



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

CRIMINAL APPEAL NO. 701 OF 2019

Datta S/o Onkar Sapkal
Aged about 37 years, Occ. Labour
R/o Juni Yerli, Tq. Nandura,
District : Buldana

... Appellant

// VERSUS //

The State of Maharashtra, through its
Officer-in-charge of Police Station Nandura,
Tq. Nandura, District Buldhana

... Respondent

Ms. Soniya Gajbhiye, Appointed Advocate for the appellant through
Video Conferencing.

Ms. Mayuri Deshmukh, APP for the respondent/State.

**CORAM : NITIN B. SURYAWANSHI &
PRAVIN S. PATIL, JJ.
DATED : 14th FEBRUARY, 2025.**

ORAL JUDGMENT (PER : NITIN B. SURYAWANSHI, J.)

This appeal challenges judgment dated 1st July, 2019 of the
learned Additional Sessions Judge, Malkapur, Buldhana in Sessions Case
No. 37 of 2018, thereby convicting the appellant under Section 302 and

sentencing him to suffer for life imprisonment and to a pay fine of Rs.500/- with default sentence.

2. The prosecution case in short is that: Accused Datta Sapkal along with his brother Mahadeo (absconding accused) assaulted deceased Yogesh on 18th June, 2018 at about 10 p.m. with axe and wooden stick and caused his death. Wife of the deceased Shubhangi (P.W.2) lodged the report of the incident (Exhibit 20) accordingly First Information Report (Exhibit 21) was registered at Crime No. 0319 of 2018, with Nandura Police Station against accused Datta and Mahadeo under Section 302 of Indian Penal Code. On completion of the investigation, charge-sheet was filed and appellant was charged under Section 302 of Indian Penal Code read with Section 34 of Indian Penal Code. Since, accused no.1 Mahadeo was absconding his trial is seperated. During the trial, prosecution examined seven witnesses and the trial Court found appellant accused guilty of the charge and convicted him as aforesaid. Hence, this appeal.

3. Heard, learned advocate for appellant and learned Additional Public Prosecutor for respondent/State.

4. Learned advocate for appellant assailed the judgment of conviction stating that Shubhangi (P.W.2) wife of deceased though claims to be an eye witness, she is not the eye witness, as can be seen from her evidence. Her conduct is totally unnatural. There is no independent corroboration to her evidence. In spite of the incident taking place in the thickly populated area, not a single independent witnesses is examined by the prosecution. There is no corroboration to the testimony of Shubhangi (P.W.2), therefore, her evidence is liable to be discarded from consideration. She submits that trial Court has wrongly appreciated the evidence on record and has erred in convicting the appellant. Appellant, therefore is entitled for acquittal.

5. Per contra, learned Additional Public Prosecutor supported the impugned judgment of conviction. She submits that Shubhangi (P.W.2) is an eye witness of the incident who saw the assault on the part of the accused. Medical evidence corroborates the testimony of Shubhangi (P.W.2). The weapon used for assault by the accused is recovered from him, therefore, the prosecution has proved the charge against the appellant-accused and the trial Court is justified in convicting

him. She submits that there is no merit in the appeal and the same may be dismissed.

6. With the assistance of the learned Advocate for the appellant and learned Additional Public Prosecutor for the State, we have perused the record.

7. Shubhangi (P.W.2) wife of deceased claims to be eye witness to the incident. She has deposed that there was quarrel between Shrihari Ghuye and accused in the year 2015. On the next day of the quarrel her husband and Shrihari Ghuye had been to accused Datta to convince him. Accused Datta raised quarrel with her husband and Shrihari Ghuye. At that time, her husband and Shrihari Ghuye had beaten accused Datta. Accused Datta had also beaten to Shrihari Ghuye at that time. Accused Datta and Shrihari Ghuye both gave cross complaints of that incident with Nandura Police Station. Thereafter, there was exchange of words between accused Datta with her husband and Shrihari Ghuye. Accused Datta was giving threats to her husband that one day he will kill him.

The incident occurred on 18th June, 2018 at about 10.00 pm in the night in front of the house of accused Datta. At that time, her husband was proceeding from the road. She was standing in front of her house. Accused Datta and Mahadeo restrained her husband. They started beating her husband on account of previous quarrel. Accused Datta assaulted her husband with axe in his hand and Mahadeo with lathi in his hand. Accused Datta assaulted with axe on the head, back side, right side, left side, on the neck, waist and knees of both the legs of her husband. Accused Mahadev has also beaten her husband with wooden log on his head and other parts of body. Due to assault, her husband sustained bleeding injuries and fell down. At that time both the accused uttered “हे ऐवढ्यानी मरणार नाही, याला अजून फटके मारा”. Thereafter, both the accused left the spot. When she reached to the spot, her husband was lying in bleeding condition. She got frightened and went to the house of Police Patil namely Sunil Patil. Accused Datta and Mahadev were already there at the house of Police Patil, before she reached. She told to Police Patil “माझे पतीला जर काही झाले, तर मी आरोपी दत्ता व महादेव यांना सोडणार नाही”. Thereafter, she left the house of Police Patil and went to the house of Devidas Hage and narrated the incident to him. Then she

went to the house of Sarpanch Sunil Verulkar and narrated the incident. Sarpanch and Police Patil came to the spot. They contacted the Nandura Police Station on mobile phone and informed about the incident. Upon that the police and Ambulance came on the spot. Her husband was shifted to Primary Health Centre, Nandura in the Ambulance. Doctor examined her husband and declared him dead. Therefore, she gave report (Exhibit 20) of the incident to Nandura Police Station. Accordingly, First Information Report (Exhibit 21) was registered. Her statement (Exhibit 22) under Section 164 of Code of Criminal Procedure was recorded by the JMFC, Nandura. She identified the axe (Article A) and wooden log used by the accused while beating her husband. She also identified the pant and underpant of her husband (Articles B and C). She also identified the cloths of accused Datta (Articles D and E).

8. In her cross-examination, omission that “At the time of incident, I was standing in front of my house” is brought on record. She admitted that her real brother of deceased Yogesh still resides in the same house where she was residing at the time of incident. House of Shrihari

Ghuye is adjacent to the house of accused Datta. There is premises belonging to Koli community in front of the house of Shrihari Ghuye. Many persons used to sit and sleep in the premises belonging to Koli community in the night in summer season. She further admitted that the locality where she resides is densely populated and people from her bhauki and relatives reside there. According to her, at the time of incident there was no one present at the spot of incident. Usually, persons residing in her mohalla used to sleep at 8 pm in the night, in their houses. At the time of incident, she was standing in front of her house along with her son. She admitted that noise at the spot can be heard by any one living in the locality, due to the density. She denied that her relatives and neighbours gathered at the spot, due to the noise of the incident. She admitted that she made a cry at the time of incident and there was commotion. She, deceased and accused were shouting at the time of incident. Nobody opened their doors of house hearing the noise of quarrel, at the time of incident. Shrihari did not come to the spot through out the night. She gave call to Shrihari Ghuye by going at the door of his house at the time of incident and tried to inform him and his mother about the incident. She did not knock the door of Shrihari

Ghuye to inform about the incident. She did not knock the door of neighbours residing in the vicinity, to the spot, to inform them about the incident. Omission that “after the incident I had been to the house of Police Patil and Sarpanch” is brought on record in her cross-examination. She admitted that house of Police Patil is in opposite direction, at the outskirts of village and it takes 15 to 20 minutes to reach the house of Police Patil by walk from the spot of incident. Police Patil was aware about the occurrence of the incident before she reached to his house. Prior to the incident on many occasions there were quarrels between accused on one hand and her husband and Shrihari on other.

9. She further deposed that she did not talk with Yogesh at the time of incident. She tried to save the deceased. She made a cry and did nothing to save deceased. Incident continued for two to three minutes, she did not go close to her husband during those two – three minutes of incident. She was standing at 10 to 12 feet from the spot of occurrence at the time of incident. She had been to the spot after 15 to 20 minutes after the incident. She admitted that she was calling the persons in the vicinity after 15 to 20 minutes instead of going to her husband. She did

not go closer to her husband even after the accused left the spot. She did not give drinking water to her husband after the incident, when accused left the spot. She admitted that deceased asked for drinking water to Devidas. She tried to lift her husband to shift him to the hospital for treatment. Then she admitted that she did not lift her husband from the spot. Accused did not gave any threats to her on the day when she gave her statement. Omission from her statement recorded under Section 164 of the Code of Criminal Procedure that “accused Mahadev had beaten the deceased with axe and stickle” is brought on record. Though she stated before the Court that accused Mahadev had beaten deceased with wooden log, she admitted that this fact was not mentioned in her statement under Section 164 of the Code of Criminal Procedure. She admitted the fact mentioned in her statement under Section 164 of the Code of Criminal Procedure that mother of the accused had also beaten deceased is not correct. She denied that there was darkness on the spot of incident. She voluntarily stated that there was sufficient light at the spot of incident. She denied that deceased was in inebriated condition at the time of incident and was repeatedly falling on the ground, due to which he received the injuries.

10. Sunil Patil (P.W.3), is the Police Patil, he deposed that he is working as Police Patil of village Yerli. There was dispute between deceased Yogesh and accused since long. Incident occurred on 18th June, 2018. On that day at about 11 pm accused Datta, Mahadev Sapkal and their mother came to his house and knocked the door. Accused Datta Sapkal informed him that there was quarrel between him and deceased Yogesh. He assaulted Yogesh with axe on his legs due to which Yogesh fell down and was lying on the ground. Meanwhile, wife of Yogesh, Shubhangi came to his house and informed that accused Datta and Mahadeo assaulted Yogesh with “stick axe and stick and Yogesh sustained injuries on his head”. She further stated that she will not spare accused Datta and Mahadev. Thereafter, accused Datta, Mahadeo and their mother as well as Shubhangi left his house. Then, he reached to the spot and saw Yogesh lying in bleeding condition. Many villagers had gathered at the spot before his arrival. Sarpanch Sunil was present there. They saw the dead body of Yogesh lying on the ground, with the help of torch. Thereafter, he called Nandura Police Station and informed about the incident. He also called Ambulance. Nandura Police came on the spot. Thereafter Ambulance came. Then Yogesh was shifted to Civil

Hospital, Nandura in the ambulance. Doctor at the hospital declared Yogesh dead. Shubhangi gave report to the incident to the police station. His statement was recorded during investigation and also before the JMFC, Nandura.

11. In cross-examination of Sunil Patil (P.W.3) following omissions from his statement recorded under Section 164 of the Code of Criminal Procedure are brought on record; (i) “the incident was narrated to him by accused Datta Sapkal”, (ii) “fact that who has beaten the Yogesh with what weapon”, (iii) “on which part of the body of Yogesh, accused had assaulted” and (iv) “wife of deceased Yogesh informed him which of the accused has beaten the deceased Yogesh with weapon”. He admitted that the brother of Yogesh resides adjacent to the spot. He did not remember even today whether there is no light facility at the house of accused. He voluntarily stated that there is electricity pole near the house of accused.

12. Mohini (P.W.4) has proved memorandum statement of the accused (Exhibit 29) and seizure panchanama of blood stained axe (Exhibit 30).

13. Shrihari Ghuye (P.W.5) has deposed that there was quarrel between him and accused Datta prior to the incident. He had given report of the said incident to Police Station Nandura that in November, 2015, Yogesh had beaten Datta with stick due to the above incident. Thereafter, present quarrel occurred on 18th June, 2018 at about 10 p.m. At that time he was sleeping at his house. His sister-in-law Shubhangi came to his house at about 10.00 pm. She was shouting loudly. Upon that he come out of the house. His brother Yogesh was lying in bleeding condition in front of the house of accused Datta. Shubhangi (P.W.2) told him that on account of his previous dispute with accused Datta, the present incident had occurred. She further told him that accused Datta, Mahadeo and their mother had beaten deceased Yogesh with axe and sticks. Thereafter, Police Patil came on the spot. Deceased Yogesh was shifted to hospital in ambulance.

14. In cross-examination of Shrihari Ghuye (P.W.5) omission in respect of the previous incident, was brought on record. He admitted that he did not tell police at the time of recording his statement that Shubhangi gave call to him. He deposed that there is premises

belonging to Koli community in front of his house but he was not aware that villagers used to sleep in that premises during summer season. Incident occurred before he reached the spot. Persons in Mohalla were present at the spot of incident when he reached there. Most of the persons in Mohalla are from his Bhauki. He admitted that he did not state while recording his statement the fact that mother of accused had beaten the deceased. At the time of incident and after the incident his mother was sleeping at his house and she did not come to the spot of incident through out the night of the incident. He did not give information about the death of Yogesh to his mother after he returned to his house.

15. Dr. Laxminarayan Jaiswal (P.W.6) has proved postmortem report (Exhibit 40). He has stated that there were 13 injuries including CLW on left occipital region, contusion and swelling under occipital region, CLW on right leg upper part of knee and right heel posterior, contusion on left shoulder, right shoulder, right side of chest region and abrasion on the body of Yogesh. On internal examination, he found depressed and commuted fracture on occipital bone of size 4 x 4 x 1 cm.

Brain meninges were torn below fracture site and brain matter was contused below fracture site, multiple hemorrhagic contusions in occipital region, parietal left and temporal left lobe. Oedematous swelling on brain stem, depressed fracture of occipital bone of size 4 x 4 x 1 cm. According to postmortem report, the cause of death is “multiple injury to the vital organ i.e. the brain”. He has stated that injuries to head and brain are possible with axe (Article ‘A’).

16. In cross-examination, he admitted that he has not mentioned the description of weapon i.e. axe in the post-mortem report. He has not mentioned specifically in the post-mortem report (Exhibit 40) whether injuries are caused by sharp side or blunt side of the axe. He admitted that injuries are caused by hard and blunt object. He denied the suggestion that injuries noted in the post-mortem report are not possible by broken axe i.e. Article ‘A’. He admitted that the injuries noted in the post-mortem report are possible by wooden handle of sickle. He did not notice blood stains on Article ‘A’ when it was shown to him for seeking his opinion. He admitted that all injuries noted in the post-mortem report are possible, if a person falls on cement road due to loss of his

balance, only if such person falls on number of times. He admitted that except the injuries of occipital region, upper part of knee, contusion and swelling, rest of the injuries are simple in nature.

17. P.S.I, Sachin Ingle (P.W.7) is the Investigating Officer. He has proved correspondence made to forensic lab and medical officer and the chemical analysis reports.

18. Trial Court has based conviction by relying on evidence of Shubhangi (P.W.2) Careful scrutiny of her evidence reveals that she is not a reliable witness. Omission that she was standing in front of her house at the time of incident, renders her presence at the time of incident doubtful. She has categorically admitted in her evidence that the spot of incident is thickly populated area and people from her Bhauki community reside there. The incident has taken place in front of house of accused Datta. House of her brother-in-law Shrihari (P.W.5) is adjacent to the house of Datta. According to her, she, deceased and accused were shouting at the time of incident and there was commotion. At that point of time, many people used to sit and sleep in Koli community premises, which is in front of house of Shrihari (P.W.5) but

not a single independent eye witnesses is examined by the prosecution to support its case. Surprisingly, even Shrihari (P.W.5) who stays adjacent to the house of accused Datta has not witnessed the incident, though, it has allegedly taken place in front of his house.

19. Conduct of Shubhangi (P.W.2) is most unnatural. She has stated that at the time of incident she did not try to save her husband. Even after accused left the spot of incident, she did not go near her husband. She did not try to give him water or did not take him to hospital. This unnatural conduct of Shubhangi (P.W.2) also renders her testimony doubtful. She has categorically stated in her statement that she has not gone to the house of Shrihari (P.W.5) immediately after incident. Whereas Shrihari (P.W.5) states that Shubhangi (P.W.2) came to his house and informed about the incident. In view of these inconsistencies in the statement of Shubhangi (P.W.2) and taking into consideration her unnatural conduct, her presence at the time of incident becomes doubtful and according to us she is not speaking truth before the Court. She does not appear to be an eye witness to the incident.

20. It is clear from the prosecution evidence that there was no light on the spot of incident. Sunil Patil (P.W.3) has categorically stated in his evidence that after he reached the spot, they saw the dead body of Yogesh lying on the ground with the help of torch. Spot panchanama though records that light pole was at a distance of 30 feet from the spot of incident, it appears that there was no light at the time of incident. On this ground also, the evidence of Shubhangi (P.W.2) that she has seen the incident as there was sufficient light, cannot be accepted. The trial Court has further relied the alleged extra judicial confession of accused Datta to Sunil Patil (P.W.3) who is Police Patil. However, fact of making extra judicial confession is proved to be an omission as the same was not stated by Sunil Patil (P.W.3) in his statement recorded under Section 164 of the Code of Criminal Procedure. Thus, the trial Court has committed an error in relying on the extra judicial confession of the accused Datta.

21. Recovery of axe from the accused is another circumstance on which reliance is placed by the trial Court while convicting accused. It is necessary to mention here that Medical Officer Dr. Laxminarayan Jaiswal (P.W.6) has categorically stated that when axe was referred to him

for his opinion, there were no blood stains on it. In the Chemical Analysis report (Exhibit 60), no blood was detected on the axe. It is necessary to mention here that blood group of accused as well as of deceased is "A". Clothes of the accused (Exhibits 12, 13 and 14) were forwarded to Chemical analyser, however, Chemical Analysis report (Exhibit 60) is totally silent about (Exhibits 12, 13 14). In this view of the matter, recovery of axe does not in any manner corroborate the case of the prosecution.

22. For the aforesaid reasons, the prosecution has utterly failed to prove the charge against the appellant beyond reasonable doubt. There is no cogent and reliable evidence to sustain the conviction of the appellant, the trial Court has failed to appreciate the evidence on record in the proper perspective and has erred in convicting the appellant. In the result, we proceed to pass the following order.

- i. Criminal Appeal No.701 of 2019 is allowed;
- ii. Impugned judgment and order of conviction and sentence dated 1st July, 2019 passed by Additional Sessions Judge, Malkapur,

District Buldana in Sessions Trial No.37 of 2018 is quashed and set aside.

iii. Appellant is acquitted of the offence punishable under Section 302 of Indian Penal Code.

iv. Appellant be set at liberty forthwith, if not required in any other cases. Fine amount, if any, paid by the appellant be refunded to him.

v. Appellant to execute the bail bond under Section 437-A of the Code of Criminal Procedure.

vi. Fees of the learned appointed Advocate Ms. Soniya Gajbhiye, be quantified as per Rules and be paid to her within four weeks from today.

[PRAVIN S. PATIL, J.]

[NITIN B. SURYAWANSHI, J.]