

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.19 OF 2017

Satish Suresh Shrisundar,
Age 22 yrs., Occ. Education,
R/o Kannad, Tq. Kannad,
Dist. Aurangabad.

... Appellant

... **Versus** ...

The State of Maharashtra

... Respondent

...

Mr. S.G. Ladda, Advocate for the appellant

Mr. A.M. Phule, APP for the respondent

...

CORAM : SMT. VIBHA KANKANWADI
ABHAY S. WAGHWASE, JJ.

DATE : 10th OCTOBER, 2023

JUDGMENT : (PER : SMT. VIBHA KANKANWADI, J.)

1 The accused takes exception to the conviction awarded to him by
the learned Additional Sessions Judge, Aurangabad in Sessions Case
No.200/2014 on 29.12.2016 after holding him guilty of committing offence

punishable under Section 302, 323 of the Indian Penal Code, 1860. PW 1 Jagannath Eknath Yeole, R/o Shivshankar Colony, Hiwarkheda Road, Kannad lodged First Information Report around 10.00 a.m. on 16.03.2014 stating that his son Umesh runs a grocery shop in front of their house. He himself and his son Umesh were in the shop around 9.00 p.m. on 15.03.2014, at that time, the present appellant and his brother (who is a child in conflict with law) came and they asked Umesh to give cigarette on credit. Umesh replied that he does not give on credit. Thereafter, those two persons went away and came back after some time and started asking as to why he is not giving the cigarette on credit. At that time, the present appellant caused injury with the help of iron hammer on the head of Umesh and Umesh was caught hold of by the child in conflict with law. When Jagannath went to separate them, he was abused by the accused persons and by manhandling him he was pushed. He fell down, as a result of which he sustained injury near his left eye. Thereupon, Jagannath's wife Mangalbai, PW 3 separated them. The said First Information Report came to be registered for the offence punishable under Section 324, 323, 504 read with Section 34 of the Indian Penal Code. Thereafter supplementary statement was recorded on 24.03.2014, which is almost the same reproduction of the First Information Report, but in addition to that it was stated that Jagannath and Umesh were shifted by Mangalabai

and other two sons Dnyaneshwar and Sandip to Dr. Chhallani's Hospital, Kannad and then on 15.03.2014 to GHATI, Aurangabad. Umesh was admitted in Intensive Care Unit and still he has not regained consciousness. Thereupon Section 326 of the Indian Penal Code came to be added. Thereafter, further supplementary statement was recorded on 30.03.2014, whereupon it was informed that Umesh expired on 26.03.2014 at Aurangabad and then offence under Section 302 of the Indian Penal Code came to be added.

2 As aforesaid, the investigation has taken place at different levels on the day when the First Information Report was lodged. Police Sub Inspector Mr. Siddiqui attached to Police Station, Kannad – Investigating Officer went to GHATI, Aurangabad to record the statement of Umesh. But it was informed to him that Umesh is not in a position to give statement. The said state of affairs as regards Umesh was not in a position to give statement remained till his death. At periodical intervals he had recorded the statements of witnesses and immediately after the First Information Report he had visited the spot and executed the spot panchnama with the help of two panchas. He had seized the hammer used in the commission of the crime from the place of incident. Clothes of the informant and deceased were collected. After it was informed that Umesh has expired, the local

police at Aurangabad carried out the inquest panchnama and got the postmortem done. Accused i.e. present appellant came to be arrested. He gave memorandum while in custody and discovered the clothes on his person on the day of incident. The seized articles were sent for chemical analysis. After collecting the other documents, when the investigation was completed, he forwarded charge sheet as against the present appellant to Judicial Magistrate First Class, Kannad, whereas as against the child in conflict with law it was sent to Juvenile Justice Board, Aurangabad.

3 After the committal of the case the learned Additional Sessions Judge, Aurangabad framed charge under Section 302, 323, 504 read with Section 34 of the Indian penal Code against the present appellant. When he pleaded not guilty, trial was conducted. Prosecution has examined in all 09 witnesses to bring home the guilt of the accused. After considering the entire evidence on record, the learned Additional Sessions Judge, Aurangabad held the appellant guilty for committing an offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer imprisonment for life and pay fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer rigorous imprisonment for one month. He also held the accused guilty for committing an offence punishable under Section 323 of the Indian Penal Code and sentenced him to suffer rigorous imprisonment for one year and

pay fine of Rs.500/- (Rupees Five Hundred only), in default to suffer rigorous imprisonment for 15 days.

4 Heard learned Advocate Mr. S.G. Ladda through video conferencing for the appellant and learned APP Mr. A.M. Phule for the respondent/prosecution. We have gone through the entire record which was before the learned trial Judge.

5 It has been vehemently submitted by learned Advocate for the appellant that the trial Judge failed in appreciating the evidence and, therefore, the conviction is illegal. The testimony of PW 8 Dr. Sushim Waghmare, who conducted the autopsy on 26.03.2014 on the dead body of Umesh, says that he had noticed two external injuries and there were internal injuries. However, the cause of death that has been given is - "bilateral lobar pneumonia with head injury". In the cross examination this witness has admitted that bacterial infection is one of the causes of pneumonia and pneumonia if not controlled or cured may lead to death of a person. According to him, this case i.e. Umesh was advanced stage of pneumonia, but he had not collected any pathological history about pneumonia and for how long he was suffering from pneumonia. He has also stated that communicated fracture may be caused in case of fall with body force on hard

and projected substance like stone. Such kind of injury may be caused by substance other than hammer. Therefore, his testimony will not give the conclusive opinion that death of Umesh was homicidal in nature.

6 The learned Advocate appearing for the appellant has further submitted that the testimony of PW 1 Jagannath, PW 3 Mangalabai – his wife, PW 4 Sandip – son of PW 1 and PW 3 would show that they were not knowing the accused prior to the date of incident. The question, therefore, arises – as to who told them about the name of the accused. The admissions given by PW 1 Jagannath in his cross-examination have not been considered by the learned trial Judge. Those admissions were fatal and it can be seen that PW 9 Siddiqui – Investigating Officer has played major role. There was no identification parade held. According to PW 1, in his cross-examination, PW 3 and PW 4 came at a later stage when Umesh allegedly fell down. So also, he has also arrived at a later stage. It creates doubt, whether they were eye witnesses to the incident. Prosecution has not examined any other person, that too independent, when PW 1 and PW 2 have stated people/neighbours had gathered at the spot. The hammer has been shown to be seized in the spot panchnama Exh.14 from a corner of the grocery shop. Question would arise – Who has kept that hammer at that place ? The cross-examination of PW 1 would show that he as well as Kalyan Patil has

produced the said hammer to the Police Station and then the police came to his house on the next day, prepared the panchnama. Police then seized the hammer in his presence, which was lying behind his shop. In clear words he is admitting that police brought the hammer with them at the time of panchnama and took it back again. This amounts to planting of the weapon and all these facts were not at all considered by the learned trial Judge. As the appreciation of evidence was wrong, it has caused prejudice to the accused and the decision rendered is perverse, which deserves to be set aside.

7 Per contra, the learned APP supported the reasons given by the learned trial Judge. He submitted that the testimony of PW 1, 3 and 4 would show that they are supporting each other. They had gone to the spot immediately and they were around the spot itself. They had seen the accused/appellant giving blow of hammer on the head of deceased Umesh. It is not in dispute that since the blow was given, Umesh became unconscious and he was unconscious till his death. Therefore, it can be certainly attributed that the said blow was given with an intention to kill him. The accused persons had prepared themselves and brought the hammer along with them when they came for the second time. On the first occasion they had come and asked for cigarette to be given on credit, which was refused by deceased and then the assault was on the point as to why he has not given

the cigarette on credit. But in between the two events some time had passed, therefore, that preparation will have to be attributed to the knowledge and intention to kill. The prosecution has examined the panch witnesses to the spot panchnama, inquest panchnama and the memorandum panchnama. The testimony of the autopsy surgeon PW 8 Dr. Waghmare would show that the blow was fatal. It had caused under scalp haematoma over right temporo parieto occipital region. Part of the right parieto occipital skull was absent. The external injury shows that there was stitch to wound of length 17 c.ms. extending from right fronto parieto occipital region with 20 stitches. Therefore, the prosecution had proved that death of Umesh was homicidal in nature. In the said incident simple hurt was caused to PW 1 Jagannath. PW 1, 3 and 4 had sufficient opportunity to see the accused persons and, therefore, it was not necessary to hold identification parade. In his statement under Section 313 of the Code of Criminal procedure the present appellant has stated that the false case has been created by Press Reporter. Umesh had fallen down. This suggests that he was present there. Under the said circumstance, no merit has been shown by the appellant. The appeal deserves to be dismissed.

8 Before we proceed to consider the ocular evidence, we would firstly consider the medical evidence. PW 8 Dr. Sushim Waghmare is the

autopsy Doctor and as aforesaid he had noticed two external injuries and there were internal injuries. The internal injuries were in the form of under scalp haematoma, however, it is to be noted that the external injury shows that there were 20 stitches applied to the injury to the right fronto parietal occipital region and it is stated that after opening the stitches, the margin of the wound were clean cut and well defined which were suggestive of surgical incised wound for the craniotomy. Even the internal injury showed that the part of right parieto occipital of skull of size 11 x 6 c.ms. was absent and removed during craniotomy. The question then arises – As to what was the original injury ? Why the craniotomy was required to be performed. PW 8 Dr. Waghmare was not the proper person to answer these questions. In his cross-examination he has admitted that craniotomy is necessary in case of treatment of brain illness and from his entire evidence it can be seen that he had not even considered the treatment papers before the cause of death was given. The cause of death that is given is - “due to bilateral lobar pneumonia with head injury”. In the cross-examination he has admitted that bacterial infection is one of the causes of pneumonia. Pneumonia if not controlled or cured may lead to death of a person. According to him, Umesh’s case was advanced stage of pneumonia. Still he had not taken care to collect the pathological history about pneumonia and how long he was suffering from

pneumonia. Therefore, when the basic required documents were not seen by him still he went on to certify the cause of death. The prosecution has not examined the treating Doctor for the reasons best known to it. The treatment papers have not been produced. There is no opinion of an expert as to whether the head injury that was caused to Umesh was sufficient to cause his death (minus pneumonia). Though this witness in examination-in-chief says that injuries mentioned in column No.19 are possible by hitting of hammer; yet, he, in cross-examination, admits that communicated fracture can be caused due to fall with body force on hard and projected substance like stone, which can also be by a substance other than the hammer. Therefore, the prosecution has not adduced an expert's definite opinion that death of Umesh was homicidal in nature. If the prosecution would have examined the treating Doctor, who would have produced the case papers as well as the nature of the injury at the time of admission of Umesh and how the situation went on changing and then connected to the result or findings given by PW 8 Dr. Sushim Waghmare, then only we could have definitely said that it was a case of homicidal death. We, therefore, hold that the medical evidence is in fact, not supporting the prosecution in its entirety. The settled position of law is that when there is variance between medical evidence and ocular evidence, then the ocular evidence would prevail. Of course, in the present case it may

not be strictly said that there is difference between or variance between ocular evidence and medical evidence but certainly independently the medical evidence was not sufficient to prove the homicidal death and, therefore, we proceed to scrutinize the ocular evidence.

9 Testimony of PW 1 Jagannath would show that though in his examination-in-chief he has reiterated what he had said in his First Information Report Exh.11 but in the cross-examination he has given many admissions. As regards the incident is concerned, he has stated that he was sitting in the shop and son was attending the business. There were houses surrounding the shop. People had gathered at the time of incident. He then says that his son was lying on the ground when he went there and thereafter he came to know that his son was injured. He also admits that he has no knowledge as to what happened earlier to that and also in clear words again the same question appears to have been asked in a different sense. He states that he came to the place of incident first and thereafter his wife and son Sandip and Dnyaneshwar followed him, after he had called them to the place. Thus, all these admissions given death blow to the story he has stated about witnessing the incident. Further, in the cross-examination he has also stated that he had not seen the hammer muddemal article prior to the incident. He himself and Kalyan Patil had produced the said hammer to the

Police Station. Then police came to his house on the next day with the hammer, executed the panchnama and took it again. This clearly creates a possibility that he himself and said Kalyan Patil might have planted the hammer. In fact, there was absolutely no necessity for them to take the hammer to the Police Station. When as per the First Information Report, he says that the accused dropped the hammer at the spot and went away, then at the time of executing spot panchnama Exh.14 it is said that the hammer was found in a corner of grocery shop. It is not the case of the prosecution that the incident had taken place inside the grocery shop, rather the spot is below a lemon tree in front of the grocery shop. Further admissions by PW 1 Jagannath would show that there is a drainage in front of their shop and it is a rough place. There is 02 feet platform in front of the shop. When the boys demanding the cigarette were not listening to his son, his son came out of the shop and he was expelling those boys from the shop. Therefore, the possibility that after he came out and fall on the rough place has been created.

10 From the testimony of PW 1 Jagannath it can be certainly seen that neither Umesh nor he himself were knowing accused in the past. Those boys had come as a customer and they were demanding cigarette to be given on credit. If it is not provided, then whether those persons would think of

eliminating Umesh, is a question. Therefore, the element of intention to kill is also missing.

11 The death blow is further given by the admissions by PW 1 Jagannath. When he admits that one Rajendra Bhamre residing in his locality was having good relations with him and he had then requested him to act as a panch. He also knows Kalyan Patil, who is a Journalist. They are having good relations with each other and he has admitted that First Information Report Exh.11 was prepared by him. Kalyan Patil brought it typed, obtained signature of PW 1 Jagannath and had submitted it to police. PW 1 Jagannath says that the contents of Exh.11 were prepared by Kalyan Patil only as per his wish and then he had taken him to Police Station. This shows that somebody else has played major role for filing the First Information Report. In other words First Information Report Exh.11 is not a voluntary act on the part of PW 1 Jagannath. PW 1 Jagannath has not stated as to who admitted Umesh to Dr. Chhallani's Hospital and what history was given at that place. The prosecution has not examined Dr. Chhallani and also the treating Doctor at GHATI, Aurangabad. The history that could have been given at the time of admission of Umesh ought to have been brought on record. Exh.11 came to be registered at 10.00 a.m. on 16.03.2014 when incident had taken place around 9.00 p.m. on 15.03.2014. Whether Medico

Legal Certificate was given by Dr. Chhallani to Kannad Police Station or whether it was given by the GHATI, Aurangabad to the Police Chowky in the hospital has not come on record. Under the said circumstance, the said delay in lodging the First Information Report has also not been explained with the admission that said Kalyan Patil had got Exh.11 typed would show that sufficient time was then available for concoction of story.

12 PW 3 Mangalabai in her examination-in-chief has posed herself as an eye witness and says that after hearing the noise about abuses she came out side along with son Sandip and Dnyaneshwar. She had no occasion to meet both the accused earlier. Under the said circumstance, when there is no Test Identification Parade, the question about her identification of the accused becomes doubtful. The distance between the grocery shop and the lemon tree has not come on record. It is also not come on record as to whether there was arrangement of light near the lemon tree. The incident has taken place around 9.00 p.m. and, therefore, the evidence adduced by the prosecution should confirm to the testimony regarding identification. Same is the case with testimony of PW 4 Sandip – brother of the deceased. He says that he knew both the accused. Taking into consideration the admission given by PW 1 Jagannath that PW 4 Sandip had come after he had called out. The testimony of PW 4 Sandip becomes doubtful. Further, for

how much time the act of abuses and convincing by Umesh to accused that he will not give cigarette on credit was going on and then scuffling started is not stated by him. Certainly, it appears that PW 4 Sandip and his another brother Dnyaneshwar were not within the reach of the place when the appellant allegedly assaulted Umesh by hammer. In other words, if he was present there, why he had not intervened, would be a question and how the hammer in the hand of accused could not have been noticed by them. Further, when he has stated that accused had thrown the hammer at the place and ran, in this statement the improvement is regarding putting hammer down. What information he had given to police as he was accompanying Umesh to Dr. Chhallani's Hospital and also in GHATI, Aurangabad has not been stated by him.

13 The testimony of PW 1 Jagannath, PW 3 Mangalabai and PW 4 Sandip does not say that after the assault Umesh became unconscious and he was unconscious till death. It is stated in Exh.11 and might be in the subsequent supplementary statements, but in the substantive evidence i.e. their examination-in-chief there is absolutely no whisper. Investigating Officer PW 9 Mr. Siddiqui has produced letter Exh.62 which he had given to Medical Officer and on 16.03.2014, wherein around 4.00 p.m. endorsement has been given by the Medical Officer that - the patient is unconscious, not

responding to any stimuli and, therefore, he is not in a state to give any statement at present. However, it has come on record that Umesh expired on 26.03.2014. Prosecution has not tried to bring it on record as to what was the condition of Umesh from 16.03.2014 to 26.03.2014 i.e. each and every day that he was not in a position to give statement.

14 PW 1, 3 and 4 are definitely interested witnesses. It is not that they are the relatives who could have been naturally present at the spot but the cross-examination of PW 1 Jagannath would reflect how much he was interested, even the First Information Report has been got prepared. As per their depositions there were independent witnesses who were present at the spot, but none of them have been examined. Therefore, the learned trial Judge ought not to have relied only on the testimony of PW 1, 3 and 4. The learned trial Judge has said that witness Kalyan Patil has no enmity with the accused and, therefore, had no reason for him to implicate the accused. We are afraid that when Kalyan Patil has not been examined and there was no occasion for the accused to bring it on record that he had enmity with them, such conclusion ought not to have been drawn, so also, as regards death being homicidal is concerned, it appears that it was argued that patient was under treatment for 10-11 days and due to his head injury he suffered pneumonia. If the head injury would not have been caused, the pneumonia

would not have occurred. In fact, these submissions on behalf of the prosecution before the learned trial Judge were not based on the documents which otherwise the prosecution was in a position to bring it on record. It was only because the prosecution failed to bring it on record we are required to come to a conclusion that it is not an homicidal death. The connection between the injury and the cause of death will have to be established by adducing evidence and not on the basis of some surmises and conjectures. It appears that the learned APP before the trial Judge wanted to cover up the lacunas left in the prosecution story or evidence made such submissions, but it was for the learned trial Judge not to get carried away with such submissions.

15 The testimony of PW 2 would show that he was the panch to the spot panchnama. He has certainly stated that the hammer was seized from the spot, but as aforesaid, that hammer was kept in a corner near the wall of grocery shop. That means, it was picked up by somebody and kept there. Therefore, its seizure from the spot with the above said admissions by PW 1 Jagannath cannot be accepted.

16 PW 5 Shaikh Hussain is the panch to the memorandum panchnama, whereby it is said that the accused has discovered his clothes.

Even if for the sake of argument it is stated that the shirt that was seized had blood stains, the eye witnesses have not stated that the injury that was caused to deceased was bleeding injury. No doubt in her cross-examination PW 3 Mangalabai is admitting that. However, again it can be said that it could have been independently brought on record by examining Dr. Chhallani and the Doctor who examined Umesh at the admissions in GHATI. Even if for the sake of argument it is accepted that the said panchnama has been proved; yet, conviction cannot be awarded only on the basis of the said piece of evidence.

17 PW 6 Vijay Wani is the panch to the inquest panchnama and PW 9 Siddiqui is the Investigating Officer. In his cross-examination he admits that there were no blood stains at the spot. The hammer seized in the matter was not referred to Medical Officer, who conducted the autopsy for opinion. He says that he made inquiry with the Doctor who was treating the injured, but has not recorded his statement. Persons other than the accused were also residing in the house from where the clothes were seized. He also states that nobody from the neighbour gave statement about the incident. When according to PW 1, 3 and 4, more than 15 persons had gathered, still, how the Investigating Officer could not get an independent single eye witness, is a question.

18 Therefore, after revisit and re-appreciating the entire evidence we hold that the prosecution had miserably failed in proving the guilt of the accused. We would further say that the statement of the accused taken by the learned trial Judge under Section 313 of the Code of Criminal Procedure is a cryptic as it can be. It does not reflect from the same as to which witness has deposed what. What is the incriminating evidence against him. There is absolutely no reference in respect of the medical evidence, that is, what is the conclusion regarding cause of death. There is no reference about the spot panchnama, memorandum panchnama in detail. We would like to rely on **Ashraf Ali vs. State of Assam**, [(2008) 16 SCC 328], wherein it has been held by Hon'ble Supreme Court that -

“Section 313 of the Code casts a duty on the Court to put in an inquiry or trial, questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. **Each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so, would amount to serious irregularity vitiating the trial if it shows that the accused was prejudiced.**”

(stress supplied)

18.1 It has been further held that the object of the Section 313 of the Code is to establish a direct dialogue between Court and the accused and if a point in the evidence is important against the accused, and the conviction is

intended to be based upon such point, it would be right and proper that the accused should be questioned about the matter and be given an opportunity to explain it.

18.2 No doubt, it has been further held that a matter can be remanded to the trial Court with a direction to re-try the accused from the stage at which the prosecution evidence was closed, when there is a perfunctory examination under Section 313 of the Code. However, the case before this Court does not require such exercise in view of the above observations.

19 We would further like to rely on **Paramjeet Singh @ Pamma vs. State of Uttarakhand** [(2010) 10 SCC 439], wherein the Hon'ble Apex Court has observed that -

“Section 313 of the Code of Criminal Procedure is based on fundamental principles of fairness. The attention of the accused must specifically be brought to the inculpatory pieces of evidence so as to give him an opportunity to offer an explanation if he chooses to do so. Therefore, the Court is under a legal obligation to put the incriminating circumstances before the accused and solicit his response. This provision is mandatory in nature and casts an imperative duty on the Court and confers a corresponding right on the accused to have an opportunity to offer an explanation for such incriminatory material appearing against him. Circumstances which

were not put to the accused in his examination under Section 313 of the Code of Criminal Procedure cannot be used against him and have to be excluded from consideration.”

Of course, further, it has been held in the said case that each and every error or omission will not cause prejudice to the accused or would vitiate the trial, but it would depend upon the degree of error. Here, when nine witnesses were examined by the prosecution, there are only 22 questions including question Nos.18 to 22 which are the usual formal questions about the entire case and not specifically to a piece of evidence. As aforesaid, neither the testimony of medical expert, postmortem report was put distinctly to him nor even the C.A. report, the questions which are formulated are also almost one or two liner. Therefore, certainly, it has caused prejudice to the accused.

20 Taking into consideration the observations above, we reiterate that the prosecution had miserably failed in proving the guilt of the accused. The appeal, therefore, deserves to be allowed. Hence, following order.

ORDER

1 Criminal Appeal stands allowed.

2 The conviction awarded to appellant Satish Suresh Shrisundar by

the learned Additional Sessions Judge, Aurangabad in Sessions Case No.200 of 2014 on 29.12.2016 for the offence punishable under Sections 302 and 323 of the Indian Penal Code stands set aside.

3 Appellant stands acquitted of the offence punishable under Sections 302 and 323 of the Indian Penal Code.

4 The appellant be set at liberty, if not required in any other case.

5 Fine amount deposited, if any, be refunded to the appellant after the statutory period.

6 It is clarified that there is no change as regards the order regarding disposal of muddemal.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)