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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.51 OF 1996

1. Maqbul Kasim Mujawar,	]	
age 42 years,	]	
	]	
2. Nijam Kasim Mujawar,	]	
age: 40 years,	]	
Both resident of Alate,	]	
Tal. Hatkangale,	]	
Dist. Kolhapur	]	... <u>Appellant</u>
	]	(Original accused
	]	Nos 2 & 3)
V/s.		
The State of Maharashtra	]	 <u>Respondent</u>
	]	(Original complainant)

Mr. Ujjwal Agandsurve, Advocate, for the Appellants.

Mrs. U. V. Kejariwal, A.P.P., for the Respondent-State.

CORAM : P.V.HARDAS &
DR. SHALINI PHANSALKAR-JOSHI, J.J.

DATE : 6TH FEBRUARY, 2015.

ORAL JUDGMENT (Per Dr. Shalini Phansalkar-Joshi, J.) :

1. This appeal takes an exception to the judgment in Sessions Case No.30 of 1991 delivered on 22nd December, 1995, by the 3rd Additional Sessions Judge, Kolhapur. By the said judgment, the Appellant Nos 1 & 2 stand convicted for the offences punishable under

Sections 302, 326 and 324 read with 34 of the Indian Penal Code and sentenced to suffer imprisonment for life and to pay fine of Rs.1,000/- each; in default simple imprisonment for three months, on the first count and rigorous imprisonment for two years and to pay fine of Rs.1,000/- each; in default to undergo simple imprisonment for three months each on the second and the third counts. By this appeal, the appellants are questioning the correctness of the judgment.

2. The facts as necessary, for deciding this appeal are, as follows :-

P.W. No.2 Mehboob K. Mujawar is the father of the deceased Mohammed Hussain; whereas P.W.1 Shaukat, is the nephew of P.W.2. The appellants are the sons of P.W.2 Mehboob's step brother Kasim. On account of dispute relating to land belonging to village dargah, the relations between P.W.2 Mehboob and his family were strained with the appellants' family.

3. On the day of the incident i.e. on 2nd September, 1990 at about 7.30 p.m. when P.W.2 Mehboob Mujawar was in the house alongwith his son Mohammed Hussain, his wife P.W.3 Momunbi (Exhibit 18) and the daughter-in-law P.W.6 Ulfat (Exhibit 21), the

appellants, alongwith acquitted accused No.1 Rasul, came to their house, armed with axe and sticks. They started raising quarrel and giving abuses in filthy language. They dragged Mohammed Hussain, out of the house. He was assaulted on his head with an axe by appellant No.2 Nizam; whereas the appellant No.1 Maqbool assaulted P.W.2 Mehboob K. Mujawar and P.W. 3 Momunbi with stick. Due to the assault P.W.2 Mehboob sustained fracture on his hand; whereas Mohammed Hussain and P.W.3 Momunbi sustained bleeding head injury. After committing the assault, the appellants, alongwith acquitted accused No.1 Rasul, ran away from the spot. P.W.6 Ulfat, with the help of P.W.2 Mehboob and P.W.3 Momunbi removed the axe which was embedded in the head of Mohammed Hussain. P.W.6 Ulfat kept that blood stained axe in her house. Mohammed Hussain was then taken to the hospital, whereas injured P.W.2 Mehboob alongwith P.W.1 Shaukat, who had rushed there after seeing the incident, went to the police station.

4. P.W.10 Police Inspector Patil recorded complaint (Exhibit 16) of P.W.1 Shaukat and registered C.R. No.124 of 1990. During the course of investigation, he made the spot panchnama (Exhibit 51), drew the scene of offence map (Exhibit 53) and seized the axe produced by P.W.6 Ulfat from her house under panchnama (Exhibit 10).

As a part of further investigation, he seized the clothes of both the appellants. Then he recorded statements of witnesses. On 27.11.1990 on account of his transfer, further investigation was handed over to P.W.11 Police Sub-Inspector Jadhav. He sent the seized Muddemal articles to Chemical Analyzer and after completion of the investigation and the arrest of accused, he filed chargesheet in the Court against all the three accused on 17.12.1990.

5. On the case being committed to the Sessions Court, the trial Court framed the charge against all the three accused vide Exhibit 1C. The accused abjured the guilt and claimed trial, raising defence of false implication on account of enemical relations.

6. To prove its case, the prosecution examined in all 11 witnesses including two injured P.W.2 Mehboob and P.W.3 Momunbi and three eye witnesses viz. P.W. 1 Shaukat, P.W.6- Ulfat and P.W.4 Balu. P.W.1 Shaukat is also the informant and on his complaint (Exhibit 16), offence is registered. The prosecution further placed reliance on the evidence of two Medical Officers, two Panchas and the two Investigation Officers.

7. On appreciation of this evidence on record, the trial Court

held guilt of the present appellants to be proved beyond reasonable doubt and convicted and sentenced them as stated above; whereas the trial Court gave benefit of doubt to original accused No.1 Rasul and acquitted him.

8. This judgment of the trial Court is being assailed in the present appeal by learned counsel for the appellants Mr. Agandsurve, on several counts; whereas supported by learned Additional Public Prosecution Mrs. U.V. Kejariwal. In our considered opinion in order to effectively deal with their rival contentions, it would be useful, to refer to the evidence on record.

9. Coming first to the medical evidence relating to the cause of death, P.W.9 Dr. Shrikant Patil, who at the relevant time, was attached to KEM Hospital, has conducted postmortem on the dead body of Mohammed Hussain and he found following external injury.

“C.L.W. on the skull running from the left upper and of the temporal bone and from the left parietal bone to behind and towards the right side of the right parietal bone posteriorly. About 15 cms in length size. Size 15 cm x ½ cm bone deep oblique in nature. Blood clot present”.

10. On internal examination, he found fracture of the left

parietal bone in pieces. On examination of brain, he found that it was lacerated at the sight of the fracture area and blood clot was present.

11. According to him, this injury was on vital part of the body like brain and was grievous. He further opined that both the external and internal injuries were antemortem and sufficient in the ordinary course of nature to cause death. In his opinion, the probable cause of death was shock haemorrhage as a result of injury to the vital organ of brain. He has issued postmortem report at Exhibit 13 in turn thereof.

12. In his cross examination, it is brought on record that the injury, which he noticed on the head was C.L.W. which can be caused by hard and blunt object and not by sharp cutting object. He has further deposed that the brain was lacerated because of the fracture pieces rubbing against it. He has given crucial admission in favour of the appellants that the brain matter was not cut by any sharp cutting injury. The submissions of the learned counsel for the appellant as regards to admission of P.W.9, Dr. Patil relating to injury being caused by hard blunt object will be considered in due course of the judgment. It is suffice, at this stage, to hold that his evidence proves the cause of death as homicidal in nature on account of injury to the brain.

13. Then there is also evidence of P.W.8 Dr. Chougule, who was at the relevant time attached to K.E.M. Hospital and has examined injured witness P.W.2 Mehaboob. On his examination, he found following injuries.

- i) Swelling tenderness crepitus over Rt. forearm deformity present in its middle 1/3rd.
- ii) Fracture right radius and ulna middle 1/3rd.

His evidence reveals that P.W.2 Mehaboob was admitted as indoor patient till 10.9.1990. He has opined that the injury was fresh and could be caused by hard and blunt object. Accordingly he has issued certificate (Exhibit 27).

On the same day, he also examined P.W.3 Momunbi and on her examination he found C.L.W. over right parietal bone. He has stated that the injury was fresh and could be possible by hard and blunt object. He has issued certificate accordingly vide Exhibit 23.

14. In his cross examination, it is brought on record that on the same night at about 8.40 p.m. he has examined appellant No.2 Nijam and found one Incised Wound on his neck. He has also examined appellant No.1 Maqbul and found C.L.W. over right parietal region. The injuries sustained by both the appellants according to him, were fresh.

15. To prove the case against accused, main reliance of the prosecution is on the evidence of the two injured eye witnesses, P.W.6 Ulfat and P.W.4 Balu. Though the prosecution has also examined P.W.1 Shaukat as an eye witness to the incident, in his cross examination, it is brought on record that when he saw the accused persons coming to the house of the deceased with sharp edged weapons in their hands, in order to conceal himself, he ran towards the backyard of the house and only after 15 to 20 minutes, he came outside and saw that Mohammed Hussain was lying in a pool of blood. Therefore, his evidence as an eye witness to the actual incident of assault may not be of much help to the prosecution. However, his evidence is relevant as he has seen the accused persons coming to the house of deceased, fully armed with weapons and he has also witnessed the deceased Mohammed Hussain with assault to his head. Immediately thereafter he has gone to the police station and has lodged F.I.R. (Exhibit 16).

16. Evidence of P.W. 2 Mehboob, P.W.3 Momunbi and P.W.6 Ulfat is most relevant. Out of them, P.W.2 Mehboob and P.W.3 Momunbi are the parents of the deceased and are proved to be injured in the same incident. P.W.6 Ulfat is the wife of the deceased

Mohammed Hssain. Hence their presence at the time of incident in their house is natural one. Their evidence more or less is of similar nature because they have witnessed the incident from the same place and in the same position. It is deposed by them that at about 7.30 p.m. when they were all sitting in the house, the accused came abruptly, entered their house. They gave abuses and started dragging the deceased Moohammed Hussain out of the house. P.W.2 Mehboob, his wife P.W.3 Momunbi and P.W.6 Ulfat ran after the accused. They started pulling Mohammed Hussain inside the house. However, the accused succeeded in dragging Mohammed Hussain out of the house. These witnesses also followed the accused and deceased Mohammed Hussain in the court yard and witnessed accused No.3 Nijam inflicting a blow of an axe on the head of Mohammed Hussain. The blow was so forceful that the axe remained embedded in the head of the Mohammed Hussain. When P.W.2 Mehboob tried to intervene, he was assaulted with stick on his right wrist by accused No.2 Maqbul. His wife P.W. 3 Momunbi was also assaulted with stick on her head by accused No.2 Maqbul.

17. After committing assault, all the accused ran away from the spot. These three witnesses then held Mohammed Hussain and removed blade of axe from his head. By that time, persons residing

nearby had gathered there and then they took the injured Mohammed Hussain in rickshaw to the hospital; whereas P.W.1 Shaukat went to police station to lodge complaint. In the hospital Doctor declared Mohammed Hussain as dead on admission.

18. All these three witnesses are cross examined at length, but nothing worthwhile is elicited in their cross examination to disbelieve them in any way, except for some minor variations or the omissions, which are bound to occur in the evidence of any truthful witness when he has seen such a ghastly incident of three accused assaulting and giving fatal blow to their son and husband respectively, on his head, as a result of which he has died instantaneously on the spot. Apart from some *interse* discrepancies in their evidence which are also of a very minor nature, as fairly conceded by the learned counsel for the appellant, their evidence has remained unimpeached and unshattered.

19. Their evidence gets further support and corroboration, though such corroboration is not necessary in this case, from the evidence of P.W.4 Balu, an eye witness to the incident, who is residing nearby and after hearing commotion, has rushed to the house of deceased Mohammed Hussain. He saw the accused No.3 Nizam

giving blow of axe on the head of the Mohammed Hussain and accused No.2 Maqbul giving blows of stick, kicks to P.W.2 Mehboob and P.W.3 Momunbi. He has also deposed that the axe has remained embedded in the head of the Mohammed Hussain which was removed by his parents and P.W.6 Ulfat, the wife of deceased, after the accused fled from the spot.

20. The only ground on which the evidence of these witnesses is challenged is that all of them are interested as they are coming from the same family. It is submitted that, as admittedly there were enemical relations between the parties, implicit reliance cannot be placed on the evidence of these witnesses. It is urged that only one independent witness examined by the prosecution viz. P.W.5 Shushilabai Haldale, the neighbour, is declared hostile and has not supported the prosecution case. It is further submitted that the evidence of these 3 eye witnesses is also contradicted by the medical evidence. These witnesses have deposed that deceased was assaulted with sharp edge weapon like axe, which remained embedded in his head; whereas medical evidence of P.W.9 Dr. Patil goes to show that the injury was C.L.W. and caused by hard and blunt object. Therefore, according to learned counsel for the appellants, a serious doubt is raised about the evidence of these alleged eye witnesses.

21. In our considered opinion, merely because these witnesses are interested, being the relatives of the deceased, their evidence cannot be discarded. As per time honoured principle of law, the relationship is no ground to reject the evidence outrightly but only to subject the evidence to careful scrutiny. As a matter of fact, when the incident has taken place in the house of the deceased, the eye witnesses are bound to be the inmates of the house. Therefore, there is no reason to suspect their presence at the time of the incident. Moreover, out of these four witnesses, two are proved to be injured through the evidence of P.W.8 Chougule who has found fracture on the wrist of P.W.2 Mehboob and head injury to P.W.3 Momunbi. Therefore, their presence is otherwise also proved on record. P.W.6 Ulfat being the wife of the deceased, she is bound to be in the house, whereas P.W.4 Balu Mujawar is the uncle and residing nearby, who has rushed there, after hearing commotion. Their ocular account of the incident, is thoroughly consistent and found to be reliable by the trial Court, which has an added advantage of watching their demeanor while recording their evidence. After careful scrutiny of the evidence of these witnesses, we also found that their testimony has a ring of truth, the colour of consistency and a sense of straight forwardness, as a result of which their evidence inspires confidence in the judicial mind.

22. As regards the inconsistency in the medical evidence and the ocular evidence of witnesses, law is well settled that the medical evidence, which is otherwise also an opinion evidence, cannot override the evidence of eye witnesses which is substantive evidence. It is well crystallized legal position that if the evidence of eye witnesses is clear, consistent and convincing, it prevails over the medical evidence. In the present case, the evidence of the two injured and two eye witnesses clearly goes to prove that appellant No.2 Nizam was armed with axe and he has dealt blow of the axe on the head of the deceased. Their evidence also further goes to prove that the blade of the axe has remained embedded in the head of deceased Mohammed Hussain and they had removed it.

23. The said axe is also recovered and seized by the police. The evidence of P.W.6 Ulfat goes to prove that after giving axe blow to the deceased, the accused fled from the spot and then she and the parents of the deceased removed the axe blade from the head of the deceased and then she kept that axe which was having blood stains, in her house. She has produced the same before the police. The evidence of P.W.10 Police Inspector Patil goes to prove that he has seized the axe produced by P.W.6 Ulfat under panchnama Exhibit 10

on 3.9.1990 itself. The axe was sent to Chemical Analyzer and Chemical Analyzer's report (Exhibit 33), goes to prove that the blood stains found on the axe blade were of blood group "O", which was the blood group of the deceased. Therefore, if this entire evidence is read together, it leads to the cumulative effect and irresistible conclusion that the head injury sustained by the deceased was with sharp edged weapon like axe and not by hard and blunt object. Hence, here the medical evidence cannot prevail over the ocular account of the eye witnesses to disbelieve them. Their evidence needs to be accepted and relied upon to prove the guilt of the accused, which in our opinion the trial Court has rightly done.

24. The last submission of learned counsel for the appellants is that in the same incident both accused had also sustained injuries as deposed by P.W.8 Dr. Chougule. On the same day at night he has examined appellant No.2 Nijam and appellant No.1. Maqbul and on their examination he found Incised Wound on the head of appellant No.2 Nijam and C.L.W. on parietal bone of appellant No.1 Maqbul. According to learned counsel for the appellants, the prosecution has not explained these injuries found on the persons of accused. It is urged that non explanation of these injuries, therefore, leads to an inference that the prosecution has suppressed the genesis of the

incident and it also creates doubt about veracity of the prosecution case and therefore the benefit of doubt is required to be extended to the accused.

25. However, this submission is devoid of merit because in the cross examination of none of the injured eye witnesses, it is brought on record that in the same incident, these two appellants have also sustained injuries. In their statements recorded under Section 313 of the Code of Criminal Procedure also, appellants have not put up this case or explained the injuries as caused in the same incident due to assault by the deceased or prosecution witnesses. Admittedly earlier to this incident, there was one more incident in respect of which C.R.No.123 of 1990 came to be registered and a separate Sessions Case was filed, which has resulted into acquittal of the prosecution witnesses. In such situation in the backdrop of these facts, the appellants cannot get benefit of injuries found on their person. They also cannot raise contention that the prosecution has suppressed the genesis of the incident.

26. The evidence on record is clinching enough to prove that it is the accused who came to the house of the deceased and that too being fully armed with deadly weapons. As they are, thus, proved to be

the aggressors, they also cannot raise the plea that in exercise of their right of private defence, the incident has occurred. The incident has resulted into death of one person and grievous injury to two prosecution witnesses. This is, therefore a case wherein the trial Court has rightly held the guilt of the present appellants to be proved beyond reasonable doubt for the offences punishable under Section 302 and 326 read with Section 34 of the Indian Penal Code. The appeal, therefore, holds no merit and is liable to be dismissed.

27. Accordingly we dismiss the appeal. The appellant No.1 Maqbul Mujawar and appellant No.2 Nijam Mujawar, to surrender to their bail bonds within 12 weeks from the date of this order, failing which the learned trial Judge shall have the appellants arrested and committed to prison to serve their sentence.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[P.V.HARDAS, J.]