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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.442 OF 2010

1. Abdul Rahiman Ibrahim Ali,	]	
age: 23 years,	]	
r/opimpari, Ranjani Fata, Pune	]	
	]	
2. Avinash Vidhadhar Bhangera (Pujari)	]	... <u>Appellants</u>
Age 23 years,	]	Orig. accused
r/o Siddharth Nagar, Karim Chawl	]	Nos 1 & 2.
colony, Kopri No.4, Thane (E)	]	
	]	
At present lodged in Yerwada Central Prison	]	

V/s.

The State of Maharashtra	].... <u>Respondent</u>
	Ori.complainant.

Mr. Priyal G. Sarda, for Appellants.

Mrs. Sangeeta Shinde, A.P.P., for the Respondent-State.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 20TH MARCH, 2015.

ORAL JUDGMENT :

1. The appellant Nos 1 & 2, who stand convicted for the offence punishable under Section 397 of the Indian penal Code and sentenced to suffer rigorous imprisonment for 7 years and to pay fine of Rs.5,000/-

each, in default to suffer rigorous imprisonment for six months, by Ad-Hoc Additional Sessions Judge-3, Solapur, in Sessions Case No.263 of 2007, by his judgment dated 20th May, 2010, by this appeal, challenge their conviction and sentence.

2. Facts, as are necessary, for the decision of this appeal, can be stated as follows :-

On 8th August, 2007, at about 9.00 p.m., P.W. 9 Jitendra Jain, was proceeding on his motorcycle alongwith Dilip Rajput, after closing their shop. They were carrying with them a bag containing cash amount of Rs.1,25,000/-. On the way, four persons assaulted them with sticks, knife and iron rod on their head, back and on the other parts of the body. Dilip was also stabbed with knife. P.W.11 Narayan Shinde, who was proceeding to his house, saw these persons assaulting. He chased one of them i.e. appellant No.2 Avinash Bhangera and caught him with iron rod in his hand. He was then taken to the police station and custody of him was handed over to the police.

3. P.W.3 Rajesh Chavan, the brother of P.W.9 Jitendra, gave information of the incident to the police by lodging complaint Exh.49.

P.W.13 API Shelar, who was at the relevant time attached to Vijapur Naka Police Station, registered C.R.No.130 of 2007, on the basis of complaint Exh.49, lodged by P.W.3 Rajesh, for the offence punishable under Section 394 and 397 read with 34 of the IPC. He arrested the appellants Abdul Raheman and Avinash Bhangera, who were caught on the spot. He traced out accused No.3 Steefen and he came to be arrested. He made spot panchnama Exh.55 in presence of panchas. He also seized the bag containing cash amount which was dropped by the accused while running away. Further he seized the clothes of the deceased and injured under panchnama Exh.47. At the behest of accused No.2 Avinash, he seized iron rod, under Section 27 of the Evidence Act, under Memorandum Exh.74 and seizure panchnama Exh.75. During the investigation, as it was transpired that crime was committed by total nine accused persons, he added offence under Section 395 of IPC. He recorded the statements of about 7 witnesses. Further investigation is carried out by P.W.12 PI Shankar Patil. P.W.14 Balaji Bhingewad filed chargesheet in the Court.

4. In all four accused were charged and prosecuted before the trial Court. After framing charge against them, to which they pleaded not guilty, the trial Court proceeded with the trial.

5. In support of its case, the prosecution examined in all 15 witnesses and on appreciation of their evidence, the trial Court held the guilt of accused Nos 1 to 3 to be proved beyond reasonable doubt and convicted and sentenced them as aforesaid. Accused No.4 Rahul Salve, was acquitted of all the charges.

6. As regards accused No.3 Steefan Nadar, Criminal Appeal No.431 of 2010 filed by him came to be decided by this Court on 4th December, 2013, in which his conviction for the offence punishable under Section 397 of IPC was set aside and he was convicted for the offence punishable under Section 392 of the IPC.

7. In this appeal, preferred by accused Nos 1 and 2, I have heard learned counsel Mr. Priyal Sarda, for the appellants and learned APP Mrs. S.D. Shinde, for the State. In my considered opinion before adverting to their submissions, it would be useful to refer to prosecution evidence on record.

8. The prosecution case stands on the evidence of two eye witnesses. The first and foremost is P.W.9 Jitendra, who is also injured in the same incident. His evidence goes to prove that he was proceeding

alongwith Dilip on his motorcycle, at about 9.00 p.m. after closing shop on the day of incident. When they reached near their house, four persons holding sticks, knife and iron rod came near them and started assaulting them. They assaulted him on his head, back and shoulder by iron rod whereas Dilip was stabbed with knife. They also took away the bag in their hands which was containing cash amount of Rs.1,25,000/-. As per his evidence, he and Dilip were taken to the hospital and were admitted there. In the evidence before the Court, he has identified all the four accused.

9. His evidence gets complete support and corroboration from testimony of another eye witness namely P.W.11 head Constable Narayan Shinde, who at the relevant time was taking his son to play ground. P.W.11 Narayan Shinde, saw four persons were beating two persons. Hence he tried to intervene and chased those persons. He tried to catch hold of one person who was holding a bag containing cash amount. However, seeing him, the said person ran away dropping the bag nearby. He chased him also, but could not succeed in catching hold of him. However, one person whom he could caught on the spot was appellant No.2 Avinash. He brought him to the police station and handed over his custody.

10. Then there is evidence of P.W.15 Dr. Hagare, who has produced and proved on record the injury certificates of deceased Dilip and injured P.W.9 Jitendra Exh.85 and 86. As per exh.85 certificate of deceased Dilip, he has sustained head injury on left side scalp having size 5 x 0.5 x 1 cm caused by hard and blunt object. Dilip had also sustained stab injury on his right hand of 6 x 3 x 4 cm caused by pointed sharp weapon. According to him, the injuries were grievous in nature. The patient i.e. Dilip could not survive and he died. As regards injuries to injured P.W.9 Jitendra, P.W.15 Dr. Hagare stated that he has sustained multiple C.L.Ws on scalp.

11. P.W.10 Dr. Gaikwad has conducted postmortem on the dead body of Dilip and issued postmortem report Exh.65. According to him the cause of death was shock due to excess bleeding as a result of stab injury to right kidney. He has further opined that injury No.3 which was incise wound on right renal triangle was of 4 x 1 x 10 cm was sufficient in the ordinary course of nature to cause death.

12. Further, there is evidence of P.W.13 PI Shelar, who has seized the bag containing cash amount which the accused has dropped while running away and he has also seized the iron rod at the behest of

appellant No.2 Avinash. In my considered opinion, this evidence, if considered in its proper perspective and taken cumulative, then it goes to prove the guilt of the appellants beyond reasonable doubt.

13. Learned counsel for the appellants has, however, advanced submission that the identification of the appellants is not properly proved as there was no test identification parade though the appellants were unknown to the witnesses. There is no such legal hurdle in believing the dock identification of the accused by the eye witnesses without being backed by the evidence of test identification parade. The substantive evidence of identification of the accused is their identification at the time of trial while recording their evidence. Test identification parade belongs to and is a part of investigation. In this case, eye witnesses had sufficient opportunity to observe the appellants and within two years therefrom they were depositing about the incident. Hence there is no reason to challenge the identification of the appellants in the Court.

14. The incident is witnessed not only by the injured P.W.9 Jitendra, but there is independent evidence of P.W.11 Head Constable Narayan Shinde. It cannot be accepted that he is a chance witness as he has stated the reason for his being there. As a matter of fact the concept

of chance witness is totally alien to the Indian context. Especially when the incident has taken place on the public road, then the passerbys on the road cannot be called as chance witnesses.

15. There is also recovery of cash amount immediately after the incident. In the incident, one person has lost his life and another was grievously injured. Therefore, in my considered opinion, it has to be held that the trial Court has rightly held the guilt of the appellants to be proved beyond reasonable doubt. The appeal, therefore, holds no merit and deserves to be dismissed.

16. It is submitted at the bar that the appellants had already undergone the imprisonment as they were in jail from the date of their arrest. Hence they are released from the jail. Therefore, no further order is necessary. Consequently the appeal stands dismissed, confirming the conviction and sentence of the appellants.

[DR. SHALINI PHANSALKAR-JOSHI, J.]