

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

CRIMINAL APPEAL NO. 416 OF 2015

Angad Vishwanath Mammale
Age : 42 Years, Occu. Agri.,
R/o. Kadmapur, Tal. Omerga,
District – Osmanabad
At present in Jail

... Appellant

Versus

State of Maharashtra
Through Investigating Officer,
Police Station Omerga,
Taluka Omerga, Dist. Osmanabad

... Respondent

. . .

Mr. Govind Kulkarni h/f. Mr. Devang R. Deshmukh, Advocate for Appellant.
Mr. A. M. Phule, APP for Respondent – State.

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

DATE : 07 JANUARY 2023.

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

1. The appellant convicted is hereby questioning the judgment and order of conviction passed by the learned Additional Sessions Judge, Omerga in Sessions Case No. 14 of 2013 recording guilt of the accused for commission of offence punishable under Section 302 of IPC and sentencing him to suffer life imprisonment and to pay fine of Rs.25,000/-, in default to suffer rigorous imprisonment for two years.

2. **Prosecution story unfolded is as under :**

Deceased Maroti had learnt about illicit relations between accused and maternal aunt of accused. Accused and informant are cousins. There were quarrels between deceased Maroti and accused Angad on various occasions. According to prosecution, on 23.10.2012 at around 8.30 a.m., when Maroti was walking towards his field, accused, who was waiting in lay, rushed towards him with axe in his hand and gave blow with it from backside of deceased Maroti, as a result of which Maroti collapsed and fell down. Thereafter, again accused Angad gave blows with the axe on the face part of Maroti and he took to his heels along with axe.

PW1 Datta, who was returning from his field, claims to have seen the assault and therefore, he and sister of Maroti, namely Mitavranda, who also was nearby, rushed towards Maroti. A tum-tum (six seater rickshaw) of one Devidas Baburao Jamadar (PW3) was called and Maroti was taken to doctor at Omerga who, after giving him preliminary treatment, advised him to be shifted to Solapur and therefore, he was accordingly taken there where he was examined and declared dead. **PW1** Datta claims to have approached police and lodged report Exhibit 15.

Police registered crime on the basis of such report and thereafter investigation was entrusted to **PW9** Sunil Nagargoje, Police Inspector and

PW10 Madhav Gundile, Police Inspector, who were attached to the Omerga Police Station and who carried out investigation at respective times and accused came to be chargesheeted.

3. Learned Additional Sessions Judge, Omerga, who was entrusted with the sessions case, conducted trial during which prosecution adduced evidence of in all ten witnesses. After recording answers of accused under section 313 of the Code of Criminal Procedure (Cr.P.C.), defence adduced evidence of doctor **DW1**. Thereafter, learned trial Judge heard and appreciated the evidence adduced by both sides and finally reached to a conclusion that prosecution has established that accused committed murder of deceased Maroti and thereby convicted him as stated above.

4. All ten witnesses on behalf of prosecution were cross-examined by defence at length. Prosecution claims that **PW1** Datta and **PW2** Mitravrandha are direct eye witnesses. On evaluating the evidence adduced by prosecution, it is emerging that **PW1** Datta happens to be cousin of deceased Maroti, and it is he who set law into motion by lodging report. **PW2** Mitravrandha seems to be real sister of deceased. From the evidence of both these witnesses it is emerging that even accused happens to be their cousin. Both, **PW1** Datta and **PW2** Mitravrandha have deposed that on 23.10.2012 they had seen accused assaulting Maroti with axe.

Both these witnesses speak of injured Maroti to be taken in tum-tum of Devidas Baburao Jamadar. **PW2** Mitravranda claims that she herself, her mother, wife of deceased, namely, Manjula and one Arjun Laxman Gogade shifted injured Maroti from civil hospital, Omerga to Solapur. According to **PW1** Datta, deceased had learnt about affair of accused with Chitrabai and therefore assault was carried out. Same motive is attributed by **PW2** Mitravranda about accused having illicit relations with maternal aunt of accused and that Maroti having learnt about it, accused felt that he is telling this to others in the village.

Therefore, here prosecution has come with a case of availability of two direct eye witnesses and motive behind the occurrence.

5. Both above witnesses i.e. **PW1** Datta and **PW2** Mitravranda are cross-examined at length. **PW1** Datta in his initial cross-examination is asked about purchasing tum-tum. He is questioned in detail about description of the spot and the geographical directions, about whose houses and located where and at what distance. Names of some relatives of deceased Maroti were also suggested and about their occupation. Some questioning and suggestions are thereafter put on the point of grampanchayat elections held two years back. Suggestion about strained relations between him and accused are denied. Likewise, there is denial about his father giving evidence against father of

deceased in a complaint. Again there is cross-examination about location of house of Rohidas Bhale and its distance from Lord Maruti temple. Then he is questioned as to whether he tried to offer water to deceased Maroti, to which there is answer in negative. He is questioned about colour of the clothes on the person of the accused. Then he is asked who all lifted and shifted deceased to Civil Hospital, Omerga. He admitted that before lodging report at police station, he had talked with **PW2** Mitavranda in the hospital and on the next day police met him. Rest is all denial. He is asked as to whom accused handed the kettle and he answered that it was handed over by accused in the hands of Nagesh s/o Babruwan Jamadar.

6. In the cross-examination of **PW2** Mitavranda, she denied that many cases are filed against her deceased brother. She has admitted that Chitrabai is aunt of accused but denied about any dispute between informant Datta and accused on account of erecting huge loose stone wall. In further cross-examination, she is unable to state exact distance between gym and the spot of incident. She too is asked about what colour clothes accused was wearing and she answered that he was wearing purple colour shirt and blackish colour pant. She is asked how much time it took them to cover the distance up to Civil Hospital, Omerga. She has answered that she did raise hue and cry on the spot and many persons gathered.

Above is the only cross-examination of **PW1** Datta and **PW2** Mitravranda who are said to be direct eye witnesses.

7. It seems from record of trial court that **PW3** Devidas, whose vehicle was alleged to be used for shifting Maroti to Omerga, has not supported the prosecution. However, in cross-examination this witness has admitted that in the hospital of doctor Vijay Patil, Sheshrao and Mitravranda had told that Maroti had sustained injuries in an accident. He is found to be admitting that thereafter they brought Maroti to Civil Hospital, Omerga, but he himself did not go to the hospital. He admitted that there are many incidences of assault on Maroti by many persons and about Maroti raising quarrel with several persons in the village after getting drunk.

8. **PW4** Indrajit Bhosale, pancha to the spot panchanama, has supported prosecution and as such spot panchanama was got exhibited vide Exhibit 20. His evidence in cross-examination has remained unshaken on the point of he acting as pancha and description given by him in his substantive evidence.

9. **PW5** Arjun Hogade, inquest pancha, spoke about seeing dead body with injuries on head and lips and inquest panchanama being drawn in his presence and he being signatory to it and he identified it at Exhibit 24.

10. **PW6** Baburao Mali at Exhibit 26 testified that on 23.10.2012 he was called at police station, Omerga. Bhanudas Ingale was also present with him. It is his evidence that police had shown one axe to them and told that the axe was used for crime. Thereafter, police prepared panchanama and obtained his signature which he identified as Exhibit 27.

In cross-examination, he answered and admitted that panchanama was already prepared and written before his arrival to the police station.

11. **PW7** Dr. Mayur Mayabhate is the autopsy doctor who spoke about receiving dead body and undertaking autopsy and finding seven external injuries and he narrated the same, which were noted in column no.17. He has issued opinion that cause of death was head injury. On being shown the muddemal axe he answered that injuries are possible by said weapon.

In cross-examination, he answered that he had done 15 postmortems and answered that he had gone through inquest panchanama before postmortem. He admitted that he had opened the first injury which was ad-measuring 5 cm X 4 cm in size and injury no.1 in column no.17 to be corresponding to first injury described in column no.19. Questions are put about requirements to be complied while conducting postmortem. He answered that as injuries were stutured, he could not determine the age of

injuries. He is unable to assign why age of injury nos. 1 and 5 are not mentioned but he agreed to the preposition laid down in Medical Jurisprudence by Prof. A. D. Deoskar which is reproduced in para 6. He answered that for causing injury nos. 1 and 2 noted in column no.17, two different blows are necessary and according to him, injury no.5 is possible by separate blow by sharp weapon. He answered that injury no.1 is individually possible by separate fall on hard surface like cement road. He admitted that if a person falls from height of about five feet on a hard surface, it may result into fracture on bone of skull. He answered that injury nos. 1 and 5 are possible by single blow. He is further questioned about preposition laid down in Modi's Medical Jurisprudence regarding falling of teeth.

Thus, from the evidence of PW7 Dr. Mayur-autopsy doctor, a medico legal expert, discussed above, it is emerging, i.e. from column no. 17 of postmortem report, that deceased had suffered injuries on **forehead right side i.e. horizontal over right eye, injuries below right eye, upper lip, mid-line lower lip, forehead horizontally placed above left eye, fall of teeth and fracture to lower jaw**. As stated above, it is the opinion of doctor that there was fracture to frontal bone of skull and therefore doctor has opined that death was due to head injury.

12. **PW8** Dr. Nanasaheb Gosavi seems to be the doctor posted at Sub-District Hospital, Omerga and according to him on 23.10.2012 while he was on duty, patient by name Maroti was brought in injured condition with history given as assault on 23.10.2012. After narrating about coming across seven injuries and treating them, he claims that patient was referred to the higher center. He identified the MLC certificate issued by him at Exhibit 41. He stated that injury nos. 1 to 5 are possible by blow given by sharp object like axe.

While under cross-examination, he has admitted that MLC signed by him is undated and without outward number. He has admitted that all kinds of wounds like incised wounds, CLW, punctured wounds, laceration and abrasion are possible in motor vehicle accident. He has admitted that for causing seven injuries, at least three to four blows must be inflicted. He admitted that there is overwriting in the MLC register.

13. **PW9** PI. Nagargoje and **PW10** PI. Gundile are Investigating Officers.

14. Now it is to be seen whether prosecution has proved that accused is author of the head injury and death is a result of such head injury as is the opinion about cause of death.

Though autopsy doctor **PW7** Dr. Mayur has admitted that injuries are possible by axe, mere possibility has been expressed on opinion being sought to that extent. It is settled law that it is mere an expert's opinion and it is for the court of facts to accept or reject his opinion. We say so because unless it is shown that axe was put to use, death cannot be said to be homicidal one. We are entertaining such doubt because we have come across some doubtful material while examining the entire chargesheet.

Firstly, according to **PW1** Datta and **PW2** Mitravranda, accused came from behind and assaulted from backside. Taking such position of accused and deceased, surprisingly, there does not seem to be any injury to the skull part or occipital part which was easily available for assault. As stated above, rather no injuries are detected on occipital part but injuries are noted by doctor on forehead, right eye and lips. Resultantly, it is difficult to accept that a person hitting from backside would hit at such sites.

Secondly, after the alleged occurrence at around 8.30 a.m., eye witnesses speak that accused ran away with the axe. However, according to the Investigating Officer **PW10** P.I. Gundile, accused was arrested on the same day at 2.20 p.m. This Investigating Officer claims that he had received information that accused was coming towards police station. Who passed such

information is a mystery. The investigating Officer has admitted in cross-examination that, he did not take note of this in the station diary. However, he claims that accused came to the police station with axe in his hand. According to him, said weapon was stained with blood and after arresting accused, he seized the said weapon on that day itself i.e. on 23.10.2012 in presence of panchas. However, on going through the muddemal receipt and even the communication made to analyzer while dispatching muddemal, there is no whisper about axe to be bloodstained. It is further pertinent to note that alleged seizure of 23.10.2012 (Exhibit 2) is dispatched to analyzer on 11.12.2012 (Exhibit 32) i.e after delay of more than one and half month and chain of custody is also not cogently proved. Pancha to seizure has admitted that it is the police who showed them the axe alleged to be recovered from accused. Pancha do not speak about accused giving any memorandum of disclosure and seizure of axe to be caused in their presence. Pancha further admitted in cross that signature was caused on already prepared panchanama. For all above reasons, recovery of axe is rendered doubtful.

The **third** reason which rendered case of prosecution doubtful is that, medical papers of Civil Hospital, Omerga are not gathered by the investigating machinery. Said hospital papers were crucial regarding history being reported at the said hospital. On the contrary, defence by examining **DW1** i.e. doctor Vijay Patil, to whom all witnesses speak of taking deceased first, has stepped

into witness box to state that history given by relatives was road traffic accident. He is an independent medical practitioner at Omerga and is even not of the village where accused and deceased resided or where the alleged incident had taken place, so as to raise doubt about his creditworthiness. Hospital papers carried by him that day in the court are placed on record and therein one comes across noting regarding history given as “RTA”.

15. Another aspect which further gives severe blow to the prosecution story is that according to **PW1** Datta and **PW2** Mitravranda, accused was angered as according to this witness **PW1** Datta deceased was broadcasting in the village about illicit relations between accused and Chitrabai and this is the precise motive which is tried to be put forth by prosecution behind occurrence. Apart from no evidence in that regard, we have come across a *khobar*. Such information was supplied to the Sadar Bazar Police Station, Solapur. It is marked at Exhibit 53. On going through the *khobar*, it is seen that it is at the instance of Police Head Constable A. K. Bansode (B.No. 607) posted at Sadar Bazar Police Station, Solapur City intimating the Police Inspector of Omerga Police Station, regarding registration of A.D. No. 0/2012, noted prior to 12.50 on 23.10.2012 vide Station Diary Entry No. 297 which was transmitted by Solapur City Police Station to the Investigating Officer, Omerga Police Station informing the *haqiqat*. Apparently, after noting AD vide no. 0/2012, timing of the alleged incident is noted as 06.30 a.m. Whereas, according to **PW1**

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Datta and PW2 Mitravrandra, occurrence took place at 8.30 a.m. in their village. Therefore, genesis of the incidence which is apparently distinct than the one stated by **PW1** Datta in the evidence before trial court creates doubt about motive. Such material creates doubt about version of prosecution on availability of motive.

Therefore, the above points noticed by us go to the root of the case regarding motive. Even **PW1** Datta and **PW2** Mitravrandra, who are cousin and real sister of deceased respectively, though claim to have seen the occurrence, the information given to doctor Vijay Patil **DW1** and the *khobar* received from Solapur City police being contrary, it is unsafe to directly rely on the evidence of **PW1** Datta and **PW2** Mitravrandra on the point of occurrence in the capacity of eye witnesses.

16. We have also noticed unnatural conduct of **PW1** Datta for the reason that, he speaks in his testimony in the witness box that while he was returning towards his house, he saw accused standing on the road holding axe and kettle. He is very specific and categorical that at that time accused was seeing Maroti in the state of anger. He also further stated that therefore he halted there itself. If this was the position, then it was expected of **PW1** Datta to rush towards deceased, to go to his rescue and/or intervene or at least raise alarm

for alerting deceased. However, there is no such reaction at his end in spite of claiming to be present at the spot. Therefore, his conduct is unnatural.

It is noticed that, this witness has stated that accused handed over a kettle in the hand of a child. Therefore, it is obvious that the incident had happened in presence of a child. Said child has not been examined for the reasons best known to the prosecution and the Investigating Officer admitted to that extent.

17. In the totality of the circumstances and quality of evidence which has come before the learned trial court, autopsy doctor is expressing possibility about head injury to be the cause of death. However, autopsy doctor in cross-examination has also agreed that said injury is possible on account of fall on cement road. **DW1** also speaks about history being reported as RTA. Ocular account fails to inspire confidence for above stated reasons. Distinct motives are coming on record. Therefore, here two views are emerging. As per settled legal preposition, the view that favours accused has to be adopted.

18. To sum up, case of prosecution cannot be accepted as proved for following reasons:

Firstly, the alleged eye witnesses account is not full proof and trustworthy.

Secondly, motive is rendered doubtful in view of evidence of PW1 Dadda and PW2 Mitravranda and Exhibit 53.

Thirdly, recovery of axe is not cogently proved for reasons stated in paragraph no.14.

Fourthly, medical evidence is self-contradictory about history of occurrence.

Fifthly, seizure is dispatched after inordinate delay and even chain of custody of seizure is not proved.

We have gone through the impugned judgment and order and the entire oral and documentary evidence. Learned trial Judge seems to have proceeded to accept the case of prosecution i.e. without minutely going through the evidence on record. Crucial defects which had surfaced during trial are not pondered upon and dealt by assigning cogent reasons. Hence, this is a fit case for intervention at the hands of this Court. Appellant succeeds and so we proceed to pass following order :

ORDER

- I. The criminal appeal is allowed.

II. The conviction of the appellant – Angad Vishwanath Mammale in Sessions Case No. 14 of 2013 on 10.04.2015 by learned Additional Sessions Judge, Omerga by holding him guilty of committing offence punishable under Section 302 of the Indian Penal Code, stands set aside.

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

IV. It is made clear that there is no change in the rest of the order regarding disposal of Muddemal passed by the learned Additional Sessions Judge, Omerga.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)

VRE