

Uday S. Jagtap

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

CRIMINAL APPEAL NO. 619 OF 2012

Raghunath Machhindra Mali
Age – 41 years, Occ. Agriculturist,
R/o. Mali Vasti, Taluka Mohol,
Dist. Solapur
(At present accused in Solapur
District Prison, Solapur) .. Appellant

V/s.

The State of Maharashtra .. Respondent

.....
Mr. D.G. Khamkar for the appellant
Mr. Arfan Sait, APP for respondent – State

**CORAM : SMT. SADHANA S. JADHAV &
PRITHVIRAJ K. CHAVAN, J.J.**

DATE : 13th OCTOBER, 2021

JUDGMENT :- *(Per Prithviraj K. Chavan)*

1. Challenge in this appeal is to the judgment and order of conviction awarded by the learned Additional Sessions Judge, Solapur in Sessions Case No. 66 of 2012 whereby the appellant came to be sentenced for life imprisonment with fine of Rs.1000/- in default to undergo 6 months R.I. for having committed murder of his nephew – Somnath Mali.
2. The facts germane for disposal of this appeal can be

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summarized as follows :-

3. The first informant and PW-1 Sham Mali is the nephew of the appellant – Raghunath Mali. The first informant is a driver of a Mahindra Bolero Jeep having Registration No. MH-13 AC 0788.
4. The father of the first informant – Jalindar Mali, appellant – Raghunath and Navnath have a common well with an electric motor installed thereon in order to fetch water for irrigating their respective lands. An arrangement has been made to fetch the water by each of them, by rotation.
5. The appellant has been on cross terms with the family of first informant – Sham since 2 years prior to the incident, on account of dispute of sharing the water from the common well. The appellant, therefore, used to abuse and threaten the first informant – Sham, his family and victim Somnath on account of their share in the well water.
6. On 28th November, 2015 around 9.15 p.m. PW-1 Sham was returning to his farm house in his jeep from Mohol Railway Station towards his *vasti*. In the headlight, near the field of one Rajesh Khapale, he noticed the appellant assaulting deceased Somnath with an iron chain. He witnessed the appellant inflicting over the forehead of the deceased Somnath by means of an iron chain. He immediately stopped the jeep and rushed towards the appellant.

However, the appellant made his escape good towards the *vasti*.

7. PW-1 Sham noticed deceased - Somnath lying on the ground motionless and his body was cold. After hearing his hue and cry his other relatives came to the spot. He was first taken to Dr. Garad Hospital, Mohol but since Dr. Garad was not present, in the same bolero jeep Somnath was taken to Kande Hospital, Mohol, in front of S.T. stand. Dr. Kande informed PW-1 Sham to take his brother to the Government Hospital, Mohol. Somnath was thereafter carried to Government Hospital, Mohol. However, they declared him brought dead.
8. A report came to be lodged with Mohol Police Station, on the basis of which a crime was registered bearing No. 368 of 2011 under Section 302 of the Indian Penal Code on 29th November, 2011 around 00.35 hours.
9. PW-8 Shivshankar Bondar - Investigating Officer conducted investigation into the crime. He drew inquest panchanama, recorded the statements of the witnesses and seized clothes on the person of the deceased - Somnath.
10. The Investigating Officer had visited the spot and drew a spot panchanama. He seized a Bajaj M-80 motorcycle which was without number plate. Pursuant to a disclosure statement made by the appellant in the custody, iron chain

used in the commission of offence came to be recovered from the farm house of the appellant in the presence of panchas.

11. After investigation, he filed charge-sheet in the Court of Judicial Magistrate, First Class, which ultimately committed to the Court of Sessions.
12. The learned Additional Sessions Judge framed a charge (**Exh.4**) under Section 302 of the Indian Penal Code. The appellant pleaded not guilty and came to be tried. His defence was that the deceased suffered accidental injuries on his forehead due to a fall from the jeep and motorcycle under the influence of liquor. No defence evidence has been adduced.
13. We heard learned Counsel for the appellant and the learned APP for the State. The learned Counsel for the appellant invited our attention to certain glaring anomalies and discrepancies in the prosecution case and submitted that the ocular evidence of PW-1 Sham does not find any support from the medical certificate as well as post mortem report of deceased Somnath. Our attention has also been drawn to the nature of the injuries suffered by the deceased Somnath as well as non-production of chain alleged to have been used in commission of the offence by the appellant.
14. The learned Counsel vehemently urged to give a benefit of doubt to the appellant since he has been implicated falsely

on account of enmity between the family of the first informant and the appellant.

15. On the other hand, the learned APP supported the impugned judgment of conviction.
16. To support the charge, prosecution has examined in all 8 witnesses.
17. Deceased Somnath aged about 26 years was a real brother of PW-1 Sham and son of PW-2 Jalindar Mali. Appellant is the real brother of PW-2 Jalindar Mali, who alleged to have murdered his nephew deceased - Somnath.
18. Ocular testimony of PW-1 Sham indicates that on 28th November, 2011 he ferried the passengers in his jeep to village Ranmasle and appellant was returning home. On the same day, appellant had his rotation to fetch water from the well from 12.00 noon till 12.00 noon of the following day.
19. At about 9.15 p.m. he started proceeding to his *vasti* (farm house), located on station road, Mohol. When his jeep reached near the field of one Rajesh Khapale, in the headlight of the jeep he witnessed appellant assaulting Somnath by means of an iron chain. He witnessed the appellant dealing a single blow of chain on the forehead of Somnath. The appellant escaped from the spot immediately after noticing PW-1 Sham.

20. Somnath was lying on the spot with injuries on his forehead and a wheal mark. He alighted from the jeep. Somnath was unconscious. He made a hue and cry and, therefore, his parents, brothers, sisters, maternal uncle reached the spot from their house located at about 200 to 300 feet from the spot of incident. Somnath was immediately carried to Dr. Kande Hospital in the same jeep. After clinically examining Somnath, Doctor advised them to take him to Government Hospital, Mohol. However, on reaching the Government Hospital, Mohol, Doctor declared him brought dead. The body was sent for post mortem and on the same day, a report came to be lodged in the mid-night. The report is proved at **Exh.19**.
21. Admittedly, PW-2 Jalindar Mali had not witnessed the incident. The only direct evidence is that of PW-1 Sham. During his cross examination, the defence has brought out the topography of the spot wherein it has been shown that the family of the appellant as well as the complainant have a common access to their homes from the cart way of the land of his uncle Gorakh. It has also been admitted by him that there were standing crops of sugarcane at the relevant time in their respective fields.
22. A suggestion has been given to this witness by the defence that deceased Somnath had eloped with the daughter of one Vilas Tele two years ago and that his daughter returned

home after three years and now her life is normal. This suggestion is not insignificant in light of the fact that PW-8 Shivshankar Bondar - Investigating Officer, in his cross-examination admits that during investigation it was transpired that the deceased Somnath had eloped with daughter of Vilas Tele and had stayed at Satara for some time. PW-8 Shivshankar Bondar, therefore, first suspected Vilas Tele and Malti Tele as the persons responsible for causing death of the deceased. He had also requested the Cyber Crime Cell to investigate the call details of appellant Raghunath as well as Shakuntala and Malati Tele. Even though suggestions in that regard given to PW-1 Sham and PW-2 Jalindar Mali were denied that deceased – Somnath had any relations with daughter of Vilas Tele, yet it assumes significance in light of the fact that the complicity of the appellant has not been proved at its hilt by the prosecution.

23. PW-1 Sham in his cross-examination admits that when he reached the spot and noticed appellant assaulting Somnath, he did not try to catch the appellant nor made any attempt to chase him. When he tried to talk to the deceased Somnath about the incident, deceased Somnath could not respond. He admits that Police Station, Mohol is in front of Government Hospital. They took injured to the Government Hospital at mid-night for the treatment of Somnath. However, no report was lodged with the Police Station, Mohol. Whether PW-1 Sham was in a position to identify the appellant only in the headlight of the jeep when he

deposes that immediately after the assault, appellant escaped from the spot is also uncertain *sans* any corroboration.

24. It is an admitted fact that there is an enmity between the appellant and the family of the first informant and PW-2 Jalindar Mali on account of fetching water from the well. A suggestion was given that deceased Somnath was a habitual boozier, who, while driving the motorcycle, was under the influence of the liquor and fell on the road resulting into injuries on the forehead and died due to such accidental injuries, which he denied.
25. There is no CA report produced on record by the prosecution *qua* the viscera of the deceased to indicate as to whether there were traces of alcohol. There is no blood report also. It has been suggested to PW-8 Shivshankar Bondar in his cross-examination that he deliberately withheld the C.A. report, as by producing the same, it would have gone against the prosecution. He had denied the said suggestion. Be that as it may.
26. The conduct of PW-1 Sham in not making any attempt to catch hold of the appellant or at least to chase him gives rise to a room for doubt as to his natural conduct since the deceased was his real brother. Secondly, why the first information report has not been lodged immediately when the appellant was known to all and the Police Station, Mohol was in front of the Government Hospital, Mohol. It

probabalises the defence that the assailants could be someone else as impliedly indicated by the Investigating Officer.

27. PW-7 Dr. Akash Patil, who conducted the post mortem over the corpse of the deceased (**Exh.39**) noticed the following injuries :-

- “1. Abrasion with contusion on fore head middly of size 1 1½ x ½ cm*
- 2. Abrasion on left ear.*
- 3. Minor fracture was found in frontal bone of size 1 x ½ cm.*
- 4. Slight haematoma seen in frontal lobe.”*

28. According to him, death of Somnath was because of shock due to rigorous injury. He further opined that injuries in column no. 17 and 19 are correlated, which are possible due to a blow of an iron chain of a motorcycle and were sufficient in the ordinary course to cause death of the person.

29. When he was cross examined, certain vital admissions surfaced which would indicate that even death of the deceased could have been caused due to fall from a motorcycle. It would be apposite to extract his cross which is self-explanatory.

- “5. Mild abrasion and contusion may be possible due to fall from the motorcycle. The wheal marks are appeared if the blow is inflicted by flexible*

articles like chain, rope and whip. The witness volunteers that the wheal marks are varies from nature and size of the article. I found chain marks on fore head of the deceased Somnath. It is not true to say that I deposed falsely that I found chain marks on the fore head of deceased Somnath.

6. It is not true to say that injuries noted in column No. 17 are not possible by chain. The injuries noted in column No. 17 may be possible if a person fell from the motor cycle.

7. The injuries noted in column No.19 may be possible by stiff and hard weapon. These injuries may not be possible if a person fell down from the motor cycle on hard surface. The injuries noted in column No.17 viz. Superficial injuries may not be possible in ordinary course of nature to cause the death of a person. If a person rides on vehicle under influence of liquor and met with an accident may cause the injuries noted in column No.17. The witness volunteers that the forceful impact is required to cause the death of a person.”

30. If a person rides a motorcycle under the influence of liquor and meets with an accident, he might sustain injuries noted in column No.17. As already stated, there is no CA report *qua* viscera and, therefore, it is difficult to believe that the death of the deceased had been caused due to a single blow of a chain on his forehead, as deposed by PW-1 Sham.
31. There are few more reasons to suspect the authenticity of the post mortem report (**Exh.40**). There are over writings on

the first page itself indicating as to who had brought the dead body of the deceased and who had identified the same. Column no. 17 indicates two injuries i.e. :-

- “1. Abrasion with contusion on forehead middly of size 1 ½ x ½ cm*
- 2. Abrasion on left ear.”*

32. However, medico-legal certificate of Rural Hospital, Mohol shockingly reveals that the doctor who was on duty at Rural Hospital, Mohol had scored off brief history on the case paper. The age of the deceased was shown as 40 years whereas from the record and evidence of witness it has transpired that he was 26 years. The date of the certificate is 1st December, 2011 and the injuries were shown as 3 abrasion and simple injuries. There are interpolation in the autopsy report also. The Medical Certificate itself is full of doubts.
33. There is no evidence as to whether PW-7 Dr. Akash Patil was shown the chain during the course of trial to seek his opinion as to whether the injury on the forehead of the deceased could have been caused by it. Whether it was a chain of bicycle, motor cycle or an ordinary chain? The evidence an expert as well as the post mortem report and medical certificates create a cloud of suspicion upon the veracity of the prosecution case. It can be seen that the ocular evidence is inconsistent with the medical evidence with respect to the nature and manner of causing the injuries.

34. PW-2 Jalindar Mali, who is the real brother of the appellant deposed that the appellant used to quarrel with him on account of cart way and share in the well water. As regards assault upon his son Somnath by the appellant, his evidence is of hearsay nature, because after hearing the hue and cry by PW-1 Sham, he along with his wife and other son reached the spot. He has testified that on the same day, around 12.00 noon appellant had threatened and abused his wife and deceased Somnath on account of fetching water from the well. He testified that the appellant threatened that he would eliminate deceased Somnath and thereafter he left for his home. However, there is no corroboration to his version by PW-1 Sham. According to this witness, when he reached the spot around 9.30 p.m. after hearing hue and cry of PW-1 Sham, he noticed appellant running towards his house. However, he too did not attempt to follow the appellant to nab him nor immediately approached the police. No doubt, his first priority was to provide medical aid to his son Somnath. However, it has come in his evidence that he had asked PW-1 Sham to take Somnath to the hospital. It has come in his cross-examination that there were no street lights on the cart way where the incident in question had occurred around 9.30 p.m. That being so, it is difficult to accept his testimony as truthful one, as to whether he had really seen the appellant running towards his house.

35. PW-3 Nagnath Mali had acted as a panch witness of the

scene of offence. Bajaj M-80 motorcycle was lying on the spot. The police had prepared panchanama of the spot and also seized the motorcycle. The spot panchanama is proved at **Exh.24C**. The sketch is also at **Exh.24C**. Though he is a panch witness, prosecution has brought in his examination-in-chief about the quarrel between the appellant and the PW-2 Jalindar Mali on account of sharing water from the well.

36. He testified that on 28th November, 2011 at about 6.00 p.m. appellant had picked a quarrel with PW-2 Jalindar Mali and deceased Somnath. However, PW-2 Jalindar Mali had testified that the quarrel between them took place at 12.00 noon on the same day. He does not say that there was any quarrel at 6.00 p.m. also. As such, version of these two witnesses are inconsistent. PW-3 Nagnath Mali rushed to the spot at 9.30 p.m. after hearing the commotion near the standing crop in the field of Rajesh Khapale. He noticed deceased Somnath lying on the road. He had no occasion to see the assault.
37. There is every reason to infer that this witness might be deposing falsely in light of the fact that in the cross he admits that a criminal case under Section 326 of the I.P.C. lodged by the appellant against him came to be compounded. He had also denied the suggestion that deceased Somnath had eloped with the daughter of Vilas Tele. However, he admits that it was so recorded in his statement before the police. Obviously, he could not give any reason as to why it was so

recorded in his statement by the police. However, it is apparent, he had an axe to grind against the appellant.

38. PW-5 Sanjay Khandare is another panch who had turned hostile. In his examination-in-chief he simply deposed that the panchanama (**Exh.29**) was signed by him and its contents are correct. However, in cross by defence, he admits that the police had obtained his signature on the panchanama at the police station and the police did not seized anything in his presence. It is quite surprising that the prosecution had not sought the permission of the trial Court to cross examine its witness, meaning thereby the prosecution accepted the version of this witness as it is, which is fatal to its case. The panchanama reads that the appellant was arrested in the presence of this witness and his clothes stained with blood comprising full shirt and pant came to be seized. Admission of this witness in cross that his signature was obtained on a ready-made panchanama at the police station and nothing was seized in his presence, remained intact. This is nothing but a height of defective investigation. It seems that the prosecutor in the trial Court had not taken pains to even draw the attention of PW-5 Sanjay Khandare towards the clothes of the appellant.
39. The learned Additional Sessions Judge has misdirected himself by observing that the evidence of the prosecution witnesses is trustworthy and reliable unmindful of the glaring discrepancies in the medical certificates, autopsy report, arrest and seizure panchanama of the appellant and inconsistencies in the testimony of PW-1 Sham and PW-2

Jalindar Mali as noted hereinabove. The quality of evidence is not as required to prove a charge of murder beyond all reasonable doubts. More so, enmity is a double edged weapon as it can provide motive to commit an offence as well as false implication. After evaluating the evidence hereinabove, we found that there is a reason to believe that the appellant had been falsely implicated.

40. Upshot of the above discussion is that the impugned judgment and order of conviction and sentence deserves to be quashed and the appellant needs to be acquitted of the offence punishable under Section 302 of the Indian Penal Code. For the reasons aforesaid, the following order is expedient :-

ORDER

- (i) The appeal is allowed.
- (ii) Judgment and order dated 10.05.2012 passed by the Additional Sessions Judge, Solapur in Sessions Case No. 66 of 2012 is hereby quashed and set aside.
- (iii) The appellant stands acquitted of the offence punishable under Section 302 of the I.P.C.
- (iii) The appellant be released forthwith, if not required in any other case.

(iv) Fine amount, if paid, be refunded to the appellant.

(v) The appeal is disposed of.

(PRITHVIRAJ K. CHAVAN, J.)

(SMT. SADHANA S. JADHAV, J.)