

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.579 OF 2016

Kashinath Vinayak Malode,
Age 39 yrs., Occ. Labour,
R/o Akhatwada, Tq. Khultabad,
Dist. Aurangabad.

... Appellant

... Versus ...

The State of Maharashtra
Through In-charge Police Station,
Khultabad, Tq. Khultabad,
Dist. Aurangabad.

... Respondent

...

Mr. Kishor Gadhave Patil, Advocate (appointed) for appellant

Mr. A.V. Deshmukh, APP for respondent

...

CORAM : SMT. VIBHA KANKANWADI
S.G. CHAPALGAONKAR, JJ.

RESERVED ON : 27th JUNE, 2023

PRONOUNCED ON : 17th JULY, 2023

JUDGMENT : (SMT. VIBHA KANKANWADI, J.)

his conviction by learned Special Judge, under Atrocities Act (Additional Sessions Judge-7), Aurangabad on 08.09.2016 in Sessions Case No.114/2012, for the offence punishable under Section 302 of the Indian Penal Code, 1860 and under Section 3(2)(v) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short, hereinafter referred to as "The Atrocities Act").

2 The prosecution story, in short, is – PW 1 Vithabai Ashok Sonawane is the wife of one Ashok Sonawane, resident of Akhatwada, Tq. Khultabad, Dist. Aurangabad. They are belonging to Bhil Tribe. She lodged First Information Report on 02.12.2011 stating that her husband Ashok was the owner of 2½ acres of land in Akhatwada. Earlier the said land was given to one Thagnabai Ambadas Satdive for cultivation on contract basis. However, in the year 2011 they had not extended the contract. They started cultivating it themselves, but they were being obstructed by Thagnabai and her two sons Gorakh and Navnath. Vithabai and her brother-in-law was assaulted by them by saying that they have purchased the land. Around 7.00 a.m. on 02.12.2011 accused Kashinath had gone to the house of Ashok. Kashinath and Ashok then went to Tanda. The sister-in-law of Vithabai came around 10.00 a.m. and told that one Janardhan Sukhdeo Satdive had gone to the house of sister-in-law Bhagubai and disclosed that Kashinath had

assaulted Ashok around 9.00 a.m. on the bandh of his land by keeping stones in one handkerchief. Kashinath informed Janardhan that he has killed dog (referring it to Ashok) on his bandh. Thereafter Vithabai and Bhagubai as well as Parvatabai went towards the land of Janardhan. They found Ashok in unconscious state, who had sustained injury to the back side of his head. Blood was oozing out of the injury. They took Ashok to Khultabad hospital and after examining him the Doctor asked them to take Ashok to Aurangabad. When they were proceeding to Aurangabad and when they were near Aurangabad Naka, Ashok succumbed to the injury, therefore, they returned to home and then he was taken to Government Hospital, Verul (Ellora). Vithabai then lodged report with Khultabad Police Station.

3 Initially the offence was registered under Section 302 of the Indian Penal Code only. It is disclosed in the First Information Report that the lady belongs to Bhil tribe. It appears that by order dated 03.12.2011 issued by District Superintendent of Police, Aurangabad (Rural) the investigation was handed over to Sub Divisional Police Officer Mr. Hage, working as S.D.P.O. for Kannad Division, Dist. Aurangabad. After completion of investigation he forwarded the charge sheet to Judicial Magistrate First Class, Khultabad. After the committal of the case, the trial was conducted. Prosecution has examined in all 13 witnesses to bring home the guilt of the

accused. After considering the evidence on record and hearing both sides the learned Trial Judge has held the accused guilty of committing both the offences. Accused Kashinath has been sentenced to suffer imprisonment for life and pay fine of Rs.2,000/-, in default to suffer simple imprisonment of one month for the offence punishable under Section 302 of the Indian Penal Code. He has been further sentenced to suffer imprisonment for life and pay fine of Rs.2,000/-, in default to suffer simple imprisonment for one month for the offence punishable under Section 3(2)(v) of the Atrocities Act. Both the sentences were directed to run concurrently. This is the conviction under challenge in this appeal.

4 Heard learned appointed Advocate Mr. Kishor Gadhave Patil for the appellant and learned APP Mr. A.V. Deshmukh for the respondent.

5 It has been vehemently submitted on behalf of the appellant that the Trial Court has not appreciated the evidence properly. PW 1 Vithabai, who is widow of the deceased and informant, is not the eye witness. But she claims that she was told about the fact by her sister-in-law Bhagubai, who in turn was told about the incident by PW 3 Janardhan Satdive. PW 3 Janardhan has turned hostile. It has come on record through the testimony of PW 1 Vithabai that accused was the friend of deceased. Under the said

circumstance, what was the motive for the accused to commit murder of the deceased, is a question. The motive has not been proved by the prosecution, in this case. No doubt, PW 1 Vithabai has produced the caste certificate showing that he is Bhil, which is a scheduled tribe, but when deceased was the friend of the accused and there was no motive at all to commit his murder, conviction under Section 3(2)(v) of the Atrocities Act cannot be allowed to sustain. Prosecution has examined PW 4 Laxmibai Barku Dhivar and PW 5 Sonabai Bhika Rathod. Both have supported the prosecution story. But it can be seen from the cross-examination of both of them that it is hard to believe that they would have witnessed the incident. Their alleged presence at the spot is doubtful. PW 6 Kalabai Totaram Rathod has only stated that around 9.00 a.m. on 02.12.2011 she had seen Ashok and Kashinath sitting in front of her house. Both were smoking Bidi and talking with each other. But then she says that she left house for plucking raw cotton. PW 7 Bhagubai Barku Gaikwad though stated that Janardhan had informed her that Kashinath has murdered her brother, but the said statement cannot be accepted in view of the fact that PW 3 Janardhan had himself turned hostile. Another fact to be noted from the testimony of PW 1 Vithabai is that when she along with her sister-in-laws went to the spot, Ashok was stated to be in unconscious state. They took him to Government Hospital, Khultabad, from where they were asked to take him to GHATI,

Aurangabad. But they did not go to GHATI, Aurangabad. She has tried to explain that on the way Ashok expired and, therefore, they returned. This conduct is also doubtful. PW 8 Dr. Mohd. Sajid Shaikh was the Medical Officer with Primary Health Centre, Verul (Ellora), who had conducted the autopsy. Though he has stated about the injuries, he had noted the muddemal was not shown to him and it has not been extracted from him, as to whether the death of Ashok was homicidal in nature. The prosecution has failed to rule out the possibility of Ashok sustaining the injuries due to fall under the influence of liquor and, therefore, it cannot be said that the prosecution has proved the offence beyond reasonable doubt. The learned Advocate for the appellant would submit that with the material placed before the learned Trial Court, the learned Trial Court ought not to have convicted the accused and, therefore, appeal deserves to be allowed.

6 Learned APP strongly objected the submissions on behalf of the appellant. He supported the reasons given by the learned Trial Judge. He submitted that PW 1 Vithabai is not an eye witness. She was the person who had seen Ashok and Kashinath leaving the house together. Therefore, her testimony cannot be simply brushed aside. She admitted that her husband is in habit of drinking liquor, but it is to be noted that PW 8 Dr. Mohd Sajid Shaikh has not been cross examined on behalf of the accused. No question of

showing muddemal would arise when he has specifically stated that cause of death was due to “intracranial haemorrhages due to head injury: (unnatural cause). Those words “unnatural cause” would depict that it is homicidal death. Merely because the deceased and the accused were friends, it cannot be said that provisions of the Atrocities Act will not be applicable. Rather it supports the prosecution story that the accused had the knowledge that deceased was belonging to Bhil tribe. Knowing it fully well he has committed murder of Ashok and, therefore, the provisions of the Atrocities Act have been rightly invoked. PW 4 Laxmibai Dhivar and PW 5 Sonabai Rathod are the eye witnesses. Though PW 3 Janardhan, who was also the eye witness, has turned hostile; yet, PW 4 and PW 5 have stuck to their earlier version and there is nothing in their cross which would disbelieve them. When there is direct evidence, the motive assumes no importance. Therefore, even if for the sake of argument it is accepted that the motive has not been proved by the prosecution in this case, it is not fatal at all. The accused has been rightly convicted.

7 As the prosecution story is narrated earlier, it is not reproduced. The examination-in-chief of PW 1 Vithabai is the replica of the First Information Report. Definitely it would *per se* show that she is not the eye witness, but she had seen accused and deceased going together. Rather this

fact has been further got confirmed in her cross-examination. She has stated that when her husband left the house, accused Kashinath was only with him. PW 7 Bhagubai Gaikwad is the sister-in-law of Vithabai and she has stated that when she was present in the village on 02.12.2011, Janardhan informed her about the incident. He told that Kashinath murdered her brother. She then states that we 2-3 women went to the house of Ashok and then he was taken to Government Hospital, Khultabai from the spot. While they were going towards Aurangabad he expired. In the cross-examination she has stated that Ashok was residing in the land, whereas she resides in the village. The distance is 2-3 k.ms. She denied the suggestion that Ashok consumed the liquor and under the influence fallen down and sustained injury. She also denied that Janardhan had not stated anything about incident to her. Her cross-examination was not sufficient to raise doubt about her examination-in-chief. She gets support in the testimony of PW 4 Laxmibai. She has stated that her land Gat No.65 is in the village Akhatwada and she is residing there. She has constructed a house in the land and adjacent to her land there is land belonging to PW 3 Janardhan. He has also constructed a house in his land. Around 9.00 a.m. on 02.12.2011 she was standing in front of her door. There is a path way, which passes from the bandh of Janardhan and she saw quarrel between Ashok and Kashinath. Then Kashinath tied stone in rumal (big handkerchief) and assaulted to Ashok. It hit the back side of the head of

Ashok. Laxmibai says that she went to the place of incident. By that time Janardhan and Sonabai also came there. Ashok had sustained injury and was lying there. Janardhan told that he would inform the incident to village Police Patil and the family members of Ashok. She then says that thereafter sister and wife of Ashok came to the spot and took Ashok to village. This chain of events has not been discarded in her cross-examination. She has stated that her house is at a distance of 150 – 200 feet. She says that she was knowing Ashok since last 40 years, but then she claims ignorance, as to whether Ashok was having habit of drinking liquor and smoking Bidi. Janardhan was not her relative. Rest are the denials. Taking into consideration the situation, her presence at the spot is not unnatural. She has told about the presence of PW 5 Sonabai. PW 5 Sonabai says that around 9.00 a.m. she was going towards her land for plucking raw cotton. On the path way, which is on the bandh of Janardhan, she found quarrel between Kashinath and Ashok. Kashinath tied stone in gamcha and assaulted Ashok, due to which Ashok sustained injury to the back side of head. Janardhan left the place of incident and went to village to narrate the incident to Police Patil. She has admitted in her cross-examination that the spot is not visible from her house. But she has given explanation that she was not in the house at that time, but was proceeding towards her land for agricultural work. Villagers proceeding to agricultural lands for doing agricultural operations in

the morning is not unusual. Both these witnesses had no enmity with accused. In other words, the accused was not successful in bringing the fact on record that these two witnesses had some motive to implicate him. Both of them are saying that Janardhan was present there and left the place by saying that he would inform the fact to Police Patil and the relatives of the deceased. Since PW 7 Bhagubai Gaikwad was residing in the village, the possibility is created that Janardhan would have informed the feed back to her instead of going to the house of Ashok, which was in the field, to inform the said fact. We do not find any doubtful circumstance. The testimony of PW 1, 4, 5 and 7 is trustworthy.

8 Now, turning towards PW 3 Janardhan, it is to be noted that he has stated that he is having his land in Gat No.65 and he reside in the house situated in the said land. He found that Ashok lying on his bandh and nobody was present. Questions in the nature of cross were allowed to be put to him. Though he has denied the suggestions and he denied that the police had recorded his statement, he admitted that two times prior to the date, on which his testimony was recorded, he had come to the Court and on the previous dates the brother of the accused Sominath was present with him in the Court. The person behind the hostility of this witness appears to be the brother of the accused. His hostility is not fatal to the prosecution story when

the testimony of PW 4 Laxmibai and PW 5 Sonabai who are independent witnesses is trustworthy.

9 PW 2 Shamrao Sheshrao Phulare is the panch witness to the spot panchnama and seizure of clothes of deceased as well as arrest panchnama of the accused. There is nothing contradictory in his cross-examination. Therefore, those documents have been proved.

10 Coupled with the testimony of the eye witnesses when PW 8, the Medical Officer, has deposed about the injury noted by him on the person of the deceased and gave the cause of death as “Cranio Cerebral injury” (unnatural cause) in the provisional certificate and Postmortem Report shows due to “intracranial haemorrhages due to head injury” (unnatural cause) was sufficient to prove that the death was homicidal in nature. Further, the Medical Officer has not been cross-examined.

11 PW 9 Jagannath Mangu Chavan is another villager from Akhatwada and he was said to be examined on the point of extra judicial confession. He has turned hostile. The basic nature of evidence in the form of extra judicial confession is a weak kind of evidence and, therefore, his hostility has also not affected the prosecution story. PW 10 Arjun Sarjerao Gaikwad is the panch to the inquest panchnama which has not been denied

at all. PW 11 Rohidas Ramchandra Chavan was another panch to the spot panchnama. PW 12 Harishchandra Ashokrao Narke is the Police Naik, who was serving as a Writer with Mr. S.S. Davle, Police Inspector, Police Station, Khultabad. Mr. S.S. Davle was reported to be dead and, therefore, PW 12 Mr. Harishchandra Narke was examined, who says that he was along with PI Mr. S.S. Davle and spot panchnama is in his handwriting. He has proved the spot panchnama. PW 12 Mr. Narke is also examined to complete the procedure as contemplated under Section 145 of the Indian Evidence Act, as he had written down the statement of Janardhan under Section 161 of the Code of Criminal Procedure. However, we would like to say that we do not approve this kind of procedure. The statement has to be recorded by the concerned Police Officer under Section 161 of the Code of Criminal Procedure. The person who writes it down cannot complete the procedure as contemplated under Section 145 of the Code of Criminal Procedure. At the most, testimony of PW 12 Mr. Narke can be considered to identify the signature of then PI Mr. S.S. Davle. PW 13 Mr. Dinesh Girdhar Bari @ Hage, then S.D.P.O., Kannad is the Investigating Officer. He has given the account of investigation which he had carried out. His cross-examination does not point out serious lacuna in the investigation.

deceased was attacked by accused Kashinath by keeping stone in a big handkerchief and that was used as a weapon to hit the head of the deceased from back side. Such instrument i.e. keeping small stones in handkerchief or some such rope is used for keeping the birds away from the crops. When the crops grown up grain, then birds get attracted. To keep those birds away from such yield, such locally made instrument is prepared by farmers and from a raised platform. Such instrument is aimed towards the birds. Therefore, preparation and use of such instrument is not foreign to a farmer. Such instrument is called sling (गोफण). The stone contained in the sling might have hit so hard that it had caused the injury to deceased noted by PW 8 Dr. Mohd. Sajid Shaikh, which was the cause of the death. It cannot be said that the said act was the act of sudden quarrel, because no such defence has been taken by the accused. The accused comes with the defence of the total denial. When he had knowledge that with force if such stone is hit on the head, then it would cause the murder, then definitely, the accused will have to be held guilty of committing murder, and together with the said offence when he had the knowledge that the deceased was member of scheduled tribe, we hold that the prosecution has proved the guilt of the accused under both the offences beyond reasonable doubt.

learned Special Judge in convicting the appellant. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, it is dismissed.

14 Before we part, we would like to say that by order dated 20.10.2016 this Court had appointed learned Advocate Mr. Kishor Patil to represent the appellant and, therefore, his fees is quantified at Rs.10,000/- (Rupees Ten Thousand only), to be paid by the office of the High Court of Judicature at Bombay, Bench at Aurangabad.

(S.G. CHAPALGAONKAR, J.)

(SMT. VIBHA KANKANWADI, J.)

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