

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

CRIMINAL APPEAL NO. 136 OF 2011

Mahantesh Shivlingappa Nivargi,
Agriculturist, Shingadgaon,
Tal- South Solapur, Dist. Solapur.

... Appellant.

V/s.

The State of Maharashtra.

... Respondent.

Ms.Vilasini Balasubramanian with Mr.Jaydeep Mane
for the Appellant.

Ms.Prajakta P. Shinde, APP for the Respondent- State.

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

DATE : 19 July 2021.

JUDGMENT : (Per Nitin Jamdar, J.)

The Appellant-Accused no. 1 has filed this appeal challenging the judgment and order passed by the learned Additional Sessions Judge, Solapur in Sessions Case No.58/2009 convicting the Appellant under section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life with fine and further punishment in default for committing murder Ambanna

Lambu on 23 November 2008. There were two accused and Accused no. No.2- Shivlingappa died during the trial.

2. The gist of the prosecution case is as follows. Complainant- Basanna Ambanna Lambu owned agricultural land. Deceased Ambanna, his father, used to go to the field in the morning and return back in the evening. On 23 November 2008 at about 9.00 a.m, as usual, the deceased Ambanna went to the field. His granddaughters- Savita aged about 12 years and Shashikala aged about 9 years were along with him. The Complainant Basanna was working in the adjoining field of one Rayappa Kore. At about 11.30 a.m., Shashikala came running and told Basanna that the Accused were assaulting Ambanna with a sattur. Complainant rushed to the spot. Appellant was standing near a well and was holding a sattur. Accused Shivlingappa was near the sugarcane crop. On noticing Basanna, the accused ran away. Ambanna was lying dead with injuries on his neck and right cheek. At about 12.00 p.m., Assistant police inspector, Bhosale received a telephonic message about the incident. He visited the spot. He collected blood smeared earth from the spot and recorded spot panchanama. Thereafter the dead body was sent for postmortem. Complainant- Basanna Ambanna Lambu lodged report Exh.21 On the basis of these allegations, an offence vide Cr.No.109/2008 under section 302 read with section 34 of the Indian Penal Code was registered against both the accused. Statements of witnesses were recorded. The accused were arrested on 26 November 2008. On that day Appellant during his police

custody as per his statement at Exh.30 produced the sword and his clothes concealed in the well situated in the field. On 19 January 2009, the seized property was sent to Chemical Analyzer. A.P.I. Shinde submitted charge-sheet for the offence punishable under section 302 read with section 34 of the Indian Penal Code.

3. The prosecution examined eleven witnesses. The Appellant examined one defence witness. The learned Sessions Judge after going through the evidence and after considering the arguments convicted the Appellant for an offence punishable under section 302 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for life and to pay fine of Rs.2,000/-, in default to further suffer rigorous imprisonment for three months.. The Appellant is before us by way of this criminal appeal challenging the conviction and the sentence.

4. We have heard Ms. Vilasini Balasubramanian for the Appellant and Ms. Prajakta Shinde, APP for the Respondent- State.

5. The prosecution witnesses can be grouped in five categories. First category was of the eye witnesses- P.W.2- Basappa Ambanna Lambu, the son of the deceased; P.W.3- Savita Basanna Lambu, granddaughter of the deceased; and P.W.10- Shashikala Basanna Lambu, granddaughter of the deceased. The second category was of panch witnesses- P.W.1- Santosh Revansiddha Salotgi who is the Panch to Spot Panchanama at Exh.19 and P.W.4-

Chandrashekhar Bhaganna Ghodke, the Panch to the Seizure Panchanama at Exh.31. The third category was of witnesses who were present to resolve the dispute between the deceased and the Appellant- P.W.5- Nagnath Chandram Achlere and P.W.9- Malkappa Laxman Panshetti. The fourth category was of two witnesses who, prior to the murder of deceased Ambanna, were injured by the Appellant. These were: P.W.7- Vijayalaxmi Nagayya Swami and P.W.8- Rekha Nagayya Swami. P.W.6- Dr. Amol Gosavi examined P.W.7 and P.W.8 and the defence witness. P.W.11- Ramesh Bhosale, API is the investigating officer.

6. Since the prosecution case is of direct evidence, the evidence of the eye witnesses P.W.2, P.W.3 and P.W.10 is of importance. P.W.2- Basanna stated as follows. He holds 12 acres agricultural land situated at the distance of 1 kilometer from their house. He has two minor daughters. Savita and Shashikala. His father used to go to the field daily at about 9.00 a.m for agricultural work. Since two years before the incident, the accused used to suspect upon his father Ambanna that he was practicing black magic. On that count, the accused used to abuse his father. A meeting was called in the village. The accused were reasoned with by a committee consisting of Nagnath Achlere, Malkappa Palshetty and others, but they still carved a grudge. On 23 November 2008, as usual at about 9.00 a.m., his father Ambanna came to the field with Savita and Shashikala.. He was, however, in the adjacent field of

one Raippa Kore for doing labour work. At about 11.30 a.m., Shashikala came running and told him that Appellant is assaulting Ambanna with a sattur near the well. He rushed to the spot and saw Appellant was holding Sattur in his hand. On noticing him, both the accused ran away. He gave a chase but could not catch them. Ambanna had sustained injuries to his neck and cheek and was lying dead near the well. Basanna went to the Valsang police station and lodged a report.

7. P.W.3- Savita aged twelve years also deposed similarly as follows. On 23 November 2008 at 9.00 a.m., she along with her grandfather and her sister Shashikala went to their field. When they reached the field, her grandfather tied their buffalo and went to asleep. Then she along with her sister was having lunch, at about 11.20 a.m., the accused came to their field and started abusing her grandfather that he was using black magic. The Appellant assaulted her grandfather with something like sattur on his neck and cheek. She and her sister Shashikala ran to their father. Her father came to the spot and tried to chase but both the accused ran away.

8. P.W.10- Shashikala, another granddaughter of the deceased and daughter of P.W.2- Basappa was examined. She was nine years old at that time. She also stated that on the date of incident, she along with her sister Savita and grandfather Ambanna went to the field at 9.00 a.m. with their buffalo. Her grandfather rested after feeding fodder and tying the buffalo. She and her sister

were having their lunch near their well. At about 11.30 a.m., the Appellant came and asked about her mother. So also he inquired about whereabouts her father. They both told him their parents are working in the field of Kore. Then the Appellant went to their grandfather and started assaulting him by weapon like sword. Her grandfather shouted. She rushed to her father to call him. She brought her father to their field. On noticing him, both the accused ran away.

9. The learned counsel for the Appellant sought to assail the evidence of these three witnesses. The learned counsel submitted that there is an inconsistency between the deposition of P.W.2, P.W.3 and P.W.10 as regards the weapon used. The learned counsel submitted that P.W.2 had deposed that the weapon used was sattur, and that he had stated that he understands that difference between the sattur and sword. The learned counsel submitted that P.W.3- Savita has stated that the Appellant- accused was using means like sattur, however, the article no.5 was sword which is an omission of the weapon of offence. The learned counsel submitted that PW-3 also stated that the weapon used in commission of offence had wooden handle while article-5 does not have wooden handle and is a sword and therefore, these discrepancies go to the root of the case. The learned APP submitted that there are no material discrepancies.

10. As regards the main incident, all the witnesses are consistent that by means of sharp cutting weapon the deceased was

assaulted and this testimony is unshaken in the cross. Through the deposition of the Investigating Officer, P.W.11 - Ramesh Bhosale, the Postmortem Report at Exh.45 was placed on record. The injuries were found to be antemortem and they were: Incised wound over left lateral aspect of mid partial region 4 x 2 cm. x bone deep. Incised wound over right side of face and neck running from right it, angle of mouth through right ear lobe base and post aspect of base of head with junction of head and neck directed medially and downwards 30 cm.x 6 cm. x 4 cm. Incised wound left side of middle of neck 11 cm. x. 4 cm. x bone deep and fracture to the left hand. There was an internal injury on the left partial region and the cut injury on the neck. The cause of the death was haemorrhagical shock. Therefore, the injuries correspond to the prosecution case that a sharp cutting weapon was used. On article-5, which was recovered at the instance of the accused, human blood was found. Therefore, merely on the basis of some admission given as confusing between sattur and sword by a 12 year old child witness, the consistent evidence of these three witnesses cannot be discarded. The learned counsel for the Appellant submitted that P.W.10- Shashikala has admitted in the cross-examination that she obeys her parents and, therefore, she was tutored. P.W.10 was nine years old. It was a general question to which she answered in the affirmative.

11. The learned counsel submitted that P.W.2- Basappa did not give any medical attention to the deceased Ambanna and instead rushed to the police station which is an unusual behavior. There is

no merit in this contention. When P.W.2- Basappa found Ambanna, he was dead and Basappa had seen the accused running away and there was no purpose of taking Ambanna to the hospital but his anxiety could have been to apprehend the assailants and to save further calamities.

12. The learned counsel for the Appellant then submitted that the version that P.W.2- Basappa could not catch the Appellant is not believable as the Appellant was older in age. There is no merit in this contention as well. There could be various reasons as to why P.W.2 was not successful in catching the assailants. It was not a race. It could be the state of mind or the topography of the area which might have made it difficult to give a chase. The evidence of P.W.2 cannot be discarded on that count.

13. As regards the motive, the prosecution examined two witnesses i.e. P.W.5- Nagnath Achlere and P.W.9- Malkappa Panshetty. Both these witnesses deposed that the deceased and the Appellant were called to the village in the meeting. The Appellant had alleged that the Ambanna was practicing black magic. In the meeting, Ambanna had complained that the allegations were useless. Thereafter 4-5 persons from village resolved the dispute and asked the Appellant to behave.

14. The learned counsel for the Appellant submitted that these two witnesses i.e. P.W.5- Nagnath and P.W.9- Malkappa and

P.W.2- Basappa have referred to an incident which took place two years back and nothing thereafter and, therefore, it cannot be said that the Appellant had any motive to commit the murder of Ambanna. The learned counsel submitted that cross-examination of P.W.5 and P.W.9 also brings out this position. We do not find any merit in this submission. P.W.2 had deposed that though the incident took place two years back, he was not at talking terms with the Appellant. It is not brought out in the cross-examination of any of these witnesses that the relation between the Appellant and deceased Ambanna were cordial. As rightly contended by the learned APP, in view of the trustworthy direct evidence of the eye witnesses unshaken in the cross examination, motive is not crucial in this case.

15. The spot panchanama at Exh.19 was drawn to which P.W.1- Santosh, the Panch was examined. The spot panchanama showed that there was a circular well around which there were bushes and trees. P.W.11- A.P.I. Bhosale stated that the body was lying on the ground 10 ft. away from a cot. The presence of cot is also deposed by P.W.10- Shashikala, the child witness. The learned counsel for the Appellant submitted that there is no mention of any cot in Exh.19, the spot panchanama, which is a material discrepancy. According to us, this is not a material discrepancy. The fact that the body of deceased was found lying on the ground is a consistent version of the prosecution witnesses. Merely, because the cot is not mentioned in the spot panchanama, it cannot lead to the conclusion that the prosecution evidence is unsafe to rely upon.

16. The learned counsel for the Appellant then argued that P.W.11- A.P.I. Bhosale had deposed that the police had visited the spot of incident on 23 November and 28 November 2008 but found nothing, but the recovery made at the behest of the Appellant of blood stained clothes was only hundred feet away from the place of incident and it is inconceivable that it is not so found by the police. The evidence of recovery cannot be discarded on this count. P.W.4- Chandrashekar, the Panch witness for the seizure panchanama Exh.30 and 31 stated that that the clothes and the sword were hidden in the bushes after digging a hole, and they were buried and covered with soil. Therefore, the blood stained clothes of the Appellant and the sword could not be found when the Police visited the spot. The panchanama (Exh.31) and the deposition of P.W.1- the Panch show that the Appellant produced his pant and shirt i.e. article Nos.6 and 7 and the sword i.e. article No.5 which were buried in the soil near the well where the incident took place. Nothing is brought out in the cross-examination as to why this recovery should be doubted. The clothes and the sword article Nos.5, 6 and 7 were sent to the Chemical Analyzer under requisition at Exh.47 as deposed by P.W.11- A.P.I. Bhosale. CA reports were received and exhibited at Exh.23 and 24. CA report stated that the blood stains were found on the clothes and the weapon and also on the soil. Though the blood group was inconclusive, the CA report showed that the articles had human blood. Nothing has been elicited by the defence in this regard.

17. The learned counsel for the Appellant strenuously urged that the evidence of the prosecution witnesses P.W.7- Vijayalaxmi, P.W.8- Rekha and defence witness DW-1-Virbhadraya Swami would show that the Appellant could not have been on the spot when the incident took place.

18. P.W.7- Laxmi deposed that on the date of the incident, she along with her daughter and other three women were working in the sugarcane field of one Shirsu Mashale. On that day, in the morning at about 10 to 10.30 a.m., Appellant came to them and inquired about money. She told him that she does not have any money with her and that money is already paid to his father. The Appellant assaulted on her back with a slipper. He also tried to assault her by a sword, but her daughter and D.W.1- Virbhadraya Swami obstructed. People gathered, so Appellant left the place. D.W.1- Virbhadraya Swami sustained injury to his palm and Rekha sustained injury on buttock. Similarly, P.W.8- Rekha daughter of P.W.7 Laxmi deposed that she along with her mother had been to the field of Mashale for cleaning sugarcane. At about 10.30 a.m., Appellant slapped her mother by a slipper. Her uncle D.W.1 received injury to his palm and she received injury to her buttock. In a question put to the Appellant under section 313 of the Code of Criminal Procedure, the Appellant admitted that this incident took place except that he did not use any sword. The defence witness D.W.1- Virbhadraya Swami deposed that on that day at about 10.30

a.m., Appellant came to them and started asking to the wife of his brother to pay money. She replied that they had already paid the amount. The Appellant assaulted her and by a stone. This continued for about half an hour. Then Appellant again came back and had brought a sickle and tried to assault Vijayalakshmi. Virbhadraya and others also intervened. Virbhadraya received injury to his left palm. Appellant he was taken by them to his vasti (settlement). The incident was informed his brother and uncle. Then they came to their work at around 12.00 noon. At about 1.30 p.m. they took lunch. At that time, Shivlingappa Nivargi, Accused no.1 (now deceased) came to his vasti. On that day, they worked up to 5.00 p.m. Then he went to doctor for treatment.

19. The learned counsel submitted that the incident of assault by the Appellant on P.W.7- Vijayalaxmi, P.8- Rekha and D.W.1- Virbhadraya Swami which is brought on record will clearly show that the said incident took place up to 11.00 a.m. and, therefore, it was not possible for the Appellant to reach at 11.30 a.m. to the spot of incident where the deceased Ambanna was alleged to be murdered. The learned counsel for the Appellant further submitted that as per the version of D.W.1- Virbhadraya which was unshaken in the cross-examination, the Appellant after the first incident was taken to the settlement and did not go to the spot where the murder was committed. The APP submitted being a case of alibi the burden of proving this fact is upon the Appellant.

20. The assault on P.W.7- Vijayalaxmi and P.W.8-Rekha is not a crime for which the Appellant is being prosecuted. Therefore, the depositions of these witnesses were entirely unnecessary for the prosecution. The Appellant is accepting the occurrence of this assault (without the sword) and assault on D.W.1- Virbhadraya Swami to demonstrate that the Appellant was not present and could not have remained present when and where the murder of deceased Ambanna took place. This is, therefore, a defence of alibi raised by the Appellant. As regards the contention of the Appellant that the Appellant could not have reached the spot of incident at 11.30 a.m. since till 11.00 a.m. he was engaged in the incident involving assault on P.W.7, P.W.8 and D.W.1, no such questions have been put to P.W.11- the Investigating Officer. The D.W.1 in his evidence has admitted that distance between his land and the land of Nambu was 1 km. Therefore, it is not difficult for a person to reach 1 km. in half hour. As regards the deposition of D.W.1 that after the assault on P.W.7 and P.W.8 and himself, the Appellant was taken to vasti, as stated earlier, this is an attempt of the Appellant to prove his alibi. D.W.1-Virbhadraya, though he was injured along with his family members P.W.7 and P.W.8, made no attempts to lodge any complaint with the police till the accused was arrested five days thereafter on 29 November 2008. This conduct is not normal. No particulars were given as to what happened after the Appellant was taken to the settlement whether he was placed under confinement whether he was pacified by somebody. No family member of the Appellant was

examined as to what happened after the incident of assault on D.W.1. Thus the version of defence that the Appellant was taken to settlement is not trustworthy and does not inspire confidence to hold that the Appellant has proved his alibi. Therefore, the defence of alibi of the Appellant that the Appellant could not have reached the spot between 11.00 a.m. to 11.30 a.m. and that the Appellant was not on the spot when the alleged incident took place cannot be accepted.

21. To conclude, therefore, the prosecution has proved the charge under section 302 of I.P.C. by leading evidence of three eye witnesses whose version is consistent. There is recovery of a weapon at the instance of the Appellant which weapon corresponds to the injuries on the body of the deceased. The blood found on the weapon and the clothes of the accused is human blood. The discrepancies sought to be argued by the defence are not material discrepancies so as to discredit the case of the prosecution or to create any reasonable doubt. The Appellant has failed to prove the defence of alibi. The prosecution has proved that the Appellant has committed murder of Ambanna Lambu on 23 November 2008 and, thus, has committed an offence punishable under section 302 of I.P.C.

22. The appeal is dismissed.

(C.V. BHADANG, J.)

(NITIN JAMDAR, J.)