to the complaint lodged by PW-1 Appa Dharmale, who is the son of the deceased, the Appellant had come to their house about 8 days prior to the incident. It is alleged that the Appellant accosted the deceased as to why he is practicing black magic. It is stated that the Appellant also asked the deceased to apply holy ash (*angara*) as the deceased was worshiping their deity. The deceased refused to apply holy ash to the Appellant on account of which the Appellant got annoyed and threatened the deceased.

3. On 16 June 2010, which was a weekly market day, the deceased after making purchase of grocery articles and vegetables was returning home at about 2.00 p.m. when the Appellant is alleged to have come from behind and assaulted the deceased on the back side of the head by a hoe (pickaxe). As a result of the assault, Tukaram fell down in a pool of blood. He was removed to the hospital, where he was declared dead.

4. According to the prosecution, the incident was witnessed by PW-1 Appa Dharmale, PW-2 Yallubai and PW-8 Anandibai. PW-1 Appa lodged a complaint of the incident whereupon an offence came to be registered. PW-12 P.I. Dyaneshwar conducted investigation in which he drew spot panchnama as well as inquest panchnama of dead body. The dead body was sent for postmortem examination. PW-9 Dr. Suhas Mane, Medical Officer, Rural Hospital, Chandgad, conducted postmortem examination and issued Postmortem Report Exh. 33. The Appellant voluntarily surrendered before police on 16 June 2010. The Appellant was arrested and his clothes were seized. According to the prosecution, the Appellant while in custody gave a voluntarily statement offering to produce the weapon i.e. the hoe. Accordingly, the memorandum was recorded in presence of PW-4 Allabaxa and PW-5 Eknath Gavasekar. The Appellant then led the police and the panchas to his house. The Appellant produced the hoe, which was seized. The seized articles were sent for report of Chemical Analysor. The Investigating Officer recorded the statement of the witnesses. After completion of the investigation, a chargesheet came to be filed.

5. The learned Sessions Judge framed a charge for the offence punishable under Section 302 of IPC. The Appellant pleaded

not guilty and claimed to be tried. The defence of the Appellant is one of total denial and false implication.

6. The prosecution examined in all 12 witnesses at the trial and produced the record of the investigation. The Appellant did not lead any evidence in defence. The learned Sessions Judge by the impugned Judgment has convicted the Appellant as aforesaid. Hence, this Appeal.

7. We have heard Mr. Arjunwadkar, the learned counsel for the Appellant and Mrs. Deshmukh, the learned APP for the State. With the assistance of the learned counsel for the parties, we have gone through the record.

8. It is submitted by the learned counsel for the Appellant that the evidence of the alleged eye witnesses is not reliable and acceptable. The learned Counsel has taken us through the evidence of the individual witnesses and had commented upon the acceptability of such evidence. It is submitted that PW-1 Appa claimed to be at his house and had no reason to suddenly appear at the spot of the incident and to witness the assault. It is submitted that the evidence of PW-2 Yallubai and PW-8 Anandibai is also not acceptable, as the situation on the spot is such that they had no occasion or opportunity to witness the incident. It is submitted that the incident occurred during the rainy season and it has come on record that it was actually raining

at the time of the incident. It is submitted that most of the farmer community at such time is busy with the sowing operations. It is submitted that the deceased was allegedly carrying an umbrella and thus, there could be no identification by the Appellant of the deceased from behind. It is submitted that PW-3 Shantabai is not an eye witness as she has admitted that she came on the spot subsequent to the actual assault and learnt about the assault from the people gathered there. He submitted that there is no clear motive which is brought on record by the prosecution and so called motive and annoyance of the Appellant is surrounded by obscurity. It is submitted that even PW-6 Subhash Mandlik, who is having a grocery shop nearby cannot be said to be an eye witness. It is submitted that it is doubtful whether the alleged witnesses could see the incident from the confines of their houses. It is submitted that if the deceased was assaulted from behind, he is not expected to fall in a supine position as found during the investigation.

9. The learned counsel also made comment on the evidence of the panch witnesses to submit that their presence or evidence regarding the alleged confessional statement made by the Appellant, the subsequent discovery and the seizure of the clothes of the Appellant is doubtful. The learned counsel was at pains to point out that there were no disputes between two brothers on any count as has been admitted by the PW-1 Appa

and thus, the Appellant had no reason to cause the death of Tukaram. It is submitted that the evidence of the eye witnesses is about a single assault and therefore, the possibility of sustaining five injuries as noted by the Medical Officer is ruled out.

10. The learned APP has submitted that the incident has happened in broad day light in the midst of the village. She pointed out that the spot of incident is on a public road surrounded by houses, a shop and a school. It is submitted that the evidence of eye witnesses is reliable and natural. It is submitted that the evidence of eye witnesses is also corroborated by the evidence of the recovery of the blood stained clothes and by disclosure made by the Appellant under Section 27 of the Evidence Act. She submitted that the deceased was mercilessly done to death which can be seen from the nature of the injuries found by the Medical Officer. She pointed out that the evidence of PW-1 Appa would show that the Appellant had gone to the house of the deceased a week prior to the incident and the Appellant was suspecting that the deceased was practicing black magic and the Appellant had threatened the deceased. It is therefore submitted that there is a clear motive which is brought on record.

11. We have carefully considered the prosecution evidence in the context of the defence and the rival submissions made.

Homicidal Death

12. The Medical Officer Mr. Suhas Sane, PW-9 has found the following injuries on the dead body.

- (i) CLW on forehead 2 cms x 1 cms x ½ cms bone deep. These was depressed fracture of frontal bone underneath.
- (ii) CLW over top of occipital region 2.5 x 1 x 1 cms deep. Sharp margin of fracture occipital bone beneath.
- (iii) CLW over mid occipital region 4 cms below injury No.2 measuring 4 cms x 3 cms x 6 cms. There was compound comminuted fracture of occipital bone underneath. The depression was of 11 cms diameter. Brain matter was protruding.
- (iv) CLW on occipital region 1.5 cms to right side of injury No.2, 105 cms x 1 cms x 1 cms. Sharp margin of fracture of occipital bone underneath.
- (v) Incised wound on lower occipital region 10 cm x 1 cm x 2 cms deep obliquely downwards.

He accordingly issued the postmortem report Exh. 33. He states that the injury No.5 was by a sharp weapon while other injuries could be caused by a hard and blunt object. He stated that the injury No.5 is possible by the pickaxe (Article -8), if it is used from the sharp edge. He states that the other injuries are also possible by the pickaxe, if used from the blunt side. It was suggested that the injuries nos. 1 to 4 were possible due to fall on the ground, in a scuffle which the Medical Officer refuted. He states that the injury No.5 was sufficient in the ordinary course of

nature to cause death. He states that the deceased would not have survived even after immediate medical aid.

13. The nature of the injuries and the evidence of PW-9 leave no manner of doubt that Tukaram met with a homicidal death. The question is whether it is caused by the Appellant.

Spot of Incident

14. PW-4 Allabaxa and PW-5 Eknath Gavasekar are the spot panchas in whose presence the spot panchnama Exh.26 was recorded. It shows that the spot of incident is in front of Marathi Vidya Mandir school at village Amroli and it is at the intersection of two roads. There houses and a grocery shop nearby. Thus the incident has happened in the midst of the village. The spot panchnama also shows that a cloth bag with the vegetables and two umbrellas were lying on the spot.

Eye witness account of the incident

15. The learned counsel for the Appellant is right that PW-3 Shantabai cannot be said to be an eye witness as such, inasmuch as, she has admitted that she has not witnessed “the cause of the fall of Tukaram on the ground” and she states that she saw Appellant while running away from the spot. She admitted that she learnt about the incident from the people, who had gathered there. She also stated that the Appellant Marryappa was not

present at the spot. She denied that she is deposing at the instance of PW-1 Appa. Thus, all that this witness states is that she had seen the Appellant running away from the spot and she having learnt about the incident from the people gathered there. Thus, essentially, we have to look to the evidence of PW-1 Appa, PW-2 Yallubai and PW-8 Anandibai.

16. PW-1 Appa states about the incident which had happened some eight days prior to the incident in question. He states that the Appellant had been to their house and had accosted his father about his father worshiping the deity. He states that on 16 June 2010 his father had gone to village Adkur for the weekly market for purchasing grocery articles and he was at his home. He states that at about 2 O'clock when his father was returning from the market with bags containing grocery articles in his hand and one umbrella, the accused came with a hoe and gave a blow on the backside of the head of his father. PW-1 states that he was going to the shop of Subhas Mandlik. As a result of the assault his father collapsed whereupon accused rushed back towards his house. His father had fallen in a supine position. He was taken to the hospital where he was declared dead. He states that the persons residing nearby namely Yallubai, Anandibai, Tukaram Nangarukar, Shantabai Nangarukar, Maya Nangarukar and Subhash Mandlik gathered there. The incident happened in front of Marathi School. He then went to the police station and

lodged a report. Nothing significant has been brought on record in the cross-examination of this witness. In the cross-examination, it has come on record that after initial blow, his father fell down after which the Appellant gave two more blows. This would to a certain extent/explain the multiple injuries found on the dead body of Tukaram. The evidence of this witness is criticized on the ground that he claimed to be at his house and therefore, suddenly had no reason to come out and witness the incident. The challenge to the evidence of this witness on any such ground in our view cannot be accepted. He admitted that the Appellant and the deceased were residing separately since last 37 to 38 years and they were cultivating their land separately and there were no disputes between the Appellant and his father on account of landed property. There were no monetary transactions between his father and the Appellant and Appellant was not on visiting terms with them. He was unable to assign any reason as to why the Appellant was having suspicion against his father of practicing black magic and “*dev karni*”. He also stated that he did not feel it necessary to lodge a report about the incident which had happened a week before i.e. on 08 June 2010 when the Appellant had accosted the deceased. Except this, nothing has come in the cross-examination of this witness.

17. PW-2 Yallubai also claims to have witnessed sitting in her house. She claims that the deceased Tukaram was walking by the

road holding a bag in one hand and umbrella in another. He was wearing a white shirt and a blue pant. The accused came from behind and assaulted Tukaram with a hoe, whereupon Tukaram fell down. She states that PW-1 Appa came to the spot and tried to lift his father. This witness went to the spot and found that brain matter of Tukaram had come out.

18. PW-8 Anandibai states that she was at her house and at about 2.00 p.m. Tukaram was returning from market holding a bag in one hand and umbrella in another. She also states that accused assaulted Tukaram with the pickaxe, whereupon Tukaram fell down. The Appellant ran away from the spot. PW-1 rushed to the spot and shouted for help, when Yallubai and Shantabai came on the spot. A part of the cross-examination of this witness is pointed out by the learned counsel for the Appellant in which she has stated that when people gathered there, the Appellant was not present at the spot. She further stated that PW-1 Appa also reached the spot when the Appellant was not present. In our view, the evidence of this witness and for the matter of that the entire prosecution evidence, on the incident has to be read as a whole and not in bits and pieces. It has come in the evidence of PW-1 Appa that he witnessed the incident from a distance and immediately after the assault the Appellant fled from the spot. Thus, there is nothing unusual in the evidence of PW-8 Anandibai that when PW-1 Appa reached the

spot (i.e. where the deceased was lying) the Appellant was not present at the spot as in all probability by that time, the Appellant had made his escape good.

19. PW-6 Subhash Mandlik is having a grocery shop in front of Marathi School where the incident happened. This witness has also stated about the deceased coming and being followed by the Appellant and Appellant assaulting the deceased by pickaxe on the back side of the head. He states that within 5 minutes Tukaram died. We, thus, find that apart from the evidence of PW-1 Appa, there are independent eye witnesses namely PW-2 Yallubai, PW-6 Subhash Mandlik and PW-8 Anandibai who have stated about the assault by the Appellant.

20. The learned counsel for the Appellant strenuously urged that the location of the houses of PW-2 Yallubai and PW-8 Anandibai is such that it is not possible that they could witness the incident. It was also suggested that during the rainy season and particularly when it is actually raining, the villagers keep the doors of the houses closed. We are unable to appreciate the evidence on such broad omnibus possibility when there is no supporting evidence or material brought out in cross-examination. We find that the evidence of the prosecution witnesses PW-1 Appa, PW-2 Yallubai and PW-8 Anandibai is cogent and natural and one inspiring confidence. There is no

reason shown why these witnesses are trying to falsely implicate the Appellant. The incident happened in the midst of the village in broad day light and therefore, the presence of the witnesses and an opportunity to witness the incident, in our view cannot be doubted. The contention that the deceased cannot fall in supine position as assault was from behind, also in our view cannot be accepted. Looking to the nature of assault and the injury sustaining, the deceased instantaneously fell down and thus, it is not necessary that a person having suffered such a severe head injury would only fall forward i.e. in a prone position and cannot fall in a supine position. The incident of the present nature happens in a fraction of second and the nature of the fall and the position cannot be predicted by any amount of mathematical precision.

Recovery of clothes and the articles

21. We then have the evidence about the discovery, PW-4 Allabaxa and PW-5 Eknath Gavasekar are the panchas of discovery along with the Investigating Officer. It has come in the evidence of PW-5 Eknath and the Investigating Officer that the Appellant made a confessional statement on 18 June 2010 offering to produce the pickaxe. Accordingly, memorandum Exh. 22 was recorded. The Appellant then led the police and the panchas to his house and brought the pickaxe from a wooden

shelf. We have already noted that the pickaxe was found having blood stains of group 'B' i.e. of the deceased.

22. The evidence is further corroborated by the seizure of the clothes of the Appellant. As noticed earlier, the Appellant surrendered on 16 June 2010 after which the clothes of the Appellant were seized in the presence of PW-7 Mahadeo Gurav, as per panchnama Exh.30, which were sent for the report of Chemical Analysis. It appears that the blood sample of the Appellant as well as the deceased were also sent for HBO grouping. It has come on record that the blood group of Appellant was 'O' while that of the deceased was 'B'. The pickaxe seized in this case was having blood stain of blood group 'B' i.e. of the deceased. The clothes of the Appellant were also having human blood of group 'B'. There is no explanation to this incriminating circumstance, offered by the Appellant in his statement under Section 313 of Cr.P.C. This part of the evidence lends corroboration to the evidence of the eye witnesses. We find that no exception can be taken to the conviction of the Appellant.

23. In the result, the appeal is hereby dismissed. The conviction and sentence awarded to the Appellant, is hereby confirmed.

(C.V. BHADANG, J.)

(NITIN JAMDAR, J.)