

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

CRIMINAL APPEAL NO.252 OF 2012

Ashish s/o Vishawnath Wachewar,
Age-24 years, Occu:Tailor,
R/o-Bhokar, Tq-Bhokar,
Dist-Nanded

...APPELLANT
(Orig. Accused No.1)

VERSUS

The State of Maharashtra

...RESPONDENT

...
Mr.Satej S. Jadhav Advocate h/f. Mr. G.P.
Shinde Advocate for Appellant.
Mr.M.M. Nerlikar, A.P.P. for Respondent.

...

WITH

CRIMINAL APPEAL NO.354 OF 2012

The State of Maharashtra,
Through Police Station Bhokar,
Tq-Bhokar, Dist-Nanded.

...APPELLANT

VERSUS

- 1) Ashish Vishwanath Wachewar,
Age-22 years,
- 2) Vishwanath Govind Wachewar,
Age-47 years,

- 3) Atul Vishwanath Wachewar,
Age-19 years,
- 4) Sow. Jayshri w/o Vishwanath Wachewar,
Age 40 years,
- 5) Ankush Vishwanath Wachewar,
Age-23 years,

All by Occupation Tailoring and
R/o-Bhokar, Dist-Nanded.

...RESPONDENTS
(Orig. Accused Nos.1 to 5)

...

Mr.M.M. Nerlikar, A.P.P. for Appellant.
Mr.Satej S. Jadhav Advocate h/f. Mr. G.P.
Shinde Advocate for Respondents.

...

CORAM: A.B. CHAUDHARI AND
INDIRA K. JAIN, JJ.

DATE : 7TH SEPTEMBER, 2015

JUDGMENT [PER A.B. CHAUDHARI, J.] :

1. Being aggrieved by the Judgment and order dated 14th November 2011 passed by the Additional Sessions Judge, Bhokar in Sessions Case No.81 of 2010, convicting the Appellant-Accused No.1 Ashish Vishwanath Wachewar for the offence

punishable under Section 302 of the Indian Penal Code and sentencing him to undergo rigorous imprisonment for life and also to pay a fine of Rs.1000/- and in default, to suffer further rigorous imprisonment for three months, present Criminal Appeal No.252 of 2012 was filed.

2. The other Appeal namely, Criminal Appeal No.354 of 2012 was preferred by the State of Maharashtra against the acquittal of original Accused No.1 Ashish for the offence punishable under Section 395 of the Indian Penal Code and acquittal of original Accused Nos. 2 - Vishwanath Govind Wachewar, No.3- Atul Vishwanath Wachewar, No.4 Sow. Jayshri w/o Vishwanath Wachewar and No.5 Ankush Vishwanath Wachewar, for the offence punishable under Section 302 and 395 read with 34 of the Indian Penal Code.

3. Both these Appeals are being disposed of by this common Judgment and Order.

FACTS:-

4. In brief the case of the prosecution is that on 18th August 2010 complainant Mohd. Shoyeb s/o Mohd. Samin went to the shop of his elder maternal uncle Mohd. Altaf in the afternoon, when all accused persons were in their shop in Kinhalkar complex located opposite to the shop of his maternal uncle with weapons. Accused No.1 Ashish Vishwanath Wachewar had knife, Accused No.2 Vishwanath Wachewar had iron rod, Accused No.3 Atul Vishwanath Wachewar, Accused No.4 Sow. Jayashri w/o Vishwanath Wachewar and Accused No.5 Ankush Vishwanath Wachewar had wooden logs in their hands. They all abused and assaulted Mohd. Altaf by their respective weapons on his head over the land dispute. Complainant Mohd. Shoyed, Mohd. Iqbal and Mohd. Akbar witnessed the incident and tried to separate the quarrel but no avail. Accused Ashish removed Rs.25,000/- from the cash

box of Mohd. Altaf and went away. Thereupon F.I.R. was lodged. Investigation was made. Statements were recorded, charge-sheet was filed. Trial was held. Evidence was heard by learned Sessions Judge. The learned Sessions Judge recorded the order of acquittal of Accused Nos.2 to 5 but convicted the Appellant - Accused No.1 Ashish Vishwanath Wachewar as above. Hence Criminal Appeal No.252 of 2012 was filed by Appellant -Accused No.1 Ashish Vishwanath Wachewar.

ARGUMENTS :-

5. In support of the Appeal filed by Appellant - Accused No.1 Ashish Vishwanath Wachewar, learned counsel for the Appellant vehemently submitted that trial Judge has disbelieved the evidence of alleged eye witnesses, namely, complainant PW-1 Mohd Shoyed s/o Mohd. Samin, PW-4 Mohd. Iqbal s/o Mohd. Nawaz and PW-5 Mohd. Akbar Mohd. Abdul Salam. However, the trial

Court placed reliance on the testimony of Court witness No.1 Vivek Tate and recorded conviction, which is perverse and liable to be set aside. Learned counsel for the Appellant contended that Vivek Tate was merely an informant to the police and information given by him should have been treated as F.I.R. and therefore there was manipulation by the prosecution in the matter of lodgement of F.I.R. According to him, F.I.R. lodged by Vivek Tate is being suppressed and instead, F.I.R. lodged by the complainant PW-1 Mohd. Shoyed, Exhibit 28 was being treated as F.I.R., which is in fact not so. He then submitted that the prosecution thus failed to prove its case and it was only on the basis of the Court witness the trial Court convicted the Appellant-Accused No.1 Ashish, which is illegal. He then submitted that the other evidence relied upon by the trial Court, namely scientific evidence, is also not without doubt in view of the faulty alleged discovery and therefore is liable to be rejected.

6. In the alternative, the learned counsel for the Appellant-Accused No.1 Ashish contended that looking to the single blow on head and the nature of injury and the incident proper, it is clear that there was no intention whatsoever nature to commit the murder but lower offence under Section 304 Part II of the I.P.C., at the most can be said to have been committed. He therefore prayed for orders accordingly.

7. Per contra, learned A.P.P. for the State opposed the Appeal and submitted that the trial Court did commit error in not relying upon the witnesses examined by the prosecution as eye witnesses, whose evidence do not suffer from any infirmity. He then submitted that at any rate conviction has been recorded on account of evidence of Court witness No.1 and no fault can be found out in the Judgment of the trial Court convicting the Appellant - Accused No.1 Ashish.

In respect of the alternative submission of the counsel for the Appellant, it is submitted that one person has lost his life in the incident and therefore no case is made out for the reduction of the sentence. He therefore, prayed for dismissal of the Appeal.

8. In support of the Appeal filed by the State, Mr. Nerlikar, learned A.P.P. for the State submitted that there is clear perversity on the part of the trial Court in not convicting the Accused No.1 Ashish under Section 395 of the I.P.C., and not convicting the other accused Nos.2 to 5 of the offences charged against them when there was ample evidence on record. The Judgment of acquittal thus being perverse, is liable to be set aside.

9. Per contra the learned counsel for the Respondents - original accused opposed the submission of the learned A.P.P. and submitted

that there is no evidence whatsoever nature against accused No.1 for the offence punishable under Section 395 of I.P.C. and against original accused Nos.2 to 5 for the offence punishable under Section 302 and 395 of the I.P.C. and therefore Appeal should be dismissed.

CONSIDERATION:-

10. We have heard learned counsel for the rival parties for quite some time. We have perused entire evidence recorded by the trial Court. We have seen the reasons recorded by the trial Judge convicting the Appellant-Accused No.1 Ashish. We find that the trial Judge has not given complete credence to the eye witnesses examined by the prosecution, namely complainant PW-1 Mohd Shoyed s/o Mohd. Samin, PW-4 Mohd. Iqbal s/o Mohd. Nawaz and PW-5 Mohd. Akbar Mohd. Abdul Salam. We have also carefully gone through the cross-examination of all these eye witnesses. Looking to the

evidence of PW-1 Mohd. Shoyed who has lodged the complaint, so also his cross-examination, we are fully convinced that he is a witness only on the first information to the police but he is not an eye witness since all that he deposed in the cross-examination qua the examination-in-chief is completely in the form of omissions and contradictions which are duly proved on record. To put in other words, his evidence that he saw that his maternal uncle was assaulted by blows of sticks so also other four accused persons assaulted his maternal uncle by their respective weapons, is all in the form of omissions which are brought in paragraph No.8 in his deposition. We agree with the trial Judge for the reasons recorded by him to reject his evidence as an eye witness, though we rely his evidence as first informant.

11. However, coming to the evidence of PW-4 Mohd. Iqbal and PW-5 Mohd. Akbar, which is

similar, we find that their evidence is firm, clear and without any infirmity or omissions or contradictions on material aspects of the matter. We quote the evidence of PW-4 Mohd. Iqbal from Paragraph No.1, as under:

"On 18.8.2010 at about 3.00 to 3.15 pm I was going to Srinivas Cloth Centre. It is situated in Mauli complex. I heard the sound of quarrel in front of shop of Mohd. Altaf. Ashish and his family members were saying to the deceased Mohd. Altaf why he erected wall touching to their house. The accused were abusing to the deceased Mohd. Altaf. Ashish had knife in one hand and wooden Danda (part of furniture) in his another hand. Vishwanath had iron rod, and other accused had wooden sticks in their hand. Deceased at that time was in his shop. Ashish intruded into the shop of the deceased Mohd. Altaf carrying Lakadi Danda and knife in his hand and assaulted Mohd. Altaf by Lakadi Danda on his head by giving two to three blows. Mohd. Altaf fell down. The other accused also assaulted Mohd.

Altaf after he fell down. I myself and Mohd. Akbar and Mohd. Shoyeb tried to rescue the deceased but the accused were not in a position to listen."

12. The submissions made by the learned counsel criticizing the evidence of PW-4 Mohd. Iqbal with reference to his cross-examination in Para 2 that he did not inform the police on the spot about he being eye witness, does not appeal to us. The reason is that the police had immediately visited the spot but then the investigation had not commenced. The investigation had commenced after lodgment of F.I.R. by PW-1. It is therefore futile to contend that he should have disclosed about he being an eye witness by telling the police on the spot and that police should have recorded his statement at that time. This is something unacceptable. The fact remains that his statement was immediately recorded by the police after lodgment of the F.I.R. and it is not that when the police visit the spot the eye witness

should go and shout that he is the eye witness, particularly when in this case the police had no occasion to record his statement before recording F.I.R. or commencement of investigation. Similar is the evidence of PW-5. We have also perused his cross-examination, which is to the similar effect. We do not find any infirmity in the evidence of PW-5 Mohd. Akbar for the same reasons which we have given for the appreciation of evidence of PW-4 Mohd. Iqbal.

13. Apart from that there is scientific evidence, which is strongly incriminating against the Appellant-Accused No.1 Ashish, namely, that the blood group of the blood on the clothes of Appellant-Accused No.1 Ashish is the blood group of the deceased Mohd. Altaf i.e. blood group "AB". The Appellant-Accused No.1 Ashish did not explain the said strong circumstance against him. We are, therefore, fully convinced that the Appellant-Accused No.1 Ashish was rightly convicted by the

trial Judge.

14. The next question is, what offence is proved by the prosecution. In this connection it is seen that it is the case of the prosecution through PW-1 Mohd. Shoyed that there was land dispute amongst the parties. The further case of prosecution is that PW-4 and PW-5 saw the Appellant-Accused No.1 giving blow by means of stick on the head of his maternal uncle. As to the blows given by the other accused persons, as stated by us earlier, there is a clear omission. The injury report shows that due to the blows given on the head of Mohd. Altaf had hemorrhage due to which he fell down. From the evidence, it clearly appears that there was no intention to cause injury with a view to commit murder of the deceased, but the Appellant-Accused No.1 Ashish certainly had the intention as well as knowledge, both, that the head injury might result into death of Mohd. Altaf. We, therefore, do not agree with

the submissions made by the learned counsel for the Appellant-Accused No.1 Ashish that the offence should fall under Section 304 Part II of the Indian Penal Code. We however hold that offence punishable under Section 302 of the Indian Penal Code is not proved. But the fact remains that the offence under Section 304 Part I of the Indian Penal Code is clearly proved. That being so, we think that the sentence of seven years rigorous imprisonment and fine of Rs.1000/-(Rs. One Thousand) deserves to be imposed on the Appellant-Accused No.1.

15. Insofar as Criminal Appeal No.354 of 2012 is concerned, we have already held that evidence against other accused persons, namely, Accused No.2 Vishwanath Wachewar, Accused No.3 Atul Vishwanath Wachewar, Accused No.4 Sow. Jayashri w/o Vishwanath Wachewar and Accused No.5 Ankush Vishwanath Wachewar is by way of omissions in the evidence of PW-1 Mohd. Shoyed and so far as the

other eye witnesses i.e. PW-4 Mohd. Iqbal and PW-5 Mohd. Akbar are concerned, their evidence is also by way of omissions in respect of other accused persons. At any rate even the other eye witnesses i.e. PW-4 Mohd. Iqbal and PW-5 Mohd. Akbar do not anywhere alleged in specific as to the manner of assault by Accused Nos.2 to 5, that is by what weapon and on which part of body. At any rate the injury report shows only the injury on the head and nowhere else. It is not possible to believe that everybody assaulted the deceased on head and head only and no where else and that too in three to four minutes. We also hold that offence punishable under Section 395 of the Indian Penal Code is not at all proved against the Accused No.1 Ashish as the prosecution has not brought any concrete evidence on record to that effect. The reasons given by the learned trial Judge have been seen us for recording order of acquittal and we are satisfied that there is no perversity in regarding acquittal order of original Accused Nos.

2 to 5 for the offences punishable under Section 302 and 395 read with 34 of the Indian Penal Code and acquittal order of original Accused No.1 - Ashish for the offence punishable under Section 395 of the Indian Penal Code.

16. In the result, we make the following order:-

O R D E R

(A) Criminal Appeal No.252 of 2012 is partly allowed.

(B) The Judgment and order dated 14th November 2011 passed by the Additional Sessions Judge, Bhokar in Sessions Case No.81 of 2010 convicting the Appellant-Accused No.1 - Ashish Vishwanath Wachewar for offence punishable under Section 302 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for life and also to pay a fine of Rs.1,000/- (Rupees One Thousand only), in default to suffer further rigorous imprisonment for

three months, is set aside and modified. The Appellant-Accused No.1 - Ashish Vishwanath Wachewar is held guilty of the offence punishable under Section 304 Part-I of the Indian Penal Code and sentenced to suffer rigorous imprisonment for seven years and also to pay a fine of Rs.1000/- (Rupees One Thousand only), in default, to suffer further rigorous imprisonment for one month.

(C) Benefit of set off under Section 428 of Cr.P.C. shall be extended to Appellant - Ashish Vishwanath Wachewar.

(D) Criminal Appeal No.354 of 2012 is dismissed.

[INDIRA K. JAIN, J.]

[A.B CHAUDHARI, J.]

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