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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO.111/2013

Gangasagar s/o Ramesh Biradar,
age 28 yrs., occu.agri.,
r/o Gangapur Tq.Udgir
Dist.Latur.

...Appellant..

Versus

The State of Maharashtra.

...Respondent...

.....

Shri V.R. Dhorde, Advocate for appellant.

Shri N.B. Patil, APP for respondent.

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CORAM: P.V. HARDAS &
N.W. SAMBRE, JJ.

DATE: 17.06.2015

ORAL JUDGMENT (Per P.V. Hardas, J.) :

1] The appellant, who stands convicted for offence punishable u/s 302 of the Indian Penal Code and sentenced to imprisonment for life and to pay fine of Rs.3,000/-, in default of which to undergo further rigorous imprisonment for two months and for offence punishable u/s 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.2,000/-, in default of which to undergo further

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imprisonment for two months, by the Additional Sessions Judge, Udgir, by judgment dated 17.1.2013 in Sessions Case No.53/2010, by this appeal challenges his conviction and sentence.

2] Facts as are necessary for the decision of this appeal may briefly be stated thus:

PW6 PI Shivajirao Kalekar, who was attached to Udgir Rural Police Station and was on duty on 7.5.2010, was entrusted with the investigation of Crime No.66/2010 u/s 302, 201 and 506 of the Indian Penal Code. He immediately proceeded to the scene of the incident and drew the inquest panchanama of the dead body of deceased Prakash at Exhibit 60. The dead body was referred to Udgir Civil Hospital for *post mortem* alongwith forwarding letter at Exhibit 61. Thereafter, the scene of the incident – panchanama was drawn in the presence of panchas at Exhibit 62. Under the said scene of the incident – panchanama, one pair of Chappal, sample of ordinary mud and blood mixed mud were seized. The clothes of deceased were seized under seizure memorandum at Exhibit 63. Statements of witnesses were recorded and on 9.5.2010, the appellant – accused was arrested under

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arrest panchanama at Exhibit 64 in the presence of panchas. On the same day, the clothes of the appellant were seized in the presence of panchas under seizure memorandum at Exhibit 65. During custodial interrogation on 13.5.2010, the appellant expressed his willingness to point out the place where a sickle had been concealed. Accordingly, a memorandum was drawn in the presence of panchas at Exhibit 66. The appellant – accused laid the Police and panch towards one Hanmantwadi via Deorjan and from a bush produced a sickle, which was seized under seizure memorandum at Exhibit 67. Photographs of the scene of the incident were taken and they are at Exhibit 68. Call details of the mobile belonging to deceased were sought for. The Tahsildar, Udgir, was requested to draw the sketch of the scene of the incident under communication at Exhibit 70. On 14.5.2010, the seized property was referred to the Chemical Analyser, Aurangabad, under requisition at Exhibit 71. Further to the completion of investigation, a charge-sheet against the appellant was submitted.

3] The *post mortem* report is at Exhibit 55, which is admitted by the appellant – accused. As per the *post*

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mortem report, deceased had sustained 10 injuries, which are as follows:

1] Incised injury over the right cheek horizontally extending 2 cm above the angle of mandible bone size 3 ½ cm long, 1 ½ cm depth and 1 cm breadth, margin sharp clean and averted. Age of injury within 24 hrs. Injury caused due to sharp weapon.

2] Incised injury over the right cheek parallel to jaw bone extending 2 cm below the lower lip upwards to the middle of right cheek. Size 3 cm long 1 cm breadth and 1 ½ cm deep margin. Regular & averted, age of injury within 24 hrs. Injury caused due to sharp weapon.

3] Chin was totally cut. Part of mandible bone was visible. Oval in shape 2 ½ cm in length & 2 cm in breadth. Margin were regular & averted. Age of injury was within 24 hrs. Injury was caused by sharp weapon.

4] Incised horizontal wound over the throat ½ cm just above the thyroid gland size 5 cm length 2 cm breadth & 3 cm deep. Margin regular & averted. Age of injury within 24 hours. Injury was due to sharp weapon.

5] Incised wound 1 cm above the right ear pinna over the right temporal area of scalp, horizontal 3.5 cm length x 2 cm breadth x 1 cm depth. Margin regular. Age of injury within 24 hours. Injury was due to sharp weapon.

6] Incised oblique injury over the left side of neck extending from the angle of mandible to the left clavicle size 5 ½ cm long 2 cm breadth & 3 cm depth. Margin regular, averted and swollen. Age of injury within 24 hours. Injury was due to sharp weapon.

7] Incised injury over the left upper arm

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extending 1 cm below the lateral side of left shoulder joint vertical size 2 $\frac{1}{2}$ cm length 1 cm breadth & $\frac{1}{2}$ cm depth. Age of injury within 24 hours.

8] Incised injury over the back of the left shoulder area just 1 cm below the left shoulder joint vertical size 3 cm length & 2 $\frac{1}{2}$ cm breadth $\frac{1}{2}$ cm depth. Margin clear regular. Age of injury within 24 hours. Injury was due to sharp weapon.

9] Incised injury over the dorsum side of left hand 1 cm below the base of left middle finger up to 2 cm above the left wrist joint size 1 $\frac{1}{2}$ cm length $\frac{1}{2}$ cm breadth & $\frac{1}{2}$ cm depth. Margin clear cut and age of injury within 24 hours. Injury was due to sharp weapon.

10] Incised injury over the dorsum side of right hand 1 $\frac{1}{2}$ cm below the base of index finger up to 1 cm above the right wrist joint 2 $\frac{1}{2}$ cm length & $\frac{1}{2}$ cm breadth & $\frac{1}{2}$ cm depth. Margin clear cut & age of injury within 24 hours. Injury due to sharp weapon.

According to the Medical Officer, deceased had died due to cardio respiratory failure due to hemorrhagic shock due to cutting of left carotid artery and sharp injury over the trachea.

4] On the case being committed to Court of Sessions, the trial Court vide Exhibit 7 framed charge against the appellant for offence punishable u/s 302, 201, 506 of the Indian Penal Code and 3/25 of the Arms Act. The accused denied his guilt and claimed to be

tried.

5] Prosecution in support of its case examined six witnesses. PW1 Veerbhadra, a panch to the inquest panchanama; PW2 Ramesh, father of deceased and father of the appellant; PW3 Manmath, a panch to the inquest and the spot panchanama; PW4 Rajkumar, a panch to the seizure of the clothes of the appellant and PW5 Sudhakar, a panch to the seizure of the motorcycle as well as seizure of the sickle, did not support the prosecution and were declared hostile. The conviction of the appellant rests solely on the finding of human blood on the sickle as well as on the clothes of the appellant. The learned Judge at paragraph no.59 has referred to the statement of PW2 Ramesh u/s 161 of the Cr.P.C. as well as recitals in the memorandum u/s 27 of the Indian Evidence Act to draw inference of motive for the appellant to have committed murder of his real brother.

6] Learned counsel for the appellant has urged before us that the circumstances of finding of human blood on the sickle as well as on the clothes of the appellant have not been put to the appellant in his

statement u/s 313 of the Cr.P.C.

7] We find from the evidence of the Investigating Officer that there is no evidence that the clothes and the sickle, on their seizure, were sealed and remained in that condition till they were examined by the Chemical Analyser. An incriminating circumstance, which is not put to the accused in his statement u/s 313 of the Cr.P.C. cannot be used against the accused for sustaining his conviction. More over, in the absence of any evidence relating to the sealing of the clothes and the sickle at the time of their seizure, would adversely affect the finding of the Chemical Analyser. The report of the Chemical Analyser, in our opinion, therefore, cannot be pressed into aid by the prosecution for sustaining the conviction of the appellant. Similarly, the recitals in the statement u/s 313 of the Cr.P.C. as well as the confessional part in the memorandum obviously do not constitute evidence u/s 27 of the Indian Evidence Act nor can they be referred to and relied upon for drawing any inference whatsoever. The statement u/s 161 of the Cr.P.C. can only be used for the purpose of contradicting and the confessional part of the

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memorandum would obviously be inadmissible in evidence u/s 27 of the Indian Evidence Act. The finding of the learned Judge, in our opinion, therefore, deserves to be set aside.

6] Since we find that there is no evidence whatsoever against the appellant, the conviction of the appellant cannot be sustained.

7] The appeal is accordingly allowed. The conviction and sentence of the appellant is quashed and set aside and the appellant is acquitted of the offence with which he was charged and convicted. Fine, if paid by the appellant, be refunded to him. Since the appellant is in jail, he be released forthwith if not required in any other case.

(N.W. SAMBRE, J.)

(P.V. HARDAS, J.)