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**(2019) 12 BOM CK 0042**  
**In the Bombay High Court**  
**Case No : Criminal Appeal No. 300 Of 1998**

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|------------------------------------------|------------|
| Chandrakant Keshav Mohite Indian Citizen | APPELLANT  |
| Vs                                       |            |
| State Of Maharashtra                     | RESPONDENT |

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**Date of Decision :** 03-12-2019

**Acts Referred:**

Indian Penal Code, 1860 — Section 34, 302  
Evidence Act, 1872 — Section 27, 74, 78  
Code Of Criminal Procedure, 1973 — Section 313, 437A

**Citation :** (2019) 12 BOM CK 0042

**Hon'ble Judges :** S.S. Shinde, J; Prithviraj K. Chavan, J

**Bench :** Division Bench

**Advocate :** S.R. Phanse, M.S. Mohite, S.V. Sonawane

**Final Decision :** Allowed

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## Judgement

Prithviraj K. Chavan, J

1. The challenge in this Appeal is to the Judgment and Order of conviction passed by the Additional Sessions Judge, Satara in Sessions Case No. 38 of 1993 by which the Appellants came to be convicted of an offence punishable under Section 302 read with Section 34 of I.P.C., sentencing them to undergo imprisonment for life, inter alia, fine of Rs.2,500/-, in default to suffer simple imprisonment for one year each.

2. Facts germane for decision of this Appeal can be summarized as follows:

3. The Appellants are real brothers. The deceased Shahaji Shankar Mohite (for short "the deceased") and the Appellants are residents of village Talbid, Taluka Karad, District Satara. The deceased was residing with his wife P.W. 1 Ranjana and children. P.W.3 Sambhaji Mohite is the first informant and elder brother of the deceased. He was residing with his wife Suman and children separately. The deceased was in habit of collecting dry leaves of sugarcane crop from the fields of other villagers. The Appellants were annoyed with such conduct of the deceased.

4. The fateful incident occurred on 03.07.1992. The deceased went to the field known as "umbar mala" for collecting dry leaves of sugarcane crop. So also, PW-3 Sambhaji too went to the field. Around 2.30 p.m. when PW-3 Sambhaji was collecting some dry leaves for the purpose of fodder for his cattle, he suddenly heard a voice of his brother deceased as "mala maru naka" (don't assault me). PW-3 Sambhaji, therefore, rushed to the field of sugarcane, only to witness that the deceased who was in the field of Shivaji Mohite was being assaulted by the Appellants. Appellant Suryakant had held his collar, while Appellant Chardrakant was giving blows of a stick to the deceased. Third accused namely Ramchandra, another brother of the Appellants, was giving blow with a sickle to the deceased. Admittedly, Ramchandra came to be acquitted by the Trial Court.

5. The deceased fell down after sustaining injuries on his person. PW-3 Sambhaji noticed that the deceased was seriously injured and his clothes were soaked with blood. He was unconscious. The Appellants escaped from the spot.

6. PW-3 Sambhaji rushed to the village and narrated the incident to his wife and mother. All of them along with other villagers came back to the spot of incident. By that time, the deceased had succumbed to the injuries.

7. PW-3 Sambhaji lodged a report with police station Umbraj (Exhibit - 36) On the basis of said report, a crime bearing No. 95 of 1992 came to be registered under Section 302 read with Section 34 of I.P.C. against the Appellants. The Investigating Ofcer, PW-10 Musa Ahmed Khan held investigation into the crime. He visited the scene of occurrence. He drew spot as well as inquest panchnama. He had collected bloodstained stone and other incriminating articles. He had recorded the statements of the witnesses and also a discovery panchnama under Section 27 of the Evidence Act.

8. After the investigation and as a result of investigation, he laid a chargesheet against the Appellants under Section 302 read with Section 34 of IPC in the Court of Judicial Magistrate First Class, Karad. Since, the case was exclusively triable by the Court of Sessions, it came to be committed to the Sessions Court, Satara.

9. The Appellants appeared before the learned Additional Sessions Judge, Satara on 05.07.1990. A charge was framed in terms of Exhibit - 3 under Section 302 read with Section 34 of I.P.C. against the Appellants and their brother Ramchandra Mohite. It was read over to all of them in vernacular, to which each of them pleaded not guilty and claimed to be tried.

10. The defence of the appellants, as emerged from the line of cross-examination as well as from their statements under Section 313 of Cr.P.C., is that they have been falsely implicated in this case due to enmity. No defence evidence has been adduced on their behalf.

11. To substantiate the charge, prosecution examined 10 witnesses. Out of those

ten, six were the eye witnesses, out of which 5 did not support the prosecution case.

12. The Trial Court, however, believed the testimonies of some of the witnesses, more particularly, PW-2 Ajit R. Mohite coupled with the testimony of PW-10 Musa Khan on the aspect of homicidal death of the deceased and, in his wisdom, convicted the Appellants as above. According to the Trial Court, the prosecution has proved the charge beyond all reasonable doubts.

13. We heard Shri. S.R. Phanse, the learned Counsel appearing for the Appellants and Mrs. S.V. Sonawane, learned Additional Public Prosecutor.

14. At the outset, the learned defence Counsel submitted that the prosecution has failed to establish the motive behind the offence. Secondly, the prosecution has neither tendered on record the postmortem report, nor, any evidence is adduced as to whether the cause of death was due to the weapons produced during the trial by the prosecution. The Doctor has not been examined. The injuries were not on vital parts of the body. No sickle came to be recovered.

15. The learned Counsel vehemently urged to acquit the Appellants by contending that the learned Trial Court has committed grave error in law and facts in placing reliance upon the testimonies of hostile witnesses, that too without any acceptable evidence as regards cause of death.

16. Per contra, Mrs. Sonawane, learned APP stressed on the inquest panchnama coupled with the fact that the stone and sickle came to be discovered at the instance of the Appellants, which establishes a link that they were the authors of injuries on the person of the deceased, coupled with the fact that there was an enmity between them. Learned APP has, therefore, strenuously urged to dismiss the Appeal being without substance.

17. The first and foremost question would be to ascertain, whether the deceased died a homicidal death? Admittedly, neither there is a postmortem report on record, nor the prosecution examined the Doctor, who conducted the postmortem. The medical certificate which is tendered on record at Exhibit-40 indicates that the deceased died due to cardio respiratory failure due to shock due to the multiple injuries with tuberculosis. There is no specific observation that the injuries were on the vital parts of body. It is unclear whether Exhibit-40 was issued before conducting the postmortem or thereafter.

18. This is, infact, a communication addressed to the Senior Inspector of police station Umbraj by Dr. S.R. Shinde, who alleged to have conducted the postmortem.

It is, per se, not a medical certificate in stricto sensu. Nevertheless, its perusal reveals that the deceased died due to combination of not only multiple injuries, but coupled with cardio respiratory failure and that he has already been suffering from tuberculosis.

19. Dehors autopsy report, it would be far fetched to construe that the deceased died a homicidal death. We say so also for the reason that even his widow PW-1 Ranjana in her evidence candidly admits that her husband was in habit of consuming liquor, who used to consume it only in the morning. The opinion of the medical officer coupled with the testimony of PW-1 Ranjana would definitely create a doubt as to whether the deceased died a homicidal death?

20. The learned Trial Court committed manifest error in law and facts by relying upon the testimony of PW-10 Musa Khan-Investigating Officer. He being an Investigating Officer would obviously be interested in securing the conviction of the Appellants. The learned Trial Judge in the impugned judgment observed that since the whereabouts of Dr. Shinde were not known, as he had left this country and therefore, the report submitted by him would be admissible under Section 74 of the Indian Evidence Act.

21. What has been issued by Dr. S.R. Shinde is the advance death certificate dated 02.09.1992, which cannot be equated to that of a postmortem report, which could have been the only proper and cogent evidence for determining the exact cause of death of the deceased. As can be seen the advance death certificate issued by Dr. Shinde, is so vague and casual that one cannot come to a definite conclusion as to whether the deceased died a homicidal death?

22. Merely because Dr. Shinde's presence could not be procured before the Trial Court because of his departure to some foreign country would not, ipso facto, mean that he had carried away the postmortem report along with him. The prosecution could have, at least in any case, produced the postmortem report, which could have been made admissible under Section 74 of the Evidence Act and could have been relied upon in view of Section 78 of the Evidence Act.

23. The observations of the learned Trial Court, therefore, are against the settled principle of law.

24. Once, we have returned our findings that the prosecution has failed to establish death of the deceased as homicidal, nothing remains to be discussed as regards the testimonies of the other prosecution witnesses and also the motive, if any. Nevertheless, it would be expedient to refer the testimonies of the prosecution witnesses in order to ascertain as to whether there is something in their evidence which would otherwise establish that the deceased was assaulted by the Appellants.

25. Unfortunately, PW-3 Sambhaji, the informant and real brother of the deceased as well as the so called eye witness turned hostile. The sum and substance of his evidence is that the deceased used to cultivate a field known as "umbar mala". Around 2 to 3 p.m. on 03.07.1992, this witness went to his field known as "Bendh" for collecting dry leaves of sugarcane. At that time, he heard some altercation and voice of the deceased from the eastern side. When he went towards that direction, which is a field of one Shivaji Mohite, he noticed the dead body of the deceased lying near one "bandh" (boundary). Clothes of the

deceased were soaked with blood. However, this witness could not see any one near the dead body. He returned home and informed his wife as well as wife of the deceased and his mother. Thereafter, this witness alongwith his mother, PW-1 Ranjana i.e. wife of the deceased and children came to the scene of occurrence. At that time, PW-5 Ajit Mohite accompanied this witness. About 20 persons gathered at the scene. They noticed injury marks over the back of the deceased. The witness has identified his signature over the FIR, which according to him, was obtained by the police in the field. He also accepts that he knew all the appellants, but denied of having given any information to the police against them.

26. After declaring him hostile, as he resiled from his statement before the police, the learned Additional Public Prosecutor cross-examined this most important witness of prosecution.

27. Astonishingly, PW-3 Sambhaji contradicted his FIR on all substantial aspects, meaning thereby, he fatly refused to have informed the police that he witnessed Appellant Suryakant holding collar of the deceased while Appellant Chandrakant giving blow with kicks and accused Ramchandra inflicting blow with a sickle due to which the deceased fell down. He categorically denied having informed the police that when he rushed towards the spot of incident, Appellants made their escape good, no sooner did they see him. He states that he cannot assign any reason as to why, the police had recorded such things in his report. He just supported the fact that the deceased was lying in the field and thereafter, he called his mother, widow of the deceased and all over there. Unfortunately, PW-3 Sambhaji denied having seen injuries on the right elbow, left arm, right ankle and right shin of the deceased which were bleeding.

28. He categorically denied the suggestion that the Appellants were enraged and had therefore, beaten the deceased because deceased had collected fodder from their field without their consent.

29. When he was cross-examined by the learned counsel for the Appellants, he testified that he did not say anything about the incident to PW-2 Ajit Mohite. He simply put his signature over some writing effected by the police as he was asked to do so. He dealt a fatal blow to the prosecution story by stating that he had not given any information about the incident to the police. The first informant and the real brother of the deceased himself had hammered a last nail in the coffin of the prosecution story.

30. Though, first information report is not a substantive piece of evidence, yet, it cannot be lost sight of the fact that the first informant, in minute details with unmistakable precision gave vivid account of the incident namely the manner and the mode in which the deceased was assaulted by the Appellants, weapons used and part of the body chosen. Here it is an encyclopedia of all the facts and circumstances, which astonishingly, been falsified by its maker himself.

31. The conduct of PW-3 Sambhaji is quite unnatural and unfathomable, for, being real elder brother of the deceased, he did not make any attempt to save

the deceased from the clutches of the Appellants, if they were at all present and he had witnessed them assaulting the deceased. He even did not make any hue and cry. By abandoning the body of the deceased from the spot, he first chooses to go to his house and then brings deceased's wife and his mother and others to the spot without giving first immediate help to the deceased. Definitely, PW-3 Sambhaji is not a Doctor to immediately reach to the conclusion that due to the assault his brother died on the spot itself. We, therefore, doubt the conduct of PW-3 Sambhaji.

32. Interestingly, the widow of the deceased PW-1 Ranjana testified that on the day of incident, her husband had been out for selling milk. He returned about 1 to 1.30 p.m. After taking meal, he proceeded to the field. While leaving home, he took a sickle, towel and other articles with him. Around 4 p.m., PW-3 Sambhaji informed that the deceased was lying in the field of Umbar mala. When she visited the spot alongwith her mother-in-law and PW-3 Sambhaji, she noticed bleeding injuries on his person. Undoubtedly, dead body of deceased was lying in the field of Shivaji Mohite and there was crops of sugarcane in that field. PW-1 Ranjana admits that neither there was any quarrel between the Appellants and her husband, nor was there any enmity between them. If the dead body was lying in the field of Shivaji Mohite, why the appellants assaulted him if the deceased was not collecting dry leaves from their field? This is an unsolved mystery by the prosecution.

33. PW-1 Ranjana admits that the deceased was suffering from ulcer and tuberculosis, who had undergone a surgical operation of ulcer. According to this witness, for these reasons, her husband was very thin. This again corroborates the facts as discussed hereinabove that the cause of death as per the medical expert was combination of multiple injuries and tuberculosis with cardio respiratory failure. It is pertinent to note that there were no injuries on vital parts.

34. PW-1 Ranjana gave certain material admissions which again renders the prosecution's story, to some extent, doubtful when she admits that since her husband was in habit of consuming liquor early in the morning, there used to be minor quarrels between him and others on account of such habit. Thus, possibility of causing injury to the deceased by any such person cannot be totally ruled out. Looking to the over all nature and personality of the deceased, it is quite probable that even during a small quarrel, he might suffer injuries which in itself cannot be said to be a well planned elimination of the deceased. Be that as it may.

35. PW-5 Ajit Namdeo Mohite turned hostile. During his cross-examination by the learned Additional Public Prosecutor, he denied the suggestion that he heard the sound of abuses and cry and therefore, he proceeded towards Umbar Mala and noticed the Appellants assaulting the deceased. He denied that he noticed accused Ramchandra inflicting blows with a sickle to the deceased and that there were injuries over the hands and legs of the deceased. His testimony is of no use

to the prosecution.

36. Similarly, PW-6 Sudhakar Shamrao Mohite testified that on the day of incident, on around 1.30 p.m. when he was proceeding towards the field known as "Gad" for collecting fire wood, he heard sound "Aai Aai". Those shouts were coming from Umbar Mala. When he proceeded towards Umbar Mala, he witnessed Appellant Chandrakant inflicting blows with a sickle to the deceased. While Appellant Suryakant was inflicting blows with a stick. Accused Ramakant was standing there. According to this witness, Appellant Chandrakant asked this witness to give his axe. When he refused, Appellant Chandrakant abused him as "madarchod". PW-6 Sudhakar frightened and thereafter, returned to his field. In his cross-examination by the defence, he states that the distance between his field and that of Ramesh Mohite is about 500 to 600 feet. There was sugarcane crop in the field of Ramesh Mohite. There was no sugarcane crops in the field of Appellants. Interestingly, he admits that PW-3 Sambhaji was not present at the scene of offence, when he was there. It necessarily means that either Sambhaji is speaking lie or this witness was not at all present at the spot. He further testified that Appellant Chandrakant dealt a blow of sickle on the person of the deceased, Appellant Suryakant dealt a blow by a stick, while Ramakant was standing over there.

37. The FIR (Exhibit-36) lodged by PW-3 reveals that Ramchandra was inflicting blows with a sickle and not Appellant Chandrakant. The FIR (Exhibit-36) indicates that Appellant Chandrakant was giving blows of kicks to the deceased; whereas PW-6 Sudhakar testified that Suryakant was giving stick blows to the deceased. These material inconsistencies in the testimonies of PW-6 vis-a-vis FIR also renders the evidence of PW-6 unworthy of credit. It is surprising to note that, if there were 10 to 12 fields between the field of PW-6 Sudhakar and that of the spot of incident, there was no reason for this witness to come to the scene of occurrence as it sounds incredible that he heard sound of the deceased. There is one more glaring aspect in the sense that PW-6 heard sound of the deceased at about 1.30 p.m.; whereas incident in question occurred after 3.30 p.m. as per the report and the evidence of other witnesses.

38. It is pertinent to note that PW-6 admits in his cross-examination that some people were working in the fields between his field and a field of Ramesh Mohite. There was a person namely Laxman Chavan and six female labourers. When he heard the shouts as "Aai Aai", when he rushed towards the field, but those persons did not go there, which is also something unnatural. The prosecution has not examined said Laxman Chavan, who, according to PW-6 Sudhakar, was informed about the incident by this witness immediately thereafter. The said Laxman Chavan also went to the spot, where the assault was going on. The conduct of PW-6 Sudhakar, further creates doubt about the veracity of his version, when he admits that he had not informed anyone about the incident even to the police which arrived at the scene. He went to attend a marriage of his cousin at Karad on the following day but, did not inform anyone. Such

conduct is also quite unnatural.

39. It is not clear as to why PW-5 Ajit Mohite had been to the house of PW-6 Sudhakar calling him for recording his statement by the police, when Ajit Mohite himself has not supported the prosecution's case. PW-6 Sudhakar admits in cross-examination that he did witness the quarrel going on between the deceased and the Appellants for 10 minutes, but does not say as to why he did to intervene or whether he informed anyone in the village.

40. PW-7 Ramesh Dadasaheb Mohite has also turned hostile and not supported the prosecution's case. It is needless to reiterate the testimonies of the hostile witnesses. PW-8 Santosh Shankarrao Mohite and PW-9 Laxman Sitaram Pawar have also turned hostile.

41. PW-4 Dilip Mohite is a witness on the aspect of discovery of stone and stick alleged to have been shown by the Appellant Chandrakant, who made a statement before the police in his presence. The memorandum panchnama is proved at Exhibit-23. According to this witness, Appellant Chandrakant led the police from Umbraj to Talbid. He took them to the field of Vishwanath Mohite. There was a crop of Soyabin. Appellant Chandrakant removed a stone from the plantation of castor which was on the bandh between the field of Vishwanath and Balasaheb. It was a bloodstained stone. Appellant Chandrakant also discovered a stick lying in the crop of soyabin. The length of the stick was 38 inches with bloodstains. It is pertinent to note that those articles were discovered from an open place accessible to any third person and therefore, it would not attract the ingredients of Section 27 of the Evidence Act, so as to say that the said fact was discovered which was within the exclusive knowledge of the Appellants. The said stone was found at the distance of 100 feet away from the scene of occurrence. It has never been the story of the prosecution that the stone was used by the Appellants in committing the offence. Thus, it is an irrelevant fact which is not connected with the crime in question. If the Appellant had concealed stone and stick, it is quite inconceivable that he would leave the stick and stone lying in an open place. The evidence of this witness, on that count, is therefore, unbelievable. No nexus has been established by the prosecution between the injuries to the deceased vis-a-vis the weapons alleged to have been used in inflicting those injuries. Interestingly, no sickle could be produced or discovered at the behest of the Appellants. The object of Section 27 of the Evidence Act is to admit evidence which is relevant to the matter under inquiry, namely guilt of the accused and not to admit evidence, which is not relevant to that matter.

42. Having taken into account the entire evidence on record, we found that neither there was any motive for the Appellants to commit the offence, nor the prosecution has succeeded in establishing that the deceased died a homicidal death. There is no shred of evidence to construe that the Appellants were responsible for intentionally and knowingly causing the death of deceased.

43. The learned Trial Court has committed grave error in law and facts in

accepting the testimonies of the prosecution witnesses, especially hostile witnesses in arriving at a conclusion of holding Appellants guilty. The learned Trial Court has turned nelsons eye to the material contradictions and omissions on record, especially that of PW-3 Sambhaji Mohite, the first informant. The ipsedixitism of the learned Trial Court is a result of conjecture and surmises. The impugned judgment and order of conviction and sentence, therefore, needs to be quashed and set aside. We, therefore, proceed to pass following order.

#### ORDER

I. Appeal is allowed.

II. The impugned judgment and order of conviction and sentence passed by the Additional Sessions Judge, Satara in Sessions Case No. 38 of 1993, is quashed and set aside.

III. The Appellants are acquitted of the offence punishable under Section 302 read with Section 34 of I.P.C.

IV. Their bail bonds shall stand cancelled. The amount of fine be refunded to the Appellants, if already recovered from them.

V. The order as regards disposal of the muddemal property is maintained.

VI. The Appellants shall furnish fresh bail in the sum of Rs.25,000/- each with one or two sureties in the like amount to the satisfaction of the Registrar (Judicial) of this Court in view of Section 437-A of Cr.P.C.