



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

CRIMINAL APPEAL NO.24 OF 2019

Santosh s/o. Sadu Bhil,
Age : 35 years, Occ. Labour,
r/o. Vikhran, Tq. Nandurbar,
Dist. Nandurbar,
presently serving his life sentence
at Central Prison, Nashik Road, Nashik

..Appellant

Vs.

The State of Maharashtra,
Through Police Inspector,
Police Station, Nandurbar

..Respondent

Mr.R.N.Chavan, Advocate for appellant (appointed)
Mr.S.D.Ghayal, APP for respondent

**CORAM : R.G.AVACHAT AND
NEERAJ P. DHOTE, JJ.
DATE : APRIL 01, 2024**

JUDGMENT (PER R.G.AVACHAT, J.) :-

The appellant has been convicted for the offence punishable under Section 302 of Indian Penal Code and therefore, sentenced to suffer imprisonment for life and to pay fine of Rs.5,000/- (Rupees Five Thousand) with default stipulation, vide judgment and order dated 30.11.2017, passed by learned Sessions Judge, Nandurbar, in Sessions Case No.52 of 2015.

2. The facts, giving rise to the present appeal, are as follows:-

The First Information Report (FIR) (Exh.29) was lodged by PW 2 - Sukmabai (informant), mother of deceased Santosh, on 29.07.2015. It is her case that the appellant and deceased Santosh together went for work by 08.00 in the morning on 29.07.2015. Santosh (deceased) returned home by 12.00 noon. He told her to have had quarrel with the appellant over wages. He also told her the appellant to have threatened him. Deceased Santosh then took rest and left home by 06.00 p.m. for Junmohida road. The informant went to that area for purchase of rice-grains. She saw Santosh (deceased), Pintu, Jagu and Raghu sitting together. The appellant came there with knife and assaulted on the neck of Santosh from behind. The appellant then fled. Her relations rushed deceased Santosh to Civil Hospital, Nandurbar. She too had accompanied him. He was declared dead on admission. She, then, rushed to Police Station and lodged the FIR at Nandurbar Taluka Police Station. The crime, being C.R. No.98 of 2015, came to be registered for the offences punishable under Section 302 of Indian Penal Code.

3. The scene of offence panchnama (Exh.49) was drawn. Inquest was conducted on the dead body of Santosh under panchnama (Exh.37). Mortal remains of Santosh was also subjected to post mortem examination. The appellant was arrested. Pursuant to the disclosure statement made by him, a knife and clothes on his person at the relevant time, were seized. All the seized articles were sent to the Chemical Analyser. Statements of the persons acquainted with the facts and circumstances of the case were recorded. Upon completion of the investigation, the appellant was proceeded against by filing charge sheet before the court of learned Judicial Magistrate, First Class, Nandurbar. Learned Magistrate committed the case to the Court of Session, Nandurbar (trial court), for trial in accordance with law.

4. The trial court framed Charge (Exh.6). The appellant pleaded not guilty. His defence is of false implication.

5. To bring home the Charge, the prosecution examined eleven witnesses and produced in evidence certain documents. On appreciation of the same, the trial court convicted the appellant and consequentially, sentenced as stated above.

6. Heard learned counsel for the parties.

7. Learned counsel appointed to represent the appellant would submit that the informant happened to be a chance witness. The scene of offence panchnama (Exh.49) indicates that there was no grocery shop in the nearby. The statement of PW 7 - Dharma was recorded first in point of time. PW 7 - Dharma, in his statement under Section 164 of the Code of Criminal Procedure, admitted that he was engaged in cleaning chicken. According to learned counsel, this witness did not have opportunity to witness the incident. Those named in the FIR as were in the company of the deceased, have not been examined. Our attention has been drawn to the disclosure statement, allegedly made by the appellant and recovery of the weapon pursuant thereto. Specially the time thereof, was brought to our notice to suggest that the same was drawn at the police station itself. It was also submitted by learned counsel for the appellant that at the relevant time, on making alleged discovery, the appellant was behind bars. Same suggests involuntariness in making of the statement. PW 7 discloses in his statement that the appellant had left behind the knife on the spot itself, then how come it could be recovered pursuant to the disclosure statement. He further submits that PW 7 testified the appellant had given two blows, when, according to the informant, it is a case of one blow. The post mortem report indicates the deceased to have suffered single injury.

Learned counsel meant to say that the appellant has given only one blow. The Medical Officer, who conducted the post mortem, testified that the injury was possible by a hard and blunt object; whereas, the weapon seized appears to be sharp on one side.

Learned counsel, in the alternative, submitted that the case may fall under Exception 4 to Section 300 of Indian Penal Code, as the incident took place at a spur of moment. He, therefore, submitted to allow the appeal and in the alternative, urged for converting the conviction of offence under Section 302 into Section 304 Part I of Indian Penal Code.

8. Learned APP would, on the other hand, submit that the case is based on eye-witness account. A mutton-cutter was used. Same indicates that it was 3-inches in length with width of not less than 5-inches. The assault was given on the neck of the deceased. Same indicates that the intention of the appellant was none other than committing murder of the appellant. Learned APP supports the impugned judgment and order.

9. Let us advert to the evidence on record and appreciate the same.

10. It is not in dispute that Santosh (deceased) met with homicidal death on 29.07.2015. PW 8 - Dr. Dnyaneshwar conducted autopsy on the mortal remains of deceased - Santosh. The post mortem report finds place at Exhs.87 to 94. According to PW 8 - Dr.Dnyaneshwar, the deceased died of "*cardio-respiratory arrest due to hypovolemic shock due to severe hemorrhage due to deep injury to neck (incised wound)*". The injuries suffered by the deceased have been described in paragraph 17 of the post-mortem report.

11. During cross-examination, PW 8 - Dr.Dnyaneshwar admitted to have opined that the weapon might have had hard and blunt edges and it will cause contused lacerated wound (CLW). He also admitted distinction between CLW and cut-injury. In our view, after all, it is an opinion given by a medical practitioner. In our view, there is direct eye-witness account. Same is reliable one. Same, therefore, prevails upon the medical opinion.

12. PW 1 - Nilesh was Translator. He testified on oath that he could translate Bhill language into Marathi language and vice-versa. Then, we have evidence of PW 2 - Sukmabai (informant). It is in her evidence that the appellant and deceased Santosh together went for work by 08.00 in the morning on 29.07.2015. Santosh (deceased) returned home by 12.00 noon. He told her to have had quarrel with

the appellant over wages. He also told her the appellant to have threatened him. Deceased Santosh then took rest and left home by 06.00 p.m. for Junmohida road. The informant went to that area for purchase of rice-grains. She saw Santosh (deceased), Pintu, Jagu and Raghu sitting together. The appellant came there with knife and assaulted on the neck of Santosh from behind. The appellant then fled. Her relations rushed deceased Santosh to Civil Hospital, Nandurbar. She too had accompanied him. He was declared dead on admission.

13. PW 2 - Sukmabai (informant) was subjected to cross-examination. She admitted to have belonged to *Adivasi* community. She did not understand Marathi language. She was suggested that the scene offence is a *chowk (plaza)*. Her evidence further indicates that the incident took place while she was returning after purchasing rice-grains. It was suggested to her that at the time of the incident, both appellant and deceased were face-to-face. This suggestion goes a long way to observe the appellant to have admitted his presence at the scene of offence and at the relevant time as well. PW 2 was categorical to state that the appellant came from backside and assaulted on the neck of her son (deceased Santosh) with knife. It was one blow.

14. We do not find any reason to disbelieve the testimony of PW 2 - Sukmabai (informant), more so, when the appellant himself admitted his presence at the scene of offence and at the material time as well. The incident took place in July, 2015. The evidence has been recorded in March, 2017 onward. It is, therefore, but natural to notice some inconsistency *interse* the evidence of the prosecution witnesses. No witness is expected to have photographic memory. True, those who were present in the company of the deceased, have not been examined.

15. PW 7 - Dharma would run mutton shop in the vicinity whereat the incident took place. It is in his evidence that it was about 06.30 p.m. The deceased along with his two friends were there. It is further in his evidence that the appellant came to his shop and took away mutton-cutter with him. It is further in his evidence that the appellant assaulted deceased Santosh with the very weapon and then, fled with it. During his cross-examination, it has been brought on record that in his statement under Section 164 of the Code of Criminal Procedure, he stated the appellant to have left the weapon at the spot itself. He offered explanation to have stated so, wrongly. True, it is in his evidence that the appellant gave two blows. The medical evidence indicates the deceased to have

suffered one blow. His evidence also indicate that he was busy in dressing the chicken in his mutton-shop. The fact, however, remains that his evidence indicates the appellant to have visited his shop and took away mutton-cutter and assaulted the deceased therewith. We have inspected the weapon allegedly used by the appellant.

16. It is true that the appellant, allegedly, made disclosure statement (Exh.43) in the presence of the Investigating Officer (PW 11) and panch witness (PW 5 - Nitin), pursuant to which he took them to his residence and took out the weapon and blood stained clothes. Admittedly, the place of the appellant was at an half an hour's drive from police station. The memorandum Exh.43 indicates that recording was over by 12.50 p.m., while recording of seizure panchnama was concluded between 12.45 p.m. to 01.15 p.m. Learned counsel for the appellant has, therefore, every reason to contend the same to have been drawn at the police station without going to the house of the appellant. We do agree with the submissions advanced by learned counsel for the appellant.

17. Rest of the evidence is in the nature of two witnesses namely, PW 3 and PW 4 to the inquest panchnama (Exh.37) and seizure of clothes of the deceased under panchnama (Exh.38). Their evidence is not of much importance to further the prosecution case.

18. PW 6 – Jitendra is witness to the scene of offence panchnama (Exh.49). We do not propose to rely on the C.A. reports relating to the weapon seized pursuant to the disclosure statement, since we are not relying on that piece of evidence (disclosure evidence and recovery of weapon of assault).

19. The fact, however, remains that the case is based on eye-witness account. The informant is mother of the deceased. PW 7 – Dharma would run a mutton shop. The appellant took a mutton-cutter from his shop and assaulted the deceased therewith. It is reiterated that during cross-examination of the informant, presence of the appellant at the place of the incident and even at the time of the incident has been admitted. This goes a long way to infer the evidence of PW 2 – Sukmabai (informant) and the informant and PW 7 – Dharma to be reliable one, though there are some discrepancies as regards number of blows (whether one or two) and nature of weapon, whether hard or blunt or sharp one.

20. Since the evidence of PW 2 (informant) and PW 7 is found to be reliable one, we find no reason to defer with the findings recorded by the trial court, convicting the appellant and consequently, sentencing him for the offence of murder.

21. In the result, the appeal fails. The same is dismissed.

22. Fee of learned counsel appointed to represent the appellant is quantified at Rs.10,000/- (Rupees Ten Thousand).

[NEERAJ P. DHOTE, J.]

[R.G. AVACHAT, J.]

KBP