

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CRIMINAL APPEAL 310 OF 2021

Babulal s/o. Chamru Naitam,
age 50 yrs, Occ. Cultivator,
r/o. Tahakatola,
Tahsil Korchi, District Gadchiroli.

....APPELLANT

...V E R S U S...

State of Maharashtra,
through Police Station Officer,
Police Station Korchi,
District Gadchiroli

...RESPONDENT

Mr. A.C. Jaltare, counsel for appellant.
Mr. M.J. Khan, APP for respondent/State.

CORAM:- ROHIT B. DEO & URMILA JOSHI-PHALKE, JJ.
DATED :- 12.12.2022

ORAL JUDGMENT (Per: Rohit B. Deo, J.)

The appellant Babulal Chamru Naitam is assailing the judgment dated 9.12.2019, rendered by the Sessions Judge, Gadchiroli, in Sessions Case 26 of 2017, whereby Babulal Chamru Naitam, hereinafter referred to as the accused, is convicted for offence punishable under Section 302 of the Indian Penal Code ("IPC") and is sentenced to suffer rigorous imprisonment for life and to payment of fine of Rs. 5,000/- (Rupees Five Thousand),

and in default to undergo further rigorous imprisonment for six months. The accused is acquitted of the charge under Section 201 of the IPC.

2. The prosecution case is that the deceased Darsu Devsai Pudo and the accused had an altercation in the evening of 19.12.2016. The dispute was the injuries allegedly caused to the he-buffalo of the accused by the he-buffalo of Darsu Pudo. During the course of altercation, the accused threatened that Darsu shall pay with blood for the injury caused by his he-buffalo to the accused's he-buffalo.

3. Darsu did not return home on the night of 19.12.2016. His wife Mrs. Kaushila and her children could not locate Darsu despite search taken. The body of Darsu was noticed hanging from a Guava tree by Mrs. Shamrobai Nuruti, who gone to fetch water from the well of Darsu on 20.12.2016. Mrs. Shamrobai informed the police patil, who, accompanied by villagers, came to the spot at 12.00 noon and saw the body of Darsu hanging from the tree with injury on the head and blood oozing. Report was lodged by Mr. Chamru Pudo, on the basis of which, Ashti police registered offence under Section 302 of the IPC

vide Crime 36/2016. The Investigating Officer-PW 10 Mr. Shekhar Tadvı recorded the Spot Panchanama in presence of witnesses (Exhibit 16), the Inquest Panchanama (Exhibit 17) and arrested the accused on suspicion (Arrest Panchanama is at Exhibit 48), autopsy was done and report obtained. The accused gave Memorandum Statement while in custody expressing willingness to produce the weapon of offence, the clothes which the accused was wearing at the time of the incident and to show the spot of incident. The Memorandum Panchanama was prepared in presence of two panchas (Exhibit 18). The prosecution case is that on the basis of the disclosures made by the accused, the Axe which was used to assault the deceased was recovered from behind the wheel of bullock cart, the spot of incident was discovered and the plain and the blood mixed soil was seized and panchanama was drawn and the clothes of the deceased were seized. The seized muddemal was sent to Forensic Science Laboratory ("FSL") and the weapon was sent to the Medical Officer at Korchi to opine whether the injuries on the body of the deceased could be caused by the weapon. Further investigation was transferred to PSI Mr. Pritamkumar Pujari, who submitted the final report before the jurisdictional Magistrate, who committed the proceedings to the Sessions Court.

4. The learned Sessions Judge framed charge under Sections 302 and 201 of the IPC. The accused abjured guilt and claimed trial. The defence is of false implication.

5. The prosecution examined ten witnesses and we may extract the details tabulated by the learned Sessions Judge:

P.W. No.	Name of witness	Exhibit Number
1	Mohan Murlidhar Bhoyar, panch on spot, inquest and memorandum panchanama	14
2	Dr. Sachin Charandas Kawadkar, Medical Officer	20
3	Netaram Tukaram Naitam, a witness who taken the dead body to postmortem.	28
4	Manoj Ramaji Walade, panch on seizure panchanama	32
5	Devendra Chintaman Talke, panch on seizure panchanama	34
6	Tularam Sujansingh Madavi, eye witness	35
7	Sattobai Shamu Kumre, eye witness	36
8	Kunal Bhaurao Hemke, police officer who received oral complaint.	37
9	Suresh Narayan Kapse, carrier	41
10	Shekhar Sabbirkhan Tadvli, I.O.	46

The prosecution further relied on the following documentary evidence:

1	Spot panchanama	Exhibit 16
2	Inquest panchanama	Exhibit 17
3	Memorandum statement	Exhibit 18
4	Seizure panchanama	Exhibit 19
5	Postmortem report	Exhibit 21
6	Viscera letter to CA	Exhibit 22
7	Letter for query report	Exhibit 24
8	Opinion on query report	Exhibit 25
9	Letter to M.O. for final opinion	Exhibit 26
10	Final Opinion of doctor	Exhibit 27

11	Duty Pass	Exhibit 29
12	Receipt of handing over of dead body	Exhibit 30
13	Seizure panchanama of clothes of deceased	Exhibit 31
14	Seizure of blood sample of accused	Exhibit 32
15	Oral report	Exhibit 38
16	Occurrence report	Exhibit 39
17	FIR	Exhibit 40
18	Letter with duty pass	Exhibit 42
19	Duty Pass	Exhibit 43
20	Invoice challan	Exhibit 44
21	Return report	Exhibit 45
22	Letter to M.O. for conducting postmortem	Exhibit 47
23	Arrest panchanama	Exhibit 48
24	Letter to Tahsildar for preparing map of spot	Exhibit 49
25	Enclosure letter of map	Exhibit 50
26	Map	Exhibit 51

6. The learned Sessions Judge held that homicidal death is proved. The learned Sessions Judge further held that in view of the ocular account of the incident (PW 6 and PW 7) and the corroborative evidence collected on the basis of the memorandum under Section 27 of the Indian Evidence Act, the prosecution has proved the charge beyond reasonable doubt.

7. We have heard the learned counsel for the appellant Mr. A.C. Jaltare and the learned APP Mr. M.J. Khan. We have scrutinized the evidence on record and have given due consideration to the reasons recorded by the learned Sessions Judge, who has rendered the judgment of conviction.

8. Mr. A.C. Jaltare has not argued that the death of Darsu is not homicidal. We have independently re-appreciated the material on record, and we have no hesitation in recording that the prosecution has proved that Darsu's death was homicidal. PW 2 – Dr. Sachin Kawadkar conducted the autopsy between 4.15 p.m. and 4.40 p.m. on 2.3.2017. Dr. Sachin Kawadkar found the following injuries on the body:

i] sharp cutting injury on backside of head, measuring 3x2 c.m. deep injury profuse heamorrhage occur occipital region of head.

ii] Circular hanging mark on neck.

Dr. Sachin Kawadkar also noticed that dry blood was oozing from mouth and nostrils and the distance of knot from the neck was 10 centimeters. Dr. Sachin deposed that the injuries were antemortem and the likely cause of death was haemorrhage due to the injury caused by sharp object. Dr. Sachin opined that the head injury was sufficient to cause death in the ordinary course of nature and proved the Autopsy Report (Exhibit 21). In cross-examination, Dr. Sachin denied the suggestion that the injury noticed may be possible due to fall from a tree on a sharp object. Considering the nature of injuries and in the absence of

any other material other than the suggestion given, that such injury could be caused by an accidental fall on sharp object, we hold that homicidal death is proved. A suggestion that the death is accidental is not very significant unless the theory of accident is probabilized.

9. Mr. A.C. Jaltare has however vehemently submitted that the ocular account of the two witnesses PW 6 and PW 7 must be discarded since the said witnesses are “wholly unreliable”. Mr. A.C. Jaltare would emphasize on certain admissions extracted in the depositions of the said witnesses, the unnatural conduct of the witnesses and the fact that the statements of the witnesses are recorded after an inordinate delay which is not explained. The learned APP Mr. M.J. Khan would join issues with Mr. A.C. Jaltare on the credibility and probative value of the testimony of PW 6 and PW 7.

10. The learned Sessions Judge has found the direct evidence of PW 6 and PW 7 confidence inspiring. Indeed, the learned Sessions Judge has observed in paragraph 29 of the judgment impugned that nothing is elicited in the cross-examination of PW 6 and PW 7 as would shake the

credibility of the testimony. We have certain reservations, and find it appropriate to revisit the ocular account before dealing with the corroborative evidence.

11. PW 6 – Mr. Tularam Madavi is the son-in-law of PW 7 – Mrs. Sattobai Kumre. Tularam has told the learned Sessions Judge that in the evening on 19.12.2016, he returned from forest where he had gone since his brother-in-law Mr. Ranjit, who had taken his tractor had not returned. Tularam then told the learned Sessions Judge that when he returned from the forest, his mother-in-law (PW 7) was in her agricultural field. Tularam was talking with PW 7 and at that time deceased was coming with his he-buffalo. The accused abused Darsu and assaulted him with Axe causing him to collapse. Tularam then told the learned Sessions Judge that Darsu collapsed and he was frightened and after a while returned to his agricultural field. Tularam has identified the Axe Article -1.

It is extracted in the cross-examination that the distance between the agricultural fields of PW 7 and accused is 80 meters and the field of deceased Darsu is 1 kilometer away from that of the accused. Tularam concedes to the suggestion that from his field, he is not in a position to see what is happening in the

agricultural fields of the accused, the deceased and PW 7. Tularam further admits that he is related to the deceased and that he disclosed the incident to the police on the 22nd day. Tularam admits that he did not lodge report with the police nor did he disclose the incident to the family members of the deceased immediately. The exact abuse allegedly hurled by the accused is shown to be an omission. Tularam further admits that it was winter and darkness had fallen. Tularam however denies the suggestion that due to the darkness, it was not possible to view the happenings from long distance. Tularam further denies the suggestion that he is deposing falsely since the deceased was his relative.

12. It is true that no attempt is made by the defence to question the Investigating Officer on the aspect of delay in recording Tularam's statement. However, that does not take away from the fact that the conduct of Tularam is unusual. Witnessing fatal assault on relative and then not disclosing the incident with reasonable promptitude does raise serious questions. The evidence of PW 6 – Tularam will also have to be appreciated in the context of the case of the prosecution that the accused did not rest at murderously assaulting Darsu, the accused further took the

body and tried to mislead the investigative machinery by hanging the body on the Guava tree.

13. PW 7-Sattobai Kumre has told the Court that when she was present in the field, the accused came there and assaulted Darsu on the backside by the Axe and she did not narrate the incident to anybody due to fear. Several admissions are extracted in the cross-examination which destroy the core of the testimony. Illustratively, PW 7 admits that the incident did not take place in her field, that there use to be early darkness in the winter season and most significantly, that the spot of the incident is not visible from her field. She further admits that her husband and the accused are not on good terms, and that the deceased was her relative.

14. We have noted that PW 6 and PW 7 claim to have witnessed the assault when they were conversing with each other in the agricultural field of PW 7. The candid admission of PW 7 that the spot of the incident was not visible from her field creates doubt, also as regards the claim of PW 6 to have witnessed the incident. That apart, we have already noted that the statements are recorded belatedly and the conduct of the witnesses is not

natural. We are afraid, we find it extremely difficult to agree with the finding recorded by the learned Sessions Judge that nothing is elicited in the cross-examination of PW 6 and PW 7 as would dent the credibility of the testimony. We are satisfied, that PW 6 and PW 7, albeit projected as eye-witnesses, their testimony is not confidence inspiring.

15. If the ocular account of PW 6 and PW 7 is kept out from consideration, we are left with the evidence of discovery on the basis of the alleged disclosures made by the accused while in custody. The accused is arrested on 21.12.2016 and the memorandum under Section 27 of Indian Evidence Act is recorded on 26.12.2016. PW 1 – Mr. Mohan Bhoyar, who is panch has told the learned Sessions Judge that the accused disclosed before him that he is ready to show the spot of incident and to produce the Axe and clothes stained with blood. PW 1 has then deposed that the accused took the police to his house and produced one bloodstained shirt and lungi which was hung on a string/rope in the house and the same were seized by the police and sealed. The accused then took the police and the panch to his house in the field and from one room, the accused produced one Axe smeared with blood from behind the wheel of bullock cart, which was

seized and then showed the place where he had killed the deceased. PW 1 has deposed that the sample of the blood smeared earth was collected and seized. The witness has identified the seized articles.

We may now consider the evidence of the Investigating Officer, who has deposed that the accused produced the clothes kept by him in his residence in almirah. PW 10 then deposes that the accused produced the Axe which was hidden by him behind the wheel of bullock cart and then showed the spot of the incident.

In response to the defence question, PW 10 states that every seized muddemal was in his custody. He further admits that for keeping the muddemal, arrangement is available in the Police Station. While the cross-examination of the Investigating Officer is not entirely effective, Mr. A.C. Jaltare has invited our attention to the fact that the seized muddemal was deposited in the Malkhana on 7.1.2017. Mr. A.C. Jaltare would argue, that there is no explanation whatsoever as to where and in which condition was the seized muddemal between 26.12.2016 and 7.1.2017. Mr. A.C. Jaltare would further emphasize that while PW 1 Mohan Bhoyar has deposed that the bloodstained clothes of the accused were lying on the string or rope in the house of the accused, PW 10 – Shekhar Tadvı has deposed that the accused

produced the clothes kept in almirah. We find substantial substance in the submission of Mr. A.C. Jaltare that the seizure of the clothes allegedly produced by the accused is not free from doubt. We have noted that according to the panch, the clothes of the accused were hung from string in the house and according to the Investigating Officer, the clothes were kept hidden in almirah. Exhibit 42 refers to the muddemal number of the clothes which is 2/17 and the date on which the clothes is presumably deposited in the Malkhana is 7.1.2017. We do not find any justification from the Investigating Officer to have retained the custody of the clothes without depositing the same in the Malkhana since he admits that there is arrangement at the Police Station for keeping the seized articles in custody. We further do not appreciate the stand of the Investigating Officer that it is not necessary that the muddemal must be immediately deposited in the Malkhana. Apart from the fact, that the incriminating circumstance which is the detection of blood on the clothes seized is not put to the accused in the examination under Section 313 of the Code of Criminal Procedure, we are not inclined to give serious weightage to the said discovery. In any event, even if the discovery is proved, in view of our finding that the ocular account of PW 6 and PW 7 must be discarded as not worthy of credit, it would be extremely

hazardous to rest the conviction on the discovery of the place where the accused allegedly concealed the clothes.

16. The Axe which was seized on the basis of the memorandum was sent to Regional Forensic Science Laboratory (RFSL), Nagpur vide Exhibit 6. The result of the analysis however, makes no reference to the Axe. The Axe allegedly seized is not linked with the crime. The identification of the Axe by eye-witnesses PW 6 and PW 7 is of no significance. Apart from the fact that the Axe is an implement possessed by every agriculturist and there is no peculiar feature in the Axe allegedly seized, we have not believed the ocular account of PW 6 and PW 7.

17. The seizure of the sample of the blood mixed soil from the spot which according to the prosecution, the accused disclosed as the place where he assaulted the deceased, and the detection of blood is pressed in service as an incriminating circumstance. Apart from the fact that, the Chemical Analysis report is not put to the accused, the seized articles are deposited in the Malkhana, along with the clothes etc. on 7.1.2017 and there is no explanation or clarification as to the state in which the said sample was preserved and where exactly were the seized articles were lying, although,

the Investigating Officer generally says that the articles were in his custody.

18. We are satisfied that the prosecution has not proved the charge beyond reasonable doubt. The ocular evidence is not creditworthy. The corroborative evidence in the nature of discovery is rendered vulnerable due to the circumstances which we have noted. It is trite to say that conviction cannot rest on suspicion. The accused is entitled to the benefit of doubt.

19. We set aside the judgment of conviction which is impugned and hold that the accused is entitled to acquittal in Crime 36/2016, registered with Police Station, Ashti, District Gadchiroli.

20. The fine paid by the accused, if any, be refunded.

21. The accused be released from custody if not required in any other case.

(Urmila Joshi-Phalke, J.)

(Rohit B. Deo, J.)

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