



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO. 187 OF 2017

Shiva s/o Tarsing Chitte
Age: 45 years, Occu.: Nil,
R/o. Dhande Bk., Tq.Shahada,
Dist.Nandurbar.

....Appellant
(Orig. Accused)

Versus

The State of Maharashtra
Through Police Station,
Shahada, Dist.Nandurbar.

....Respondent

...
Mr.R.K.Ashtekar, Advocate for Appellant
Mrs.V.S.Choudhari, APP for Respondent State
...

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

**RESERVED ON : 12 SEPTEMBER, 2023
PRONOUNCED ON : 25 SEPTEMBER, 2023**

JUDGMENT (PER ABHAY S. WAGHWASE, J.) :

1. Appellant Shiva Tarsing Chitte is hereby questioning the judgment and order of conviction passed by the learned Additional Sessions Judge, Shahada, Dist. Nandurbar in Sessions Case No.40 of 2013 dated 17-08-2016, by which he is held guilty for commission of offence under Section 302 of the Indian Penal Code (IPC) and sentenced to suffer imprisonment for life.

BRIEF FACTS OF THE PROSECUTION CASE

2. Nephew of deceased Yuvraj Kuwar namely Machhindra has performed

love marriage with daughter of accused. Accused Shiva had opposed said affair and marriage and since then he was harbouring animus with deceased and his entire family. On 27-03-2013, in the early morning, when deceased had been for answering call of nature, it is the case of prosecution that, accused followed him and he stabbed him in stomach and fled. Shortly, after being shifted to hospital, Yuvraj succumbed to injury and hence, son of deceased, PW1 Shrawan approached Shahada Police Station and lodged report that on query, his injured father informed that he was assaulted by accused. He reported occurrence to Police, on the basis of which, crime was registered by PW9 Vinod Patil (API).

On being chargesheeted and on committal, learned Additional Sessions Judge, Shahada conducted trial during which prosecution has examined in all nine witnesses and also relied on documentary evidence like FIR, various panchanamas and post mortem report. On hearing both the sides and appreciating evidence, learned trial Judge held that charge under Section 302 of the IPC is brought home and thereby learned trial Judge, by his judgment and order, handed down conviction, which is assailed before us by way of instant appeal by invoking Section 374 of the IPC.

SUBMISSIONS

On behalf of appellant :

3. According to learned Counsel for the appellant, there is no direct

evidence and FIR is only because of annoyance and previous quarrel. He emphasized that though informant claims that there was oral dying declaration, it is pointed out that it is not possible with such injury that deceased would name accused. He invited our attention to the evidence of PW3 Prakash Kuwar, other brother of informant and would submit that though this witness claims to be an eye witness, the manner of his evidence clearly shows that he was not direct eye witness for the reason that he did not intervene to rescue his own father and he kept himself hiding and even he did not report the occurrence to his own mother and brother and his statement is rather recorded after three days. Therefore, such unnatural conduct disentitles his testimony from consideration. He further pointed out that PW7 Latabai, wife of deceased has also reached spot after alleged occurrence but her evidence does not support informant. Consequently, it is his submission that there is no direct evidence as claimed by prosecution.

It is next submitted that learned trial Court has accepted case of prosecution without there being independent corroboration or independent testimony. That there is no proper appreciation of evidence of PW1 Shrawan, PW3 Prakash Kuwar and PW5 Prakash Sonawane. He pointed out that even PW6 Raju, driver, whose vehicle was used for shifting deceased to hospital, is silent about deceased to be in a position to speak and therefore, the very information based on statement of PW1 Shrawan is without any foundation. Resultantly, it is his submission that learned trial Court ought not to have

accepted the case of prosecution with such quality of evidence and he prays to re-appreciate and re-analyze the above evidence and to allow the appeal.

On behalf of State :

4. Refuting case of appellant, learned APP for the respondent submitted that information was immediately passed about deceased lying in injured condition by a lady and thereafter, informant and his mother had left to spot and at that time, deceased was in a position to speak and he named the accused to be the assailant. That shortly thereafter deceased succumbed and even informant approached Police within half an hour also and there is a prompt report and there is no reason for false implication. Accused is apprehended with blood stained clothes and knife is recovered from him. Such evidence is appreciated and on finding that there is overwhelming evidence, learned trial Court has rightly held accused guilty. That prosecution case being found trustworthy and reliable, credence has been given by the learned trial Court and therefore, there is no perversity or illegality whatsoever. Thus, she prays to dismiss the appeal for want of merits.

5. This being appeal under Section 374 of the IPC, we are now called upon to re-appreciate, re-analyze and re-evaluate entire evidence adduced by the prosecution in the trial Court.

On doing so, we have noticed that in support of its case, prosecution has examined in all nine witnesses and their brief introduction is as under:

EVIDENCE ON BEHALF OF PROSECUTION

PW1 Shrawan Yuvraj Kuwar is informant. He is son of deceased. His evidence is at Exh.23.

PW2 Jitendra Raghunath More is Pancha to seizure of clothes of deceased. His evidence is at Exh.29. Seizure panchanama is at Exh.30.

PW3 Prakash Yuvraj Kuwar is another son of deceased. His evidence is at Exh.34.

PW4 Nagsen Sahebrao Sonawane is Pancha to spot panchanama. His evidence is at Exh.38.

PW5 Prakash Sahebrao Sonawane is neighbour, who on receiving information from informant went to spot and then called PW6 Raju Patil with a vehicle and helped to shift deceased Yuvraj to hospital. His evidence is at Exh.39.

PW6 Raju Mansaram Patil is driver in whose vehicle deceased Yuvraj was shifted to hospital. His evidence is at Exh.45.

PW7 Latabai Yuvraj Kuwar is wife of deceased. Her testimony is at Exh.47.

PW8 Dr.Suresh Palusing Thakre is Autopsy Doctor, who conducted post mortem on dead body of deceased. His evidence is at Exh.49.

PW9 Vinod Bhalerao Patil (API) is Investigating Officer, who conducted investigation.

6. In the light of charge, it is to be first seen that death of Yuvraj is homicidal or otherwise. To find answer, we need to visit testimony of **PW8**

Dr.Thakre, Autopsy Doctor. He, in his evidence at Exh.49, claimed about going through inquest and doing post mortem on dead body of Yuvraj on 27-03-2013. He narrated following injuries noticed by him in paragraph no.1 of his evidence.

- “1] CLW over epigastric region to right hypochondriac region of upper abdomen, size about 12 x 6 c.m. x deep to cavity oblique in direction.
- 2] CLW over Epigastic region to lower to left hypochondriac region of abdomen, size about 15 x 2 x deep cavity, oblique in direction.
- 3] CLW over small intestinal coils size about 4 x 2 x deep coils.
- 4] CLW over large intestinal coils size about 3 x 2 x deep to coil.
- 5] CLW over outer layer of spleen with bleeding size about 2 x 0.5 x deep to tissue oblique in direction.

It is further stated that age of injuries is within 12 hours and nature of injury is grievous. In additional remark, it is noted that intestinal coils comes out through incised wound over the abdominal region. The above injuries were ante mortem. The probable cause of death is noted as “due to cardio respiratory arrest due to hemorrhagic shock due to cut - incised wounds due to sharp object.”

Above witness in **cross-examination** admitted that the time of death is mentioned as per inquest panchanama. That the dead body was brought in hospital between 09:30 a.m. to 10:00 a.m. That rigar mortis starts after 2 hours of death and it requires 12 hours for complete development of rigar mortis. That in column no.21 he noted that spleen was cut and the tissue

was damaged and he admitted that due to cutting of spleen there was excessive bleeding. He also admitted that if the spleen is cut, person dies within few minutes. That there is difference in size of injury nos.1 and 2 of column no.17 and both the injuries may be possible by different weapons. It is denied that spleen can be torn or damaged due to heavy drink. He admitted that he saw article knife first time in the Court and Police had not obtained his opinion by showing article knife. He further admitted that one side of article knife is blunt and other side is sharp. He admitted that cut is possible by one side of knife and there may be difference in the size of injury. That the dimension of the injury on half portion is same. He admitted that he cannot tell the measurement of deep to tissue of injury no.1. He admitted that the width of article knife towards backside is about 1 cm. He denied that for causing injury measuring 15 x 6 cm., it requires big knife.

Taking into account the nature of injury, the manner of cross-examination, there is no hesitation to hold that deceased Yuvraj met only and only homicidal death.

ANALYSIS

7. Now let us see whether as claimed by prosecution, accused is the assailant.

We have carefully gone through the evidence of prosecution witnesses. In our opinion, evidence of PW1 Shrawan, PW3 Prakash Kuwar, PW5 Prakash

Sonawane, PW6 Raju and PW7 Latabai is relevant. PW1 Shrawan, PW3 Prakash Kuwar are sons of deceased and PW7 Latabai is wife of deceased, whereas as PW6 Raju is the owner of the vehicle, which was used for shifting injured to hospital. Rest witnesses are Panchas, Autopsy Doctor and Police Officer.

8. Informant **PW1** Shrawan, son of deceased, stated that his paternal cousin i.e. son of his paternal aunt namely Machhindra had performed love marriage with daughter of accused and therefore, accused was annoyed and used to pick up frequent quarrels with deceased and other family members. According to him, on 27-03-2013, at around 04:30 a.m. his father went to answer call of nature. At around 05:00 a.m., one Bayabai came and informed about deceased lying on the road and therefore, this witness, his mother, elder brother and neighbour PW5 Prakash Sonawane rushed to the said spot. He stated that his father was lying in injured condition. His intestine has come out of stomach but at that time his father was alive. He claims that his father told that he was assaulted by Shiva Chiite (appellant). Thereafter, his father was shifted in the Jeep of PW6 Raju to the Hospital of Dr.B.D.Patil at Shahada, where he was examined and declared dead. Therefore, he claims that he went to Shahada Police Station and lodged report at around 06:50 a.m. and he identified the same to be at Exh.24 and FIR to be at Exh.25.

Above witness in **cross-examination** is asked whether there was big pool

of blood at the spot and he answered it in affirmative. Then he is asked at what time generally villagers go to answer call of nature; what was nature of clothes on the person of his father; whether noise can be heard and Aadiwasi Vasti. He is asked whether there was blood stains in the vehicle; whether he felt like approaching Police prior to taking father to the hospital; whether Police visited the hospital; whether there was previous report against accused for raising quarrel.

9. **PW3** Prakash Kuwar, another son of deceased, stated in his evidence at Exh.34 that his paternal cousin Machhindra has performed marriage with daughter of accused and so he used to pick up quarrels and he used to ask deceased to bring his daughter back. Accordingly, his father had brought her once, however, she again went back with Machhindra to Surat.

Regarding the occurrence, he deposed that he had also been to answer call of nature and at that time his father also came there and they both were sitting 10 to 15 feet apart. At that time, accused came carrying weapon in his hand and gave blow on the abdomen of his father. He claims that he has seen the incident clearly. Then he stated that accused ran towards Londhare village and this witness stated that at such time, he has concealed himself in the wheat crop adjacent to the spot due to fear of the weapon in the hand of accused and dangerous face of the accused. He stated that accused was carrying sharp edged one feet long weapon. That due to the incident, he fell

unconscious and regain consciousnesses after 15 minutes. By that time, the people were gathered there. As he was frightened, he quietly went to his house and remained alone in the house. He again returned back after some time and found his mother and brother had shifted his father to the hospital. He learnt about death of his father. Police came, prepared spot panchanama and recorded his statement. He stated that after the funeral, he narrated the incident to his brother and mother.

This witness is also extensively **cross-examined**, but there is no effective cross on the actual occurrence of assault and there is unnecessary and irrelevant cross-examination on other aspects.

10. **PW5** Prakash Sonawane, who is neighbour, claims that he learnt from PW1 Shrawan about incident and therefore, he went there and he saw that deceased had sustained injury on the abdomen and so he went and called PW6 Raju and they all shifted deceased to hospital. He stated that intestine of Yuvraj was come out but he was breathing. That on reaching hospital of Dr.B.D.Patil at Shahada, on examination, Yuvraj was declared dead.

In **cross-examination**, this witness admitted that when he reached the spot, wife of deceased Yuvraj was present there. He is unable to answer why portion marked "A" is appearing in his statement. Then he is questioned as to where he was sitting in the vehicle and what was used as cover over the injured and whether there were blood stains on it.

11. **PW6** Raju is the owner of the Jeep and he deposed about PW5 Prakash Sonawane approaching him alongwith PW1 Shrawan and they shifting deceased in his vehicle to hospital of Dr.B.D.Patil at Shahada.

12. **PW7** Latabai, wife of deceased Yuvraj, stated that because of marriage of Machhindra with daughter of accused, accused used to give threats to both Machhindra as well as her husband. That on 27-03-2013, at around 04:30 a.m., her husband went to answer call of nature. She stated that Bhatu and Shrawan also were in house, whereas Prakash had also been to answer call of nature. Her neighbour Mayabai informed about her husband lying in injured condition and therefore, they all rushed there and they saw her husband in injured condition. She deposed that her son PW1 Shrawan asked her husband as to what happened and he told that accused Shiva Chitte assaulted him and therefore, thereafter her husband was taken to hospital, where he was declared dead.

Even this witness is **cross-examined** about her education, spot where dead body was lying; how far it was lying from the thrashing floor; whether there was pool of blood; whether clothe was tied on the injury; whether there was residential locality near the spot. She answered that she became unconscious at around 10:00 a.m. and she was not present at the time of spot panchanama. Suggestion about father of Machhindra being ousted from the village for outraging modesty is denied by her. Thereafter, she is questioned as

under:

Q. 1. While dying her husband was taking name of god “Shiva, Shiva”.

Ans.: He was taking name of Shiva and thereafter, she volunteered that he was taking name of Shiva Kalsing.

13. On critical analysis of above discussed evidence, in our opinion, evidence of PW1 Shrawan, PW5 Prakash Sonawane, PW6 Raju and PW7 Latabai is only relevant. We refrain from relying on testimony of PW3 Prakash Kuwar for the simple reason that, inspite of claiming to be present at the spot, he has not attempted to intervene or save his own father. He kept himself hiding and quietly claims to have went to his house out of fright. He has not even informed to his brother informant as well as mother till the funeral was over. This is unnatural conduct and unbecoming of a son. Therefore, it is doubtful whether he has at all seen any actual assault.

However, what is pertinent here is that there is oral dying declaration by deceased immediately when his son PW1 Shrawan his wife and PW7 Latabai had reached the spot. PW1 Shrawan, informant speaks about he asking his father about the injury and deceased allegedly told that he was assaulted by accused.

14. Learned Counsel for the appellant submits that considering nature of injury, it is not possible for deceased Yuvraj to speak or name accused.

Here injury is to the abdomen and not to the upper part of the body. Even PW7 Latabai, wife of deceased speaks about her son PW1 Shrawan asking her injured husband and he naming accused. Infact while cross-examining PW7 Latabai, there was a specific question thereby suggesting that deceased was taking name of Lord Shiva. However, witness has volunteered and given full name of accused to be told by her injured husband. Independent witnesses like PW5 Prakash Sonawane and PW6 Raju are also stating about deceased to be alive at the time of lifting him and taking him towards hospital at Shahada. PW5 Prakash Sonawane is specific about deceased to be breathing. Therefore, when PW1 Shrawan reached the spot, in presence of PW7 Latabai there seems to be an oral dying declaration. Such material has not been damaged or rendered doubtful rather as stated above it is got reconfirmed from PW7 Latabai in the cross-examination itself. Therefore, on the strength of evidence of PW1 Shrawan, PW5 Prakash Sonawane, PW6 Raju and PW7 Latabai, case of prosecution is found to be trustworthy.

15. It is pertinent to note that alleged occurrence had taken place at around 05:00 a.m. to 05:30 a.m at village Dhandare Budruk and deceased was shifted by PW1 Shrawan to hospital at Shahada and FIR is lodged shortly after reaching Shahada. Therefore, there is prompt report. There is also recovery at the instance of accused which is not rendered doubtful.

CONCLUSION

16. Therefore, on taking survey of above evidence, here there is evidence about accused to be annoyed and angry on account of love marriage of his daughter with nephew of deceased. PW7 Latabai, wife of deceased speaks about regular quarrels and threats issued by appellant to both Machhindra as well as her deceased husband. Resultantly, case of prosecution can safely be accepted.

17. We have gone through the judgment under challenge, learned trial Court has correctly appreciated the evidence, findings are supported by sound reasons and no perversity is brought to our notice so as to cause interference. Therefore, finding no merits in the appeal, we proceed to pass following order.

ORDER

Criminal Appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)