

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO.24 OF 2021

Shivprasad Sunaram Toppo (C-10631)
Aged about 40 years, Occ. Cultivator/Labour,
R/o. Malampadi, Tah. Etapalli,
District Gadchiroli
(in jail since 12.3.2018)

...APPELLANT

VERSUS

State of Maharashtra,
through the Police Station Officer,
Police Station Etapalli,
Tah. Etapalli, District Gadchiroli

...RESPONDENT

Mrs. Swati Paunikar, Advocate (appointed) for the appellant.
Shri M.J. Khan, Additional Public Prosecutor for the
respondent/State.

CORAM : ROHIT B. DEO & URMILA JOSHI-PHALKE, JJ.
RESERVED ON : DECEMBER 05, 2022.
PRONOUNCED ON : JANUARY 13, 2023

JUDGMENT (Per Urmila Joshi-Phalke, J.)

Heard finally with the consent of learned Counsel for the parties.

2. By this appeal, the appellant challenges the judgment and order dated 04/07/2020 passed by the Additional Sessions Judge,

Gadchiroli in Sessions Case No.62/2018 whereby he is convicted of the offence punishable under Section 302 of the Indian Penal Code, 1860 and sentenced to suffer imprisonment for life and to pay fine of Rs.3000/ in default to suffer further simple imprisonment for three months. The appellant is also given set off under Section 428 of the IPC since he is in jail.

3. Heard Mrs. Paunikar, learned Counsel for the appellant and Shri M.J. Khan, learned Additional Public Prosecutor for the State.

4. The case of the prosecution in a nutshell is as under :

A] Sau. Khulaso Nanduram Topo who is the wife of the deceased lodged report on 03/03/2018 at Etapalli, District Gadchiroli police station on an allegation that the deceased Nanduram is her husband. She is residing along with her husband and children. The accused Shivprasad Sunaram Topo is her brother-in-law. Her family as well as family of Shivprasad are residing separately. There was previous dispute between her husband and accused Shivprasad on account of partition of properties between them. She further alleged that accused Shivprasad was demanding share in the property which was allotted to her husband and there was quarrel between them and since last two years, there was no communication between them. It is further alleged that on

02/03/2018, at about 6.30 pm when she was present in the house along with her children, deceased and her son-in-law, her husband went outside the house for urination, at the relevant time she heard the shout of her husband. She immediately rushed outside the house along with her son-in-law and witnessed that accused was assaulting her husband on his head by means of spade. Due to the assault her husband sustained grievous head injury and died on the spot. Due to her shouts her children and villagers rushed to the spot and accused fled away from the spot. On the basis of the report lodged by the informant, police have registered the offence vide Crime No.007/2018 against the accused under Section 302 of the Indian Penal Code (hereinafter referred to as 'the IPC' for short).

5. After registration of the crime, wheels of the investigation started rotating. During investigation, Investigating Officer has visited the alleged spot of incident and drawn the spot panchnama. During the spot panchnama, he has seized blood stained spade from the spot of incident, blood stained soil and simple soil. During the investigation, Investigating Officer has also seized the cloths of the deceased and cloths of the accused. All the incriminating articles are forwarded to Chemical Analysis. The Investigating Officer has collected the post-mortem notes, obtained the opinion and after completion of investigation, submitted charge-sheet against the accused, in the Court of law.

6. Learned Magistrate has committed the case to the Court of Sessions. The charge was framed against the accused vide Exhibit 9. The accused pleaded not guilty and claimed to be tried. To substantiate the charge leveled against the accused, the prosecution has examined in all 9 witnesses as mentioned below :

- (i) PW-1 – Khulaso Nanduram Topo (Exhibit 13) – Informant.
- (ii) PW-2 – Umesh Hanmantrao Chittiwari (Exhibit 16) – Panch on the spot.
- (iii) PW-3 – Akbar Hussain Sheikh (Exhibit 19) – Panch on recovery.
- (iv) PW-4 – Surekha Nanduram Topo (Exhibit 23)
- (v) PW-5 – Bholaram Dhansai Tirki (Exhibit 24)
- (vi) PW-6 – Hariram Jiwan Kinchak (Exhibit 25) – Carrier
- (vii) PW-7 – Nagesh Gangaram Gudpallilwar (Exhibit 30) – Panch on seizure of cloths.
- (viii) PW-8 – Kishor Manikrao Ughade (Exhibit 35) – Medical Officer
- (ix) PW-9 – Vinayak Vitthal Mahurkar (Exhibit 37) – Investigating Officer.

7. Besides the oral evidence, the prosecution relied upon the various documents including Oral Report Exhibit 14, First Information Report Exhibit 15, Spot Panchnama Exhibit 17 and 18, Memorandum Statement Exhibit 20, Recovery Panchnama Exhibit 21, Cloth Seizure

Panchnama of cloths of the deceased Exhibit 31, Query Report Exhibit 36, Arrest Panchnama Exhibit 44, Chemical Analyzer Report Exhibit 46, Post-mortem Report Exhibit 53.

8. The defence of the accused is of total denial. As per the defence of the accused there was previous enmity between the deceased and the accused on account of partition of the property, and therefore, he is falsely implicated in the alleged offence.

9. Mrs. Paunekar, learned counsel for the appellant submitted that PW-1 - Khulasoo Nanduram Topo who alleged to be eye witness of the incident specifically admitted that she has not witnessed the accused assaulting. Then only evidence available of PW-4 - Surekha Nanduram Topo who is the daughter of the deceased. The evidence of PW-1 and 4 is not consistent and corroborating to each other. PW-1 nowhere states that after hearing shouts of the husband she went at the spot along with PW-4. The evidence of PW-4 is cryptic in nature. She further submitted that evidence of PW-5 - Bholaram Dhansai Tirki is also cryptic in nature as nowhere he states that he witnessed the accused assaulting the deceased. Due to the previous enmity accused is implicated falsely in the alleged offence. As per the prosecution case, PW-1 rushed to the spot of incident after hearing the shouts along with her son-in-law. Her

son-in-law intervened in the quarrel, and therefore, accused has attempted to assault him also. But the prosecution has not examined son-in-law of the deceased. There is no other incriminating evidence though cloths of the accused are seized. Chemical Analyzer report shows no blood is detected on the cloths of the deceased. Thus, absolutely there is no evidence to connect the present accused with the alleged offence. Hence, accused be acquitted from the charges.

10. On the other hand, Shri M.J. Khan, learned Additional Public Prosecutor for the respondent submitted that evidence of PW-1 and 4 corroborated by PW-5 is sufficient to show the involvement of the accused in the alleged offence. There is no reason for the prosecution witnesses who are the close relatives to implicate the accused falsely and to allow the original assailants to go Scot-free.

11. In support of his contention, he placed reliance on ***Vijender Kumar alias Vijay Vs. State of Delhi (2010) 12 SCC 381*** wherein it is held that number of injuries caused is not a conclusive in determining nature of offence, but what has to be primarily seen are circumstances preceding incident and not exclusively during the incident. Hence, case of the appellant does not fall within any exception. He further placed his reliance on the decision of ***Namdeo Vs. State of Maharashtra (2007)***

14 SCC 150 wherein it is held that the term “interested” postulates that the witness has some direct or indirect “interest” in having the accused somehow or other convicted due to animus or for some other oblique motive. On the basis of this submission, he submitted that the prosecution proved the charge against the accused beyond reasonable doubt. Hence, no interference is called for in the judgment and order impugned in the appeal.

12. As regards the homicidal death of the deceased namely Nanduram is concerned, the material evidence adduced by the prosecution is the post-mortem report which is admitted by the defence. As per the prosecution case, deceased died homicidal death due to the assault by the weapon like spade. Deceased has sustained head injury and the cause of death is contused lacerated injury with blunt trauma with severe hemorrhage with cardio pulmonary arrest due to hypovolemic shock as well as multiple abrasion all over the body. The post-mortem report is admitted by the defence. The recitals of the post-mortem report shows that the deceased had sustained following external injuries which are mentioned in column No.17 :

- (1) CLW of side 5 x 4 x 5 cm over occipital region at skull.
- (2) abrasion over right shoulder 10 x 0.2 cm.
- (3) abrasion over right forehead of size 3 x 2 cm.

13. On internal examination, fracture of skull in parieto occipital region of size 5 x 5 cm was observed. There was fracture of skull in parieto occipital region of size 5 x 5 cm. Thus, the recitals of the post-mortem report shows that deceased had sustained injuries on occipital region of skull. There was corresponding injuries observed on the part of skull in the nature of fracture. CLW of size 5 x 2 x 0.5 cm was also noted by the Medical Officer. As the evidence regarding the injuries sustained by the deceased are not challenged by the defence. No other reason brought on record to show that the deceased died either natural death or sustained accidental injuries due to which he succumbed to the death. Thus, nothing incriminating is brought on record to deny injuries on the person of the deceased. After considering the evidence in the nature of post-mortem report, no other possibility is brought on record to show that the deceased has sustained injuries due to any other reason. Thus, the prosecution has proved that death of the deceased is homicidal one.

14. To prove the guilt of the accused implicit reliance is placed by the prosecution on the evidence of PW-1 - Khulaso Nanduram Topo who according to the prosecution is the eye witness. She testified regarding the incident is that on the day of incident at about 6.30 pm she was

present along with her husband. At about 6.30 pm her husband went besides the house for urinating. At that time, accused hit her husband with a spade on his head. After hearing the shouts she along with her son-in-law went to rescue, but the accused fled away. After hearing her shouts villagers gathered there. Her husband sustained injury on the head and succumbed to the death. However, during cross-examination she specifically admitted that she has not seen accused assaulting. Thus, the contention of the prosecution that PW-1 - Khulaso Nanduram Topo is the eye witness of the incident is washed out by the said admission which came on record during the cross-examination. It is further the evidence of PW-1 that there was previous dispute between her husband and the accused who is the brother of her husband, on account of partition of the land. Thus, her evidence shows that there was previous enmity between her husband and the accused who are the real brothers.

15. As per the evidence of PW-1, after hearing the shouts of her husband, she went along with her son-in-law however, prosecution has not examined her son-in-law and no reason is assigned behind his non-examination. In the light of above facts, prosecution further relied upon the evidence of PW-4 – Surekha Topo examined vide Exhibit 23. PW-4 – Surekha Topo is the daughter of the deceased and PW-1. Her evidence is only to the extent that the alleged incident occurred in the evening. At

the relevant time she was in the house. Her father went outside the house for urination, at that time her uncle came with spade in his hand and assaulted her father on the head. At the relevant time, she along with her sister, brother-in-law and her mother were in the house. Her father died instantaneously after the assault. During the cross-examination of PW-4 also it came on record that there was previous enmity between her father and the accused who is her uncle. Admittedly, the evidence of PW-4 nowhere shows that how she has witnessed the said incident. Admittedly, the alleged incident has occurred outside the house, whereas at the relevant time PW-4 was inside the house. Though the evidence of PW-1 shows that after hearing the shouts, she immediately rushed towards her husband along with her son-in-law. She nowhere stated that PW-4 was also along with her at the relevant time. PW-1 herself has admitted that she had not witnessed the accused assaulting, therefore, if the admission of PW-1 is taken into consideration and even if the evidence of PW-4 is accepted, then she has also not witnessed the incident. In fact, the evidence of PW-4 is very cryptic in nature as she nowhere stated from which place she has witnessed the incident when she was inside the house at the time of incident. Likewise, the evidence of PW-5 – Bholaram Dhansai Tirki is also very cryptic. His evidence is only to the extent that he heard loud shouts so he went there and saw that Nanduram was dead. Shivprasad

had assaulted Nanduram and fled away in the forest. He nowhere claims that he witnessed the accused assaulting the deceased. He nowhere claims that when he reached at the spot, accused Shivprasad was present there. Besides the evidence of these witnesses, prosecution placed reliance on the evidence of PW-2 – Umesh Hanmantrao Chittiwari who acted as a panch on the spot panchnama. As per his evidence, on the direction of his superior, he approached to the police to act as a Panch. PW-1 shows the spot of incident. He had seen the spot of incident. On the spot they saw wooden fencing around the spot of incident. It was the house of the deceased. Spade was lying there. Police collected the blood stained soil and simple soil from the place of incident. Thus, the evidence of Panch who acted as a Panch on spot, shows that alleged spot of incident was besides the house of the deceased surrounded by the wooden fencing. The evidence of Investigating Officer is also adduced by the prosecution by examining PW-9 – Vinayak Vitthal Mahurkar (PSI). His evidence is to the extent that he visited the alleged spot of incident and found blood stained spade. He collected blood stained soil accordingly and drawn the panchnama. From the evidence of PW-2 and PW-9, it is crystal clear that alleged spot of incident was besides the house of the deceased. The house of the deceased was surrounded by the wooden fencing. It is not disputed that the accused was not residing adjacent to the house of the

deceased which is surrounded by fencing. As per the map drawn on the spot panchnama, the house of the accused was shown beyond the fencing.

16. It is pertinent to note that the panchnama nowhere shows that wooden fencing was bent or broken at any place. It is also not the case that the accused entered from the main entrance in the courtyard of the house. In fact, prior to the incident, the presence of the accused was not marked by anybody. Whatever the incident was happened in a spur of the moment and admittedly neither PW-1 nor PW-4 or PW-5 had seen the accused at the spot of incident. The cross-examination of PW-1 shows that after hearing the shouts immediately she along with her son-in-law went at the spot. Her admission during the cross-examination shows that she had not witnessed the accused assaulting. Thus, when she had not witnessed the accused assaulting, the question that PW-4 has seen the accused assaulting her father does not arise. Now, the question is whether any other evidence is available against the accused to connect him with the alleged offence. The prosecution also placed reliance on the evidence of PW-3 – Akbar Hussain Sheikh who acted as a Panch on the memorandum statement of the accused and discovery of the place where he concealed his cloths. As per the evidence of PW-3, accused made a memorandum statement in their presence that he will show the

place where he concealed the cloths which were on his person at the time of incident. Accordingly, his memorandum statement was recorded which is at Exhibit 20 and accused led them towards his house and produced the cloths which are one blue coloured pant and black coloured half shirt. The evidence of PW-9 is also to that extent that the accused made a memorandum statement and on perusal of the said statement the cloths of the accused are recovered. All the cloths are referred to the chemical analysis along with the requisition. Chemical Analyser report is at Exhibit 46. As per Exhibit 46, no blood stains are found on Article 6 full pant and Article 7 half shirt which are of the accused. Thus, there is no evidence regarding blood stained cloths to connect the present accused with the alleged offence. Admittedly, the alleged weapon of the offence was seized from the spot of incident and the Investigating Officer has not ascertained whether the weapon is having any imprints of hands on it.

17. The question before us would be as to what is the evidence as against the accused which would lead to a necessary inference that the accused is the author of the injuries sustained by the deceased Nanduram. Except the bare statement of PW-1, PW-4 and PW-5 that it was the accused who assaulted the deceased and committed his murder, no evidence is adduced. As PW-1 has specifically admitted that she has

not witnessed the accused assaulting her husband, therefore, the contention of the prosecution that she is the eye witness of the incident is not sustainable. Section 3 of the Indian Evidence Act, 1872 is reads as follows :

“Evidence” – “Evidence” means and includes -

“Proved” - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

18. An accused can be convicted only in the eventuality that the investigation places on record, such material which could be converted into admissible evidence and can be read in evidence.

19. In the present case, in view of the nature of the evidence adduced by the prosecution, it would be difficult to act upon the supposition that the fact of homicidal death at the hands of the accused is proved especially in the light that PW-1 has admitted that she has not witnessed the accused assaulting her husband. Moreover, neither the presence of the accused is marked by any family member nearby to their house prior to the incident. The circumstances i.e. during panchnama, the fencing which is around the house of the deceased nowhere shown

to be bent or broken. Admittedly, the house of the accused is not inside the fencing but it is beyond the fencing. There is no evidence on record to show that any witness has seen the accused present in the premises or in the courtyard of the house of the deceased. In the present case, in view of the nature of the evidence adduced by the prosecution, it would be difficult to act upon the supposition that the fact of homicidal death at the hands of the accused is proved. To prove the involvement of the accused, though the prosecution relied upon the evidence of circumstance that the cloths are recovered at the instance of the accused but no blood stains are found on the cloths of the accused. The Chemical Analyzer report Exhibit 46 completely exonerated the possibility of having blood stains on the cloths of the accused.

20. Learned Counsel for the appellant has submitted that this is a case of no evidence and hence, the accused deserves to be acquitted of the charge leveled against him.

21. Per contra, the learned Additional Public Prosecutor has submitted that it is the accused who was having previous enmity with the deceased. Thus, there is a motive for the accused to commit an offence. It is well settled that previous dispute or previous enmity is double edged weapon. It can be used to implicate the accused falsely as

well as it can be a motive to commit the offence. It is also well settled that when two views are possible, the view which is in favour of the accused, would prevail.

22. As already observed that the evidence of PW-1 shows that she has not witnessed the incident. The evidence of PW-4 and PW-5 is cryptic in nature and nowhere reveals that they are the eye witnesses of the incident. Though the prosecution witnesses stated that several villagers gathered there but none of the villager is examined by the prosecution in support of the contention. It is also case of the prosecution that immediately after hearing the shouts PW-1 along with her son-in-law went at the spot. The accused has also attempted to attack on the son-in-law but said son-in-law is not examined by the prosecution before the trial Court and no explanation is placed for non-examination. Thus, the value of the evidence depend on the reliability of the witnesses who gives the evidence. In the present case, the evidence adduced by the prosecution in the nature of so called eye witnesses is not sufficient and not inspiring the confidence to convict the accused. Hence, this could be a case of benefit of doubt and thus, falls in the category of disproved.

23. In view of the above discussion, we passed the following order :

- (i) The appeal is allowed.
- (ii) The judgment and order passed by the Additional Sessions Judge, Gadchiroli in Sessions Case No.62/2018 vide judgment and order dated 04/07/2020, is hereby quashed and set aside.
- (iii) The appellant is acquitted of the offence punishable under Section 302 of the IPC. The appellant be released forthwith, if not required in any other offence.
- (iv) Fine amount if paid, be refunded.

24. The appeal is disposed of in the aforesaid terms.

25. Fees of learned Advocate (appointed) for the appellant be paid as per Rules.

(URMILA JOSHI-PHALKE, J.)

(ROHIT B. DEO, J.)

**Divya*