

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

**CRIMINAL APPEAL NO.562 OF 2021  
with  
INTERIM APPLICATION NO.1669 OF 2021**

Sakharam Raoji Dharap  
40 years, Occ.: Labour  
r/o. Vafeghar, Adivasi Wadi,  
Taluka Sudhagad ... Appellant  
District Raigad  
(at present lodged at Nashik Road Central  
Prison)

**Vs.**

State of Maharashtra  
through Pali Sudhagad Police Station ... Respondent  
vide C.R. No.7 of 2010

Ms.Ameeta Kuttikrishnan, Advocate appointed for the Appellant  
Mr.S.S. Hulke, APP, for Respondent – State

**CORAM: S.S. SHINDE &  
SURENDRA P. TAVADE, JJ.**

**JUDGEMENT RESERVED ON: DECEMBER 10, 2021  
JUDGEMENT DELIVERED ON: DECEMBER 16, 2021**

**JUDGEMENT (PER S.S. SHINDE, J.):**

**1.** This Appeal challenges the impugned judgement and order of conviction dated 24<sup>th</sup> February, 2011 passed by the learned Additional Sessions Judge, Mangaon, District Raigad in Sessions Case No.17 of 2010 thereby convicting and sentencing the appellant – accused to undergo rigorous life imprisonment and to

pay fine of Rs.1,000/- and in default thereof, to suffer RI for six months.

2. The prosecution case in brief is that the father of the accused i.e., Ravaji Govind Dharap was residing with his family consisting of his wife Sangeeta (mother of the accused) and sons Ravindra and Chandrakant at Mouje Wafeghar Adivasi Wadi, Taluka Sudhagad, District Raigad. The accused is the younger son of Ravaji Dharap, who was staying at Panvel on account of his work. It is alleged that on 14.1.2010 at about 9.45pm, in the presence of Ravaji and Sangeeta, Ravindra was having some interaction with the accused. Hence, a scuffle took place between Ravaji and Ravindra. Ravindra brought an axe to the spot, which Ravaji attempted to snatch and yelled at Ravindra as to whether he was attempting to hit Ravaji. It is alleged that the accused Sakharam gave blows on the head of Ravindra, due to which he received head injury and he became unconscious. It is alleged that Ravaji left the spot.

In contrast and variance to the above allegation, it is further alleged that the accused Sakharam and Ravindra were not in good terms. Ravindra brought an axe from his room. However his

mother pacified him and he went back to his room. It is alleged that Ravindra threw an article towards the son of Sakharam, which annoyed Sakharam. Hence, Sakharam pelted a "pata" towards Ravindra, due to which he received head injury. Ravindra became unconscious and was fell on ground. It is further alleged that Sakharam took an axe and gave a blow on his person. Thereafter, Sakharam threw the axe unattended and ran towards the forest area. It is alleged that Ravindra Succumbed to his injury on the spot.

PW1 Shankar Kashiram Belose, who is the Police Patil, lodged the First Information Report on 15<sup>th</sup> January, 2010 being C.R. No.7 of 2010 in Pali Police Station, which was registered for the offence punishable under sections 302 and 506 of the Indian Penal Code.

After completion of investigation, Ravaji was dropped as accused and chargesheet was filed only against the appellant. The case was then committed to Sessions Court, Mangaon, District Raigad as Sessions Case No.17 of 2010 for trial. Thereafter, charge came to be framed to which appellant pleaded

not guilty and claimed to be tried. The trial Court after a full fledged trial, vide the impugned judgement and order dated 24<sup>th</sup> February, 2011, convicted the appellant – accused as aforesaid and hence, this Appeal.

**3.** The learned Counsel appearing for the appellant submitted that if the evidence of the Police Patil is read carefully, no role or overt act is attributed qua the present appellant. The entire case of the prosecution rests upon the alleged confessional statement of the appellant recorded by the Magistrate under section 164 of the Code of Criminal Procedure and the alleged recovery from the appellant. It is submitted that the alleged confessional statement does not fulfill the requirement of provisions of section 164 of Code of Criminal Procedure. It is submitted that there was no eye witness to the incident. At the time of the alleged memorandum statement of the appellant recorded by the concerned police officer, the appellant was handcuffed and, therefore, no implicit reliance could have been placed on such memorandum statement and pursuant to it, the recovery of the articles. Therefore, it is submitted that the learned Magistrate recorded the statement of the appellant under section

164 of Code of Criminal Procedure. Before recording such statement, he dealt with the remand application of the appellant and sent him to judicial custody. It is submitted that the said Magistrate was not competent to record the statement under section 164 of Code of Criminal Procedure in view of the fact that the said Magistrate had undertaken adjudication of remand application and enquiry. Therefore, the learned Counsel appearing for the appellant submits that the appeal may be allowed.

**4.** On the other hand, the learned APP appearing for the Respondent relying upon the findings recorded by the trial Court, the contents of the alleged confessional statement of the appellant – accused and recovery of the articles, submitted that the findings recorded by the trial Court are in consonance with the evidence on record and, therefore, interference in the impugned judgment and order is not warranted.

**5.** We have given careful consideration to the submissions of the learned Counsel appearing for the appellant and the learned APP appearing for the Respondent – State. With their able assistance, we have perused the entire evidence. It appears that there is no direct evidence to the alleged incident inasmuch as

there is no eye witness. To prove its case, the prosecution has, in all, examined 10 witnesses. PW1 Shankar Kashiram Belose is the Police Patil, who had reported the incident to the police. PW2 Dr.Bharati Vinod Jaiswal is the Doctor, who had conducted postmortem on the dead body of Ravindra in the PHC Pali. PW3 Jaykumar Nage, Circle Officer, had visited the site and drawn map at Exhibit 17. PW4 Pappu Mahamad Maniyar is the panch witness in whose presence, as per the memorandum of the accused, weapon was recovered alongwith other articles under panchanama. PW5 Waman Laxman Jadhav is the panch witness for the spot panchanama at exhibit 22. PW6 Dattatraya Chandra Chavan is another panch witness for the panchanama of the clothes of the accused at exhibit 25. PW7 Ganesh Bhivaji Bhure, is the panch witness for the alleged spot panchanama and recovery of Pata. PW8 Shakuntala Dharap is the witness of the alleged incident but turned hostile. PW9 is Dr.Bharati Jaiswal, who is again examined in this case. PW10 Uddhav Gyanba Jadhav is the Police Inspector who had registered the offence and was in charge of investigation.

6. As already observed, the First Information Report was registered pursuant to the complaint given by PW1.

PW1, in his deposition before the Court, has stated that he was the Police Patil of Vafeghar, Adivasi Wadi and he knew Ravaji Dharap as a resident of Adivasi Wadi. Ravaji had 3 sons – Sakharam being the youngest and Ravindra being the second son. Sakharam resided at Panvel. On 4.1.2010, between 9pm to 9.30pm, Ravaji alongwith his wife went to him and told him that Ravindra was killed. So, PW1 accompanied them to the spot i.e., the house of Ravaji, where he saw that blood was oozing from the head of Ravindra. He then informed the Pali police who came to the spot and in his presence, Ravaji disclosed to the police that Ravindra was quarrelling with the son of Sakharam when Ravindra took out an axe. At that time, Ravaji told Ravindra '*bhadvya, mala marayachya aivaji mi tulach marato*'. Then, the dead body of Ravindra was taken to the police station alongwith Ravaji. Thereafter, statement of PW1 was recorded, as above.

7. Upon a careful perusal of examination in chief of PW1, nowhere he has stated about the involvement of the accused Sakharam. On the contrary, it appears that Ravaji Dharap reacted

to the action of Ravindra to take out the axe and said '*bhadvya, mala marayachya aivaji mi tulach marato*'.

8. During the cross-examination of PW1, he stated that the accused present in the Court was Sakharam. He never stated to the police that Sakharam made an assault on Ravindra. It is evident from the deposition of PW1 that Sakharam has no role to play in the alleged commission of offence. Therefore, the evidence of PW1 to prove the involvement of Sakharam in the alleged offence is not useful.

9. It appears that one Dr.Bharati Vinod Jaiswal (PW2) was examined by the prosecution. He stated that the dead body of Ravindra was brought to PHC, Pali. At the relevant time, he was on duty. On examination, he found CLW over right temporal region, CLW over occipital area; contusion over left neck middle; neck side 6x6 cm during internal exam. He found CLW right temporal area bone deep and CLW over occipital area bone deep and all were ante mortem injuries. He found depressed fracture of temporal bone right side and comminuted fracture of occipital bone. Laceration of temporal lobe 4x3cm, laceration over occipital lobe 3x2 cm. The internal injuries are corresponding to the

external injuries as shown in col. 17 and 19 of postmortem notes. He has deposed that the cause of death is hemorrhagic shock due to head injury. All observations are in postmortem notes. He has deposed that the injuries are not possible in one blow and they require successive blows. Such injuries are sufficient to cause death in ordinary course of nature. He had also deposed that the depressed fracture is possible due to infliction of Pata (article 8).

During his cross examination, he stated that the deceased Ravindra had consumed food prior to six hours of his death.

**10.** It appears from the evidence of PW2 that the death of Ravindra was homicidal, however, the real question is, who was the author of the injuries of the deceased Ravindra. The prosecution has placed heavy reliance upon the alleged statement of Sakharam recorded by the Magistrate under section 164 of the Code of Criminal Procedure.

**11.** During the recording of the statement of the accused under section 313 of the Code of Criminal Procedure, the following question (question No.15) and the answer thereto is reproduced is hereinbelow for ready reference:

“Q.No.15: It is in the evidence of witness PW11 that on 21.1.2010, you voluntarily shown willingness to record the confession before the JMFC Roha. She gave you 24 hrs time for reflection. What do you want to state about the same?

Ans.: Time of 24 hrs was given. It is not true that I made voluntary statement.”

**12.** It is crystal clear from the reading of answer to question No.15 as referred to above, that the accused denied the suggestion that the statement made by him under section 164 of Code of Criminal Procedure was voluntary. Therefore, it can be safely concluded that the accused retracted the statement under section 164 recorded before the Magistrate.

**13.** The learned Counsel appearing for the appellant has also brought to the notice of this Court that the alleged confessional statement under section 164 of Code of Criminal Procedure was not signed by the appellant. Her submission is that the said statement was not voluntary and same was not signed by the appellant and, therefore, the said statement cannot form the basis of conviction. She has placed reliance on the judgment of the Bombay High Court in the case of **Abdul Razak Shaikh Ismail**

**Shaikh vs. State of Maharashtra<sup>1</sup>** and submitted that in absence of signature of the accused, the said statement cannot be relied upon.

**14.** As it is already observed, the said alleged statement before the Court under section 164 of the Code of Criminal Procedure had been retracted by the appellant and also, it was not signed by him. The Division Bench of this Court (Coram: R.A. Jahagirdar and A.D. Tated, JJ.), while explaining the purport and scope of section 164 of Code of Criminal Procedure, held thus:

“10. .... The provision for obtaining signature of the accused on the confession recorded by the Magistrate and that too in the presence of the very Magistrate who recorded the confession, under sub-section (4) of Section 164 and sub-section (5) of Section 281 is a salutary provision and it is meant to safeguard the interest of the accused making the confession. There are in built safeguards in the provisions of Section 164 and, therefore, it is necessary for the Magistrate to follow scrupulously the procedure laid down in that section. As provided in Section 463 (1), Code of Criminal Procedure, certain omissions may be supplied by examining the Magistrate who recorded the confession; but there are certain omissions which cannot be supplied by recording evidence of the Magistrate. Failure to obtain signature of the accused on the confession recorded by the Magistrate is an omission which can never be supplied by examining the Magistrate on oath touching the confession recorded by him. As already stated, the provision that the Magistrate should obtain signature of the accused on the confession recorded by him is a salutary provision meant for safeguarding interests of the person who made the confession and as

---

1 1987 Mh.L.J. 863

such in our opinion it is a mandatory provision and in the present case that mandatory provision having not been complied with by the Magistrate Mr. Vyavahare, the confession recorded by him cannot be read into evidence. We, therefore, ignore that confession and exclude it from consideration in this case.”

**15.** We also find considerable force in the submission of the learned Counsel appearing for the appellant that the Magistrate who has dealt with the remand application of the appellant was not expected to record the statement of the appellant under section 164 of the Code of Criminal Procedure. In support of the said submission, the learned Counsel has brought to the notice of this Court sub-section 6 of section 164 of Code of Criminal Procedure, which reads as follows:

"164. Recording of confessions and statements.

...

....

(6) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.”

**16.** She also placed reliance on paragraph 14 of the judgment in the case of **Maruti Narayan Kalamkar vs. The State of Maharashtra**<sup>2</sup> to contend that insofar as the recovery of the

---

<sup>2</sup> 1997 ALL MR (Cri.) 559

articles is concerned, at the highest, the said evidence if proved by the prosecution, can be used for the purpose of corroboration. However, in the present case, the prosecution has utterly failed to bring on record substantial piece of evidence in the nature of eye witness or any other evidence. As already observed, the alleged confessional statement under section 164 of the Code of Criminal Procedure had been retracted by the accused and the said statement was not signed by the accused and, therefore, the said statement could not have been relied upon by the trial Court.

**17.** Insofar as the alleged recovery of the articles pursuant to the memorandum statement given by the accused is concerned, it has come in the evidence of the panch witness that at the relevant time, when the memorandum statement was made by the accused, he was handcuffed. The Division Bench of this Court (Coram: P.V. Kakade & J.A. Patil, JJ.) in the case of **Laxman Keraba Patil vs. State of Maharashtra**<sup>3</sup>, in paragraph 11 has held thus:

“11. The next piece of circumstantial evidence is, the alleged recovery of blood stained clothes, other articles and dagger having blood stains at the instance of the accused.

---

3 2000 All. MR. (Cri.) 1530

P.W. No. 8 Giri, the panch witness has stated that, on 11-9-1995, the accused made statement in his presence at the police station that he had hidden the knife and clothes in a land and he would show the place to the police. Accordingly, memorandum panchnama Exh. 20 was made. Thereafter the accused led the police and panchas to the place where sugarcane crop was grown and accused produced one pant on which blood stains were found. Thereafter he further led them to another field and produced one bag, a dagger and a sandal alongwith a banian, a shirt and a pant. There was a sheath of dagger also. All these articles were seized by the police under panchnama Exh. 21. Said articles were at Nos. 19 to 26. In the course of his cross-examination, the panch witness has admitted that, during the entire process, the accused was handcuffed and was taken handcuffed in the jeep with the police.

Now, apart from the merits of this particular piece of circumstantial evidence i.e. recovery contemplated under section 27 of the Evidence Act, it is to be noted that, factum of handcuffing of the accused shows that it cannot be said beyond doubt that the recovery was voluntary and not the result of duress, threat or pressure by the police authorities.

This Court, in the case of Shankar Raju Banglorkar v. State of Goa, has held that the disclosure by the accused while he was handcuffed, amounted to disclosure under duress, pressure or threats given by police and hence is not admissible in view of Article 20 of the Constitution. This view was again relied upon by the Division Bench of our High Court in the case of Deoraj Deju Suvarna v. State of Maharashtra, 1994(4) Bom.C.R. 85 : 1994 Cri.L.J. 3602, wherein similar view was taken. We may observe that, no doubt that, while disclosure of the fact is made by the accused as contemplated under section 27 of the Evidence Act, he is in police custody, however, the voluntariness of his statement is guaranteed by the testimony of independent panch witnesses. However, when the accused is handcuffed during the process, it is nothing but physical manifestation of possibility of duress, threat or pressure by the police authority and, therefore, voluntary nature of the disclosure

becomes doubtful.

Apart from this aspect, the evidence on record is conspicuously silent if the said articles were sealed or not after its seizure because it is not testified to by the panch witness nor by the Investigating Officer in the course of their evidence. Therefore, in our considered view, the entire evidence regarding recovery of incriminating articles at the instance of the accused is rendered doubtful and thus cannot be accepted at all.”

**18.** In the present case also, during the entire process of the alleged recovery of the articles, as admitted by the panch witness, the appellant was handcuffed by the police at the relevant time of finding out the allegedly recovered articles. In the aforesaid authoritative pronouncement, this Court has taken a view that the factum of handcuffing of the accused shows that, it cannot be said beyond doubt that the recovery was voluntary and not the result of duress, threat or pressure by the police authorities.

**19.** In the light of the discussion in the foregoing paragraphs, in our opinion, it is not necessary to elaborately discuss the evidence of other witnesses i.e., panchas and other witnesses on recovery of the articles in view of the legal position stated in the case of **Laxman Keraba Patil vs. State of Maharashtra (supra)**, that when the accused is handcuffed and the articles are recovered

pursuant to his statement, cannot be said to be beyond doubt that the recovery was voluntary and not the result of duress, threat or pressure by the police authorities.

**20.** In the light of discussion in foregoing paragraphs, we are of the considered view that the appellant – accused deserves to be given benefit of doubt and is entitled to be acquitted. Accordingly, the following order is passed:

#### **ORDER**

- i) The impugned judgment and order dated 24<sup>th</sup> February, 2011 passed by the learned Additional Sessions Judge, Mangaon, District Raigad in Sessions Case No.17 of 2010 is set aside;
- ii) The accused be set at liberty and released forthwith unless required in any other case;
- iii) The accused shall be released forthwith initially on furnishing personal bond of Rs.5,000/-, on his undertaking that within two months from his release, he would furnish one solvent surety in the like amount;

- iv) The accused shall comply with the mandate of section 437A of Code of Criminal Procedure upon his release on furnishing bond of Rs.5,000/-.
- v) Fine amount, if any, paid by the appellant - accused be refunded to him.

**21.** We appreciate the able and quality assistance rendered by the advocate Ms.Ameeta Kuttikrishnan and we quantify her fees at Rs.10,000/- to be paid by the High Court Legal Services Committee within a period of four weeks from today.

**22.** Criminal appeal stands disposed of accordingly.

**23.** In view of the disposal of the Appeal, nothing survives in the Criminal Interim Application No.1669 of 2021 and the same stands disposed of accordingly.

**(SURENDRA P. TAVADE, J.)**

**(S.S. SHINDE, J.)**

VISHWANATH  
SATYANARAYANA  
SHERLA

Digitally signed by  
VISHWANATH  
SATYANARAYANA  
SHERLA  
Date: 2021.12.16  
14:50:30 +0530