

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

922 CRIMINAL APPEAL NO.702 OF 2016

Suresh Pratap Musalde,
Age 22 yrs., Occ. Labour,
R/o Javkheda, Tq. Shahada,
Dist. Nandurbar.

... Appellant

... **Versus** ...

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

... Respondent

...

Mr. S.K. Adkine, Advocate (appointed) for appellant

Mr. A.V. Deshmukh, APP for respondent

...

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

DATE : 11th JULY, 2023

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

1 The appellant challenges his conviction in Sessions Case No.12/2014 by learned Additional Sessions Judge, Shahada, Dist. Nandurbar on 04.03.2016 after holding him guilty for committing an offence punishable

under Section 302 of the Indian Penal Code, 1860.

2 The prosecution story is that – deceased Pratap Kutrya Musalde was the husband of informant Sumanbai. Present accused is the son of deceased Pratap and Sumanbai. They were residing together with another son Prakash at Javkheda, Tq. Shahada, Dist. Nandurbar. They all were doing labour work. Around 4.00 p.m. on 29.11.2013 Sumanbai and Pratap had gone to the forest to bring fodder for their cow. After they brought the fodder around 5.00 p.m., Pratap has kept the it on the raised platform outside the house (Ota). Present accused has returned from his work. He asked his father some money as he wanted to purchase tobacco. Pratap told accused that if he desires to consume tobacco, then, when he is working he should spend on the same. He has no money. The accused got annoyed and started assaulting his father with fists and kicks. Sumanbai intervened and rescued husband. She started doing work on the Ota, however, accused Suresh took out knife from his pocket and pierce the same in the chest of his father. When Sumanbai saw it, she shouted. One Gabu Musalde, Chhotya Shemale and Pravin – son-in-law of Satu rushed. They saw. They as well as Sumanbai separated Suresh and Pratap. At that time, Suresh was possessing the knife. Pratap fell down on the ground, Sumanbai gave call to him, but he did not move. She held her husband and the other had then caught Suresh.

Sumanbai and younger son Prakash with Police Patil took Pratap to Municipal Council Hospital, Shahada. After examining him the Doctor declared him dead. Thereafter, she went to Police Station with Prakash and lodged report.

3 PW 17 API Vinod Patil took up the investigation and went to the village Javkheda, as he came to know that accused has been caught by the villagers. After going to village, he found that the accused was caught and the Police Patil was present there. Therefore, he took the custody of the accused, got his person search in presence of panchas. He found a knife in the right pocket of his pant. Thereupon, he executed panchnama of the seizure of the knife. Thereafter he got the accused medically examined and then arrested. On the next day he visited the Municipal Hospital, Shahada, where the dead body was kept, executed inquest panchnama and sent the dead body for postmortem. The clothes of the deceased, accused came to be seized by drawing panchnama and also the spot panchnama was executed. Statement of the witnesses were recorded under Section 161 of the Code of Criminal Procedure as well as of certain witnesses under Section 164 of the Code of Criminal Procedure. The Postmortem Report was collected and after the investigation charge sheet was filed.

4 After the committal of the case, the trial was conducted.

Prosecution has examined in all 20 witnesses to bring home the guilt of the accused. After considering the evidence and hearing both sides the learned trial Judge has held the accused guilty of committing offence punishable under Section 302 of the Indian Penal Code and he has been sentenced to suffer rigorous imprisonment for life and to pay fine of Rs.500/- (Rupees Five Hundred only), in default to undergo simple imprisonment for one month. Set off under Section 428 of the Code of Criminal Procedure has been granted. Hence, the present appeal.

5 The appellant has been given legal aid and learned Advocate Mr. S.K. Adkine has been appointed to represent the appellant. Heard learned Advocate Mr. S.K. Adkine for the appellant and learned APP Mr. A.V. Deshmukh for the respondent and perused the evidence on record.

6 It has been vehemently submitted on behalf of the accused/appellant that the learned trial Judge has not appreciated the evidence properly. Informant PW 2 Sumanbai has turned hostile and, therefore, it cannot be said that she has proved the contents of the First Information Report. Though she admits that husband is no more; yet, she has stated that she has not witnessed the incident. As regards the First Information Report is concerned, she has admitted that she does not

understand and speak or read Marathi. She was conversant with the local language of the tribe only and her son Prakash had not explained the contents of the First Information Report to her. In her cross-examination she admits that there is dispute amongst the accused and his uncle as well as other relatives on account of land and, therefore, she was deposing at the behest of the brother of the deceased. The possibility of the implication of the accused at the behest of the brother-in-law of PW 2 Sumanbai has not been ruled out. Secondly, her testimony does not stand corroborated by Prakash, her second son. As he has not been examined at all, there was no reason for prosecution to keep him away out of the witness box. The learned trial Judge has further failed to see PW 6 Jagan Bhil – one of the eye witnesses, PW 9 Pravin Shelar – panch to the seizure panchnama of the pant of accused, PW 10 Bapu Thakare – another panch to the seizure of pant of the accused, PW 11 Ekusing @ Sajan Thakare – panch to the seizure of clothes of deceased, PW 12 Subhash Tirmale, another panch to the seizure of clothes of deceased, as all have turned hostile. The seizure of murder weapon has not been proved. Though the testimony of PW 20 autopsy Doctor Suresh Thakare would disclose that death of Pratap is homicidal in nature; yet, there is no cogent evidence to connect the accused with the said crime. The conviction being illegal deserves to be set aside.

7 Per contra, the learned APP has supported the reasons given by the learned Additional Sessions Judge while convicting the accused. He submitted that though now PW 2 Sumanbai has turned hostile; yet, the fact that the accused is the author of the crime has been proved through PW 4 Chhotu Shemale and PW 5 Gabu Musalde. Both have categorically stated that they had seen accused stabbing father on chest by means of knife. There is nothing in cross-examination to discard their testimony. PW 3 Ravindra Patil though turned hostile, who was panch to the seizure panchnama of the knife; yet, the said fact has been proved through PW 17 the Investigating Officer. The hostility of the panch witnesses is concerned, it can be certainly said that even if their testimony is kept aside; yet, there is ample evidence on record which would support the prosecution and prove that except the accused, there is no other author of the crime. Accused is not disputing that his father died due to the chest injury caused by sharp weapon, then the other evidence in the form of other eye witnesses is sufficient. The Postmortem Report has been proved and every opportunity was given to the accused to contest the case. The available evidence would definitely show that the material which was placed before the trial Court was beyond reasonable doubt. Appeal deserves to be dismissed.

8 The case of the prosecution is based on direct evidence. If the

incident is witnessed by more than one witness and some of them turned hostile, then it may not affect the prosecution story, however, there should be consistency and trustworthiness in the testimony of those witnesses, who say that they have witnessed the incident. Here, in this case, PW 2 Sumanbai is the mother of the accused and widow of deceased Pratap. When the incident was fresh, she lodged the report, but now, after one year she has resiled from the same. The reason appears to be obvious that she is now desirous that the son should not remain in jail for long period. The incident took place on 29.11.2013 and her testimony was recorded on 30.01.2015. The accused was in jail throughout the trial and, therefore, being the mother she might have now decided to take the side of her son. She has not denied that herself, her husband Pratap and son Suresh were present in the house. She also says that Pratap is no more, but then claims ignorance as to how he expired. She admits that she had gone to Police Station but for what purpose she is not explaining, but then she denies that her thumb impression was taken and police had made inquiry with her. When learned APP was granted permission to put questions in the nature of cross as per Section 145 of the Indian Evidence Act, she admits that she had gone along with Pratap to forest around 4.00 p.m. on 29.11.2011 for bringing grass for the cow and they returned at about 5.00 p.m. She claims that she does not know whether accused has returned at that time and he had demanded money for

purchasing tobacco from her husband, which was then refused by her husband. She claimed ignorance about the fact that accused became angry and by taking out knife from his pocket he stabbed Pratap on his chest. But then she admits that she shouted and, therefore, Gabu Musalde, Chhotya Shemale and Pravin came to the spot. They caught hold of Suresh and she held her husband. When she gave call to husband, there was no movement from him, then she along with Prakash, Police Patil and villagers took her husband to Municipal Council Hospital, Shahada, where after examining Pratap Doctor declared him dead. She further admits that she went to Police Station and lodged report against the accused. She then also admits that she had narrated the incident to police. Police had recorded her statement as per her say and Prakash has explained the contents of complaint to her in Aadiwasi language. After understanding the contents she had put her thumb impression on the First Information Report and then Prakash had also signed the same. She has then identified the clothes, which were on the person of her husband at the time of incident. Thus, it can be seen that she thereafter supported the prosecution. She has again claimed ignorance about the knife which was shown to her. In her cross-examination she has stated that she cannot speak, write and read Marathi and also cannot understand the same. She cannot tell the contents of the document where she had put her thumb impression in the Police Station. Prakash had not read out the contents to

her. She then again claims ignorance about quarrel between accused and Pratap. She admits that she had put the thumb impression on blank paper. There was dispute between accused and his uncle and other relatives and, therefore, on the say of the uncle of the accused she was deposing falsely. Here, important point is that it was not suggested to her as to on which point there is dispute between accused and uncle. Mere such suggestion that there is dispute will not be sufficient, when it comes to the allegations about implicating somebody. Therefore, the cross-examination of PW 2 Sumanbai was not sufficient to wipe out the admissions given by her in her cross-examination taken on behalf of the prosecution.

9 The evidence that was brought through PW 2 Sumanbai was then supported by PW 4 Chhotu Shemale and PW 5 Gabu Musalde. Both have stated that they were present around 5.30 p.m. near the house of accused. It appears that the house of the accused is surrounded by other houses/shops. They both have stated that when there was initial quarrel between Pratap and accused, they had intervened and then they say that accused went inside the house and came out and thereafter stabbed father. It is to be noted that their testimony is consistent with their statements under Section 161 of the Code of Criminal Procedure as well as under Section 164 of the Code of Criminal Procedure. There is nothing in their cross to suggest

that they have any enmity against the accused. Therefore, when these two eye witnesses have totally supported the prosecution story, the said evidence is of high quality and accused has not discarded the same in the cross-examination. PW 5 is also the panch to the spot panchnama. He has proved the contents of spot panchnama Exh.18. Even though he has admitted that he is unable to read and write Marathi. We cannot discard the contents of the spot panchnama. PW 6 Jagan Bhil has also witnessed the first incident. He has stated that his wife was Sarpanch of the village at the relevant time and he himself was member of the Grampanchayat. The work of pipeline through the Grampanchayat was going on near the house of Pratap and he had gone there for supervision. He heard the quarrel between accused and Pratap on the count of tobacco. He intervened and pacified the quarrel. Thereafter, he says that he went in the village. He came to know about the incident through somebody else. It was found that he had resiled from his earlier statement to the extent that he had seen the actual incident also, but in the cross taken by the learned APP he has not supported the prosecution. This contradiction is in respect of his earlier statement under Section 161 of the Code of Criminal Procedure only. In his statement under Section 164 of the Code of Criminal Procedure Exh.23 he has stated that he had witnessed the main incident. As regards the first incident is concerned, he is consistent. Except denial in the cross there is nothing. Therefore, the testimony of this

witness would show that there was quarrel before the final act by the accused. Therefore, taking into consideration the testimony of all the above said witnesses, it can be seen that evidence led by the prosecution was sufficient to arrive at a conclusion that accused is the author of the crime. When there is direct evidence, we need not go to the other evidence and here in this case the direct evidence is trustworthy.

10 Though the panchas to the inquest panchnama have turned hostile, the fact that death of deceased Pratap is homicidal in nature has been proved through PW 20 Dr. Suresh Thakare. He has stated that during the postmortem he found three injuries; 1) cut incised wound (stab wound) over left chest region 5 c.ms. left above xiphisternal region, size 1.3 c.m. x 0.3 c.m. deep to cavity, 2) cut incised wound over left temporal region of scalp, size 1.3 c.m. x 0.3 c.m. x deep to over skull and 3) CLW over left first finger from proximal joint to distal phalnx. He says that the nature of the injury was grievous and it was within 24 hours and cause was sharp object (knife). He has also given the corresponding internal injuries and then he opined that the probable cause of death is “due to lung collapse with haemothorax with penetrating trauma to heart”. The Postmortem Report Exh.70 has been proved by him. He had also examined the accused medically. He has given the opinion that all the injuries were possible by knife. In the cross-

examination there is nothing which will discard his observation or opinion in Postmortem Report Exh.70.

11 As regards the seizure of the murder weapon is concerned, PW
17 API Mr. Vinod Patil has categorically stated that after the registration of the offence when he came to know that the accused has been arrested by the villagers, he immediately went to the village and took the custody of the accused. Question to this effect was specifically put to the accused in his statement under Section 313 of the Code of Criminal Procedure. He has answered that 'it is false'. But he has not given as to from where he has arrested. PW 19 Hiralal Patil is the President of Tanta Mukti Samiti, who resides to the back side of the house of accused. He has stated that after he heard the noise, he went to see what has happened. It was seen by him that 20-25 persons had brought the accused to the house of accused. Those persons, who had caught hold of accused, were trying to beat the accused, but he told the accused that he should sit and then he called the police. In his presence the police had taken the accused in his custody. Here also, there was no reason for this witness to speak against the accused and, therefore, though the panch to the arrest panchnama has turned hostile, the fact has been brought on record that the custody of accused was taken from his house and at that time the murder weapon has been seized. PW 13 is the panch to

the panchnama, which was executed at the the time re-seal. PW 20 Dr. Suresh Thakare had opened the sealed packet of the knife and showed the knife to the panchs and thereafter Dr. Suresh had given opinion that those injuries were possible by Article No.8 'knife'. PW 14 Vilas Patil is the panch to the seizure panchnama of the knife at the time of arrest of the accused. Here, in this case, the panchas to the arrest panchnama are different and panchas to the seizure of knife from the search of the person of accused at that time is different. The shirt, which was seized from the accused, had blood stains. It is further reflected in the C.A. report also. There was no injury on the person of the accused. No doubt, it appears from the C.A. Reports Exhs.61 and 62 that blood group of Pratap and that of accused is same i.e. 'A'. But when there was no injury to accused; yet, blood of blood group was found on his shirt, then, it ought to have been explained by him as to how he received the said blood stains.

12 Non examination of Prakash is not at all fatal to the prosecution story, as PW 2 Sumanbai has not come with a case that Prakash was there at the spot since beginning.

13 The prosecution has proved that accused demanded money from his father for purchasing tobacco and when it was refused, there was quarrel.

Though people intervened including PW 2 Sumanbai, it appears that the things did not subside and the anger of the accused also. He had gone inside the house and brought the knife and stabbed his father. This shows that, that act has been done by the accused with knowledge that if he inflicts the blow, then father may die. Further, the stabbing is in the chest, therefore, the situs chosen is unequivocally proved that the accused had intention to kill his father, though that incident started on a trifle matter. Therefore, we conclude that conviction of the appellant for the offence punishable under Section 302 of the Indian Penal Code is perfectly legal. There is no question of giving consideration to a thought that as the incident took place due to sudden quarrel and of one blow, then it can be brought under Section 304 II of the Indian Penal Code. For the aforesaid reasons it is a clear case of murder. There is no merit in the present appeal. It deserves to be dismissed. Accordingly, appeal stands dismissed.

(ABHAY S. WAGHWASE, J.)

(SMT. VIBHA KANKANWADI, J.)